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THE
FEDERAL REPORTER.

VOLUME 63.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 63.

JUDGES

OF THE

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¹Commissioned Circuit Judge, March 23, 1893.

²Commissioned Circuit Judge, August 9, 1894.

³Commissioned August 9, 1894.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CITY OF OMAHA v. REDICK.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 405.

1. SUPPLEMENTAL BILL—WHEN ALLOWED.

A supplemental bill, in the nature of a bill of review, to obtain a modification of a decree on account of newly-discovered facts, cannot be entertained when it appears that the new facts or circumstances were well known to the complainant prior to the entry of the original decree.

2. SAME.

A bill was filed by R. to vacate a deed by which he had conveyed a strip of land to the city of O., on the ground that the deed had been executed by him under a mistake of fact. The original bill and answer disclosed that the city had improved the strip of land as a street, at great expense, before the original bill was filed. A decree was entered on the original bill which adjudged, in the alternative, that, unless the city paid into court the assessed value of the strip of land within 90 days, the deed therefor, executed by R., be canceled and annulled. At a subsequent term, the city not having paid the assessed value of the land, the complainant filed a supplemental bill with a view of obtaining such a modification of the decree as would compel the city to pay such assessed value. No fact or circumstance was stated in the supplemental bill, as ground for such modification of the decree, other than the fact that the complainant had no correct knowledge, at the date of the original decree, of the amount that had been expended by the city in converting the land into a street, and the further fact that he would be embarrassed by the intervention of property owners whose land abutted on the street, if he attempted to recover possession of the same. *Held*, (1) that the supplemental bill stated no facts entitling the court to modify its original decree; (2) that, if the sum of money expended by the city in converting the strip of land into a street had any bearing on the relief to which the complainant was entitled, he should have obtained information as to the amount of such expenditures before submitting to the original decree; (3) that if the original bill had been framed with a view of recovering a judgment for the value of the land, such as was asked by the supplemental bill, it would have stated a cause of action at law, and could not have been maintained in equity.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Suit by John I. Redick against the city of Omaha. From a decree on a supplemental bill, respondent appeals. Reversed.

E. J. Cornish, for appellant.

William A. Redick, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is an appeal from a decree entered on a supplemental bill of complaint which was filed after a decree had been rendered on the original bill. The single question presented by the appeal is whether the circuit court erred in allowing the supplemental bill to be filed, and in entertaining the same, and entering a decree thereon modifying the terms of the original decree. This question can be best answered by stating the substance of the original and supplemental bills, and the substance of the respective decrees, which were rendered by the circuit court.

The original bill was filed by John I. Redick, the appellee, against the city of Omaha, the appellant, on the 27th day of January, 1890. The complainant averred that in the year 1875 he was the owner of one-half of lot No. 9, and all of lot No. 8, and the east half of lot No. 7, in Capitol addition to the city of Omaha; that in the month of November, 1876, he conveyed a strip of this land, 66 feet in width, to the city of Omaha, so as to divide the tract into two parcels, one of which lay on the east and one to the west of the strip so conveyed; that he was induced to make said conveyance by representations made to him by one Gibson that the city would convert said strip of land into a public street, and that the conveyance was made to enable the city to construct a street across the three lots of land so owned by the complainant; that the city failed to grade and open the street as he understood it had agreed to do, and that the complainant subsequently commenced a suit at law in the district court of Douglas county, Neb., to recover damages for the failure of the city to comply with its agreement; that the city prevailed in said action at law, upon the ground that it had not agreed to build the street in question, and that the deed executed as aforesaid by the complainant, although duly acknowledged and recorded, had never been delivered to or accepted by the city. The bill further averred that after the termination of said suit at law the complainant had waited for six or seven years before instituting further proceedings, trusting and relying upon the good faith of said city, and believing that it would eventually construct a street upon the strip of land that had been conveyed to it by the complainant for that purpose; that the city did not in fact take any steps in that direction, or open said street and render it passable as such, until about the year 1886. The bill further averred that the strip of land conveyed to the city was worth the sum of \$3,000 in the year 1876, and that it was worth at least \$20,000 at the time the bill was filed. The complainant thereupon prayed that the court would decree that the conveyance to the city was made under a misapprehension and mistake of fact, and without

consideration; that the deed had never been delivered to or accepted by the city of Omaha; and that the conveyance in question might be set aside and held for naught, as a cloud upon the complainant's title. The complainant further prayed that, if the court should find that the deed had in point of fact been delivered to and accepted by the city, it might be decreed and adjudged by the court that the city either reconvey the land to the complainant, or pay him the value thereof, together with interest. The city filed an answer to said original bill, in which it admitted the execution and delivery to the city of the deed dated November 21, 1876. It averred the truth to be, however, that the said deed was executed and delivered to the city of Omaha as an inducement to it to improve the strip of land as a street for public travel; that the delivery thereof was entirely unconditional, and was not predicated upon any agreement by the city to open or build the street at any particular time, or at an earlier date than its judgment might dictate. The defendant further averred that long prior to the filing of the bill of complaint the city had in fact constructed a street upon the strip of land in question, and had done so at great cost and expense to the taxpayers of the city. Testimony was taken on the issues thus raised by the bill, answer, and replication, and a final decree was entered in favor of the complainant on the 8th day of January, 1892.

In its decree upon the original bill the circuit court found that the complainant was the owner of the strip of land in question; that it was worth \$2,500 on the 21st day of November, 1876; and that when the city took possession of it, and improved it for street purposes, it was reasonably worth the sum of \$6,000. The court also found that the complainant was entitled to be paid the value of said land as of the day when the city took possession thereof; that he was further entitled to have the deed of November 21, 1876, canceled and annulled. It thereupon "ordered, adjudged, and decreed that unless the respondent paid into court for the use of the complainant, within ninety days from the entry of the decree, the sum of six thousand dollars, and interest at the rate of 7 per cent. per annum, from January 1, 1887, the deed of November 21, 1876, be canceled, annulled, and set aside." At a subsequent term, to wit, on the 25th day of November, 1892, the complainant tendered, and was allowed to file, a supplemental bill of complaint. The supplemental bill contained a statement of the various proceedings that had theretofore been taken in the case. Attached to the supplemental complaint, as an exhibit, was a copy of the decree that had been rendered on the original complaint. The fourth and fifth paragraphs of the supplemental bill contain a statement of all of the grounds upon which the complainant predicated his right to file same. The fourth paragraph was as follows:

"Your orator further represents that said decree was unskillfully drawn, and did not dispose of, adequately, the issues in said cause, or settle the equitable rights of the parties. While it is true that the decree provided, among other things, that the deed made to said city by complainant in 1876 should be set aside and held for naught in the event that the said city should fail to pay the complainant the condemnation value found by said court of

the property in question at the time mentioned in the decree, yet it left to your orator nothing but the right of possession, which relief is wholly inadequate and incomplete, and inequitable both to your orator and to the respondent. And your orator alleges, as a reason why said decree is defective and inequitable to both parties, that after the respondent took possession of said property, in the latter part of the year 1886, it immediately commenced and graded down said land, and the whole thereof, from six to twenty feet, and prepared to and did pave the street over the entire surface of said property, * * * making a complete pavement, * * * and, before doing such paving, made a sewer through the center of said street, through the whole length of said property, * * * all of which cost the said respondent from sixteen to twenty thousand dollars, the greater part of which was assessed against the property abutting on said street. And your orator alleges that while the answer in the original suit discloses the fact that said property had been paved, guttered, and otherwise improved, this respondent had no correct knowledge of the nature, character, and value of said improvements until long after said decree had been rendered, and never knew until quite lately that the cost of said improvement amounted to so large a sum."

The fifth paragraph of the supplemental bill alleged in substance that the city of Omaha had not paid the value of the land, as assessed in the original decree, but had failed to do so, and that, if the complainant attempted to recover possession of the property by a suit in ejectment, he would be embarrassed in such proceeding by the intervention of property owners whose lots abutted upon said street. The complainant accordingly prayed that a supplemental decree might be entered, which should direct and require the city to pay into court, for the use of complainant, the sum of \$6,000, and interest at the rate of 7 per cent. from January 1, 1887, and that in default of making such payment a judgment might be entered against the city for that amount. Thereafter, on the 5th day of December, 1892, the city of Omaha entered a special appearance, and filed a motion to strike the supplemental complaint from the files upon the ground that it was not a supplemental bill, and that the court had no jurisdiction to entertain the same at that time. This motion was overruled, whereupon, on the 31st day of January, 1893, the city demurred to the supplemental pleading upon the ground that the pretended supplemental bill was in no sense a pleading of that character, also upon the ground that the court had no jurisdiction to entertain said bill, and also upon the ground that it appeared from said supplemental bill that the court had no jurisdiction in equity to grant the relief prayed for, because the complainant had an adequate remedy at law. The case was thereafter submitted to the court upon the supplemental bill of complaint and the demurrer thereto. On the succeeding 22d day of December, 1893, the court rendered a decree in favor of the complainant upon his supplemental bill, granting him the relief therein prayed for. By the terms of this latter decree the complainant was required, within 20 days thereafter, to deposit with the clerk of the circuit court, for the benefit of the respondent, a deed transferring to the respondent all of the complainant's interest in and to the strip of land heretofore referred to and described in the original decree. A judgment was also entered in favor of the complainant and against the city for the sum of \$8,870,

and the costs of the suit up to the date of filing the supplemental bill.

In view of the foregoing statement of the contents of the original and supplemental bills, it is difficult to discover any substantial ground upon which the last decree rendered in the case can be sustained. The supplemental bill appears to have been nothing more nor less than an application addressed to the circuit court to modify its original decree in a material respect, after the term had elapsed, without suggesting any additional facts or circumstances as the basis for such judicial action. It is manifest from an inspection of the original bill and the answer thereto that when the first decree was entered, on January 8, 1892, the record disclosed every material fact pertinent to the case which is alleged in the supplemental complaint as a reason for filing the same and for invoking further action. The original bill and answer showed that the city had improved the strip of land in controversy, as a street, at great cost and expense, as early as 1885 or 1886, and that it was then being used as one of the public thoroughfares of the city of Omaha. It is not contended that the complainant was ignorant of that fact when the original bill was filed, nor that he has since become aware of any fact or circumstance, or that anything has since transpired, which, if known at the date of the entry of the first decree, would have led to any modification of its terms. The supplemental bill does indeed allege that the complainant "had no correct knowledge of the nature, character, or value of the improvements until long after the first decree had been rendered, and never knew until quite lately that the cost of said improvement amounted to so large a sum." But this is irrelevant and immaterial matter, for, beyond all question, it was the duty of the complainant to have sought information on this subject, if the nature and cost of the improvements in question had any material bearing upon the form of the decree or kind of relief to which he considered himself to be entitled. In short, we have found it impossible to escape the conviction that the original decree was carefully and intelligently drawn, with a view of keeping within the purview of the original bill, and of affording to the complainant all of the relief that was fairly warranted by the allegations of the original complaint. The first pleading was, without doubt, a bill to obtain the cancellation of the deed of November 21, 1876, on the ground that it had been executed and placed on record by mistake, where it operated as a cloud upon the complainant's title. The complainant did not allege that the city was under a legal obligation to pay him for the strip of land in question, whether it desired to do so or not, and he did not ask for a judgment against the city unless it should elect to take the land and pay for it. His original bill was not framed with a view of recovering a judgment against the city for the value of the land upon the theory that the city had wrongfully converted the same to its own use. Counsel who drew the original complaint doubtless understood that, if it was so framed, they would be confronted with the obvious objection thereto that the proceeding could not be maintained in a court of equity. In the light of these

considerations, we think it obvious that there is no basis for the charge contained in the supplemental bill that "the decree was unskillfully drawn, and did not adequately dispose of the issues in the case." We are of the opinion that the original decree was drawn in strict conformity with the allegations of the original bill, and that it granted to the complainant the full measure of relief which he desired at that time to obtain.

It remains to be considered whether, upon the authorities, a supplemental bill, in the nature of a bill of review to obtain a modification of a decree, can be properly entertained, which discloses no facts pertinent to the litigation and to the issues involved therein, except such as were well known to the complainant prior to the first decree. A leading case on that point is *Pendleton v. Fay*, 3 Paige, 204, where it was held that a supplemental bill ought to be filed as soon as the new matter sought to be inserted therein is discovered, and that, if a party proceeds to a decree after the discovery of the facts upon which the new right or claim is founded, he will not be permitted afterwards to file a supplemental bill, in the nature of a bill of review, founded on such facts. The same doctrine was reaffirmed by Chancellor Walworth in *Dias v. Merle*, 4 Paige, 259, and was stated and applied on the circuit, by Judge Caldwell, in *Henry v. Insurance Co.*, 45 Fed. 299, 303. The rule of practice in question is likewise approved by the leading text writers. Vide *Story*, Eq. Pl. § 338a; 1 *Hoff.* Ch. Pr. 398; 1 *Barb.* Ch. Pr. pp. 363, 364; *Daniell*, Ch. Pl. & Pr. p. 1581, note; *Id.* p. 1524, note 2; and *Fost. Fed. Pr.* § 188.

Our conclusion is, therefore, that the question stated at the outset of this opinion should be answered in the affirmative. We are of the opinion that the supplemental bill, so termed, should not have been entertained by the circuit court, because it stated no facts or circumstances bearing upon the relief sought, except such as were well known to the complainant at the date of the entry of the original decree. We think that the supplemental pleading wholly failed to state a case which entitled the circuit court to modify its original decree after the same had been entered of record, and the term had lapsed. Entertaining these views, the case will be reversed, and remanded to the circuit court, with directions to set aside the decree entered on the supplemental bill on the 22d day of December, 1893, and to dismiss said bill at complainant's cost, but without prejudice to the complainant's right to bring an action at law to recover the value of the tract of land in controversy, if he shall so elect.

HAYDEN et al. v. WELLINGTON et al.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 422.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES—EVIDENCE.

Mills' Ann. St. Colo. §§ 169, 171, authorizing general assignments for the benefit of creditors, provide that no such assignment by an insolvent,

or one in contemplation of insolvency, shall be valid, unless it is for the benefit of all his creditors in proportion to their claims. *Held*, that a bill of sale of all one's property for the purpose of paying a portion only of his debts, including a debt due one who had attached such property, and not intended by the debtor to be a general assignment, would not be given effect as such, though in consideration thereof it was agreed that the attachment should be released, the attachment having been obtained in good faith, and not in pursuance of a secret agreement for its subsequent release and the execution of the bill of sale, to enable the parties to evade the provisions of the assignment act.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill by Charles H. Hayden and Harvey S. Hayden, copartners as Hayden Bros., against Herbert D. Wellington, Earl M. Cranston, and the Union National Bank of Denver, to establish a trust, and for an accounting. The circuit court sustained a demurrer to and dismissed the bill. Complainants appealed.

In the circuit court this case was disposed of by a demurrer to the bill of complaint. The bill was filed by the appellants, Charles H. and Harvey S. Hayden, composing the firm of Hayden Bros. The appellees demurred on the ground that the bill did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, and thereupon entered a decree dismissing the bill, whereupon the complainants below appealed.

In substance, the bill disclosed the following facts, to wit: That in an action begun on January 21, 1893, by the firm of Hayden Bros. against Herbert D. Wellington, one of the appellees, the firm recovered a judgment against Wellington on the 7th day of March, 1893, for \$8,607, on which judgment and execution was issued, and was returned unsatisfied on the 6th day of June, 1893; that in the fall of the year 1892 the Union National Bank had commenced a suit by attachment against said Wellington for the sum of \$20,000, which the latter owed to the bank, and that prior to October 13, 1892, all of the property then owned by Wellington had been levied upon by the bank, and was, at the last-mentioned date, held under a writ of attachment to satisfy the bank's demand; that at or about the last-mentioned date other creditors of Wellington had sued out writs of attachment against him, and had caused the same to be levied upon his property. The bill averred that, after these several levies in favor of the bank and other attaching creditors, an agreement had been entered into between Wellington and the bank, whereby the bank was to release its attachment, and Wellington was to convey the attached property to Earl M. Cranston, also one of the appellees, to be by him sold and disposed of for the payment of the demands of the several attaching creditors; that this agreement was subsequently carried into effect on or about the 13th day of October, 1892, and that the attached property was transferred by Wellington to Cranston for the purpose and object last stated. The bill averred that the purpose of Wellington in entering into the aforesaid arrangement was to prevent the complainants, Hayden & Bros., and other creditors who had not then brought suit, from levying attachments on the said property, and to prevent them from collecting their several debts, and to compel them to compromise the same on such terms as Wellington might propose. It was also alleged in the bill that the Union National Bank had agreed with Wellington that the attached property should be sold by Cranston for its benefit, and that, after its debt had been paid in full out of the proceeds of the sale of the attached property, it would assist Wellington to resume business. The bill also charged that the property levied upon and subsequently conveyed to Cranston, as agent or trustee for the bank, was worth largely more than the amount of the bank's demand; that Cranston had sold the property for the sole purpose of enabling the bank to realize what was due to it, but that he had not administered the trust fairly, and that he had sold the property conveyed to him for a small percentage of its actual value. The relief prayed for was that Cranston and the Union National Bank might be required to disclose what property had been conveyed

to Cranston; that the latter might be compelled to account for whatever had been realized by him therefrom; that Cranston might be adjudged to be a trustee for all of the creditors of Wellington; and that he be compelled to divide the proceeds of the property conveyed to him ratably among all of Wellington's creditors.

Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on the brief), for appellants.

Robert J. Pitkin (Earl M. Cranston, William A. Moore, and C. P. Butler, on the brief), for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

There are some allegations in the bill which are sufficient, no doubt, to show that Wellington was actuated by a fraudulent purpose, as regards some of his creditors, in making the alleged bill of sale to Cranston, as agent or trustee of the Union National Bank; but there are no allegations which tend to show that the bank either had knowledge of or participated in any such fraudulent design; nor is it claimed by the appellants that the bill can be maintained on the ground that it is a proceeding to cancel and annul a conveyance which was contrived by the parties thereto with an intent to hinder, delay, or defraud creditors. The sole contention is that the averments contained in the bill of complaint are sufficient to show that the "bill of sale or conveyance," as it is described in the complaint, was, in legal effect, a "general assignment for the benefit of creditors," within the meaning of the Colorado statute on that subject; and it is said that the purpose of the suit was to have it adjudged to be a general assignment, and that the demurrer should have been overruled, and that Cranston should have been compelled to account for the proceeds of the assigned property precisely as if it had been in form a general assignment for the benefit of all of Wellington's creditors. The question to be considered, therefore, is whether this view is tenable.

The provisions found in the Colorado statute which are most material to the discussion of the question in hand are sections 1 and 3 of an act passed in 1885, which are now sections 169 and 171 of Mills' Annotated Statutes of Colorado. They are as follows:

"169. Any person may make a general assignment of all his property for the benefit of his creditors by deed duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or if a non-resident, where his principal place of business is in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor in trust for the use and benefit of his creditors."

"171. No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

It will be observed that this statute contemplates voluntary action on the part of an insolvent debtor. It does not compel him to relinquish the possession or control of his property to an as-

signee or trustee for the benefit of his creditors, when he becomes unable to pay his debts. The act gives him permission to make a transfer of that nature, with certain prescribed formalities, and it provides for the due administration of his estate when it has been thus assigned. It declares, in substance, that such deed of assignment shall be invalid unless it is made for the benefit of all of the debtor's creditors. In this latter clause, declaring the invalidity of the conveyance, the reference is manifestly to an instrument executed in the mode and manner prescribed by section 169, and intended by the assignor to be administered under the assignment act. This statute differs materially from laws which have been enacted in some other states on the subject of assignments, which declare, in effect, either that "all voluntary assignments or transfers of property for the benefit of creditors shall be void unless made for the common benefit of all creditors," or that "no general assignment by an insolvent person for the benefit of creditors shall be valid unless made for the benefit of all creditors," or that "every provision in any assignment hereafter made, providing for the payment of one debt in preference to another, shall be void," or that "every voluntary assignment of property by a debtor for his creditors shall be for the benefit of all of the creditors of the debtor." Statutes of the latter nature differ so essentially from the one now in question, and are to such extent indicative of a different public policy, that decisions made thereunder are of little value in construing the Colorado statute. More weight, we think, ought to be given to decisions of the supreme court of Colorado, which foreshadow the construction that the act in question will probably receive in that state. In the case of *Campbell v. Iron Co.*, 9 Colo. 60, 10 Pac. 248, the court was called upon to construe a previous statute of Colorado on the subject of assignments that contained provisions very similar to those found in the existing law which is above quoted. With reference thereto, the court said:

"The general rule is that statutes in derogation of the common law are to be strictly construed. Certainly, a proper regard for this rule forbids the enlargement of a statute by construction so as to include common-law principles not clearly within its language and spirit. * * * Experience demonstrates the extreme danger of interfering by legislation with the debtor's *jus disponendi* so long as he retains dominion over his property, and a careful and skillful attempt by statutes to guard all the equitable rights of creditors might result in untold disaster to the business world. Accordingly, legislative bodies—our own included—have exercised extreme caution in dealing with the subject of assignments, and have left untouched many of the principles relating thereto which prevailed at common law."

See, also, the observations made with reference to the same subject in *May v. Tenney*, 148 U. S. 60, 69, 13 Sup. Ct. 491.

If we adopt the rule of strict construction thus announced, in the interpretation of the statute in question, so as to make it applicable only to those transfers of property which are clearly within the spirit as well as within the letter of the assignment act, then we think that no difficulty will be experienced in reaching the conclusion that the bill of sale involved in the present suit was not rendered invalid by the provisions of the Colorado statute, although

it operated to transfer all of the debtor's property to a third party for the purpose of paying a portion only of his debts. It is apparent from the allegations of the bill of complaint that the debtor did not intend to proceed under the assignment act, or to take advantage of any of its provisions. Moreover, it is not charged, nor is it claimed, that the attachment writ was sued out by the bank in pursuance of a secret agreement between it and its debtor, by virtue of which the writ was to be subsequently released, and a bill of sale executed, so as to enable the parties by that device to evade the provisions of the assignment act. The bill shows affirmatively that the creditor for whose benefit the bill of sale to Cranston was made had secured a valid lien, in good faith, and in the mode provided by law, upon all of the assigned property, before the bill of sale was executed; and it is a fair inference from the facts stated in the bill of complaint that the parties agreed upon a dismissal of the attachment suit, and the execution of the bill of sale, solely for the purpose of preventing a possible sacrifice of the attached property by a judicial sale. As the bill does not aver that the attachment was sued out by the preferred creditor in pursuance of any such secret arrangement between the debtor and creditor as is last indicated, it is fair to presume that the agreement to release the attachment lien, and to substitute a bill of sale therefor, was entered into in perfect good faith, in the belief that the attached property could by that means be sold to much better advantage.

In view of these considerations, we are unable to hold that the bill of sale executed by the insolvent debtor was invalid, and we are equally unable to give it effect as a deed of general assignment, according to the prayer of the bill. We think that the assignment act in question was not intended to deprive an insolvent debtor of that dominion over his property which appears to have been exercised in the present case, and that it would be unwise to give it such effect. As the bank had secured a lawful preference by its superior diligence before the bill of sale in its favor was executed, no creditor of Wellington was prejudiced by the conveyance. That conveyance made the same disposition of the proceeds of the attached property which the law would have made if the attachment suit had been regularly prosecuted to final judgment. At common law the debtor had an undoubted right to enter into such an arrangement with his creditor as appears to have been made in the present instance, and we know of no sufficient reason why the assignment act should receive a construction which will interdict such arrangements in future, if they are entered into in good faith, and are not conceived with a view of evading the provisions of the assignment law. Certain it is that the transaction in question was not expressly prohibited by the assignment act, and was not opposed to the policy of any other statute of the state of Colorado.

In conclusion it will not be out of place to observe that, as the Colorado statute invalidates a deed of general assignment by an insolvent debtor, unless it is made for the benefit of all of his creditors, no reason is perceived, if the appellants are right in their con-

tention, why they did not have an adequate remedy at law to reach the assigned property at the time this proceeding was instituted. In *May v. Tenney*, supra, it was held that in Colorado a general transfer of property by a debtor for the benefit of a preferred creditor does not, if found to be in violation of the policy of the state as expressed in its legislation, become a general assignment for the benefit of all creditors without preference, but is entirely void. According to that view of the case, it follows that, if the bill of sale to Cranston was within the provisions of the assignment act, it was a void instrument, and in that event the property conveyed was subject to attachment in Cranston's hands, and he might have been compelled to account for the proceeds thereof by garnishment process. But, be this as it may, our conclusion is that the bill of complaint did not show that the conveyance to Cranston was within the purview of the assignment act, and, so holding, the decree of the circuit court is affirmed.

PENNSYLVANIA STEEL CO. v. J. E. POTTS SALT & LUMBER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 3, 1894.)

No. 196.

MECHANICS' LIENS—CONSTRUCTION OF RAILROAD.

Acts Mich. 1885, p. 293, § 1, giving one who builds any house, building, machinery, wharf, or structure a lien thereon, and on the lot or piece of land, not exceeding a quarter section, or, if in an incorporated village, not exceeding the lot on which the improvement is made, does not give a lien for the materials used in the construction of a railroad.

Appeal from the Circuit Court for the Eastern District of Michigan.

Suit by the Pennsylvania Steel Company against J. E. Potts Salt & Lumber Company and others to enforce a lien. Decree for defendants. Complainant appeals. Affirmed.

The J. E. Potts Salt & Lumber Company was a corporation organized under the laws of Michigan for the purpose, among others, of carrying on a lumber and logging business in that state. Incident to such business, it owned or was interested in extensive tracts of land in the counties of Oscoda, Iosco, Alcona, and Ogemaw, on which it carried on its operations. For the purpose of facilitating the getting out of the timber from the woods to a convenient place for manufacture and shipment, it caused to be organized the Potts Logging Railway Company, under the train railway act, being No. 148 of the Laws of Michigan of 1855, and that company built a railroad from Au Sable to Potts, a distance of 37 miles, and from thence constructed spurs of track in various directions into the different locations from which the logs were to be taken. These spurs were in the main temporary constructions, and were taken up and moved to other locations when the special purpose had been subserved or the exigencies of the business required. The entire property of the railway company in fact and in substance belonged to the Salt & Lumber Company, but, while the principal purpose and business of the railway company was to act as an auxiliary of the Salt & Lumber Company, it yet engaged in the carriage of mails and passengers in the ordinary modes of railway business. In August, 1890, the complainant, the Pennsylvania Steel Company, under a contract with the Salt & Lumber Company, furnished 500 tons of steel rails, together with their fastenings, for the use of the Logging Railway Company, and to be laid on its roadbed.

This material was so used, being laid principally on the spurs above referred to. The agreed price therefor was \$19,040.44. Soon after that date, the Salt & Lumber Company became embarrassed, and was unable to, at least did not, pay this debt. On March 6, 1891, the Pennsylvania Steel Company filed its claim of lien on the railroad and the lands on which it was laid, in the register's office in each of the counties of Oscoda, Iosco, Alcona, and Ogemaw, for the price of the material so furnished. The railroad is therein described as extending from Au Sable to Potts, and through or over a strip of land 100 feet or more in width, across certain townships of given numbers and ranges. No other or more definite description of the land was given in this statement of lien. Questions of title and ownership of the lands sought in this proceeding to be subjected to the complainant's claim of lien are involved, but, in the view taken of the main question decided, it is not material to detail a statement of them. On the 27th of November, 1890, on a bill filed in the state circuit court for Wayne county by certain defendants in the present suit against the Bank of Montreal and other mortgagees of the Salt & Lumber Company, the defendants Harmon and Tisdale were appointed receivers of the property covered by the mortgages. These mortgages had been given prior to the creation of the debt to complainant, on the lands on which the complainant asserts its lien. In July, 1891, the receivers sold the property to another defendant herein, the Au Sable & Northwestern Railway Company, with a guaranty against the complainant's claim. On the 29th day of November, 1890, the Salt & Lumber Company made a general assignment for the benefit of their creditors, and, the designated assignees having declined, Harmon and Tisdale were appointed assignees by the Wayne county circuit court. The present complainant, having obtained leave from the state court, filed its bill in the United States circuit court for the eastern district of Michigan against the receivers and assignees above named, joining the other parties in interest as defendants. The cause afterwards came on to be heard upon pleadings and proofs. The circuit court, being of opinion that the lien claimed by the complainant was not sustainable under the laws of Michigan, dismissed the bill, and the complainant brings the case here by appeal.

Bowen, Douglas & Whiting, for appellant.

Alfred Lucking, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The statutes of Michigan have, from the time when it was a territory, afforded to those furnishing labor or materials in the construction of buildings on the lands of others a lien for the price and value thereof on the land itself. By successive enactments, the scope of provision for the creation and enforcement of such liens has been considerably extended. At the time when the materials were furnished and the proceedings were taken in the present case to enforce a lien therefor, the act of 1885, found at page 293 of the Session Laws of that year, was in force; and the principal question to be determined is whether that act is broad enough to entitle the complainant to a lien in the circumstances shown by the record in the case. Section 1, upon which the question turns, provides as follows:

"Every person who shall, in pursuance of any contract, express or implied, existing between himself as contractor, and the owner, part owner, lessee, or person holding under any land contract or otherwise, any interest in real estate, build, alter, improve, repair, erect, beautify or ornament, or put in, or

who shall furnish any labor or materials in and for building, altering, improving, repairing, erecting, beautifying or ornamenting, or putting in, any house, building, machinery, wharf or structure * * * shall have a lien therefor upon such house, building, machinery, wharf or other structure and its appurtenances, and also upon the entire interest of such owner, part owner, lessee or person holding under land contract or otherwise, in and to the lot or piece of land, not exceeding one-quarter section of land, or if in any incorporated village, not exceeding the lot or lots upon which said improvement is made to the extent of the right, title and interest of such owner," etc.

The industry of counsel for both parties, of which there is abundant evidence in their briefs, has not discovered any decision of the supreme court of the state especially adapted to aid us in the construction of this statute, and recourse has been had to decisions in the federal courts and in other state courts upon statutes more or less similar to that of Michigan. In the absence of any controlling decision in the state court, the case of *Commissioners v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 1186, may be regarded as a leading authority in the solution of the question involved. That case involved the construction of the statute of North Carolina, which enacted that "every building built, rebuilt, repaired or improved, together with the necessary lot on which said building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, shall be subject to a lien," etc. The bill was filed for the purpose of foreclosing a mortgage upon a railroad, and some of the defendants claimed liens for labor and materials furnished in its construction. But it was held by the supreme court that the language of the act was not adequate to express an intention to give a lien upon a public improvement of that character. In the words of the act then under consideration, there was no such limitation as that found in the Michigan statute in respect to the amount of the land made subject to the lien. The conclusion there reached strongly negatives the construction which the complainant seeks to impose upon the section of the act in question. By the statute of Ohio, a lien was given for labor and materials upon "any house, mill, manufactory or other building, appurtenances, fixtures, bridge or other structure and on the interest of the owner of the same, in the lot of land on which they stand, or may be removed to." In the case of *Rutherford v. Railroad Co.*, 35 Ohio St. 559, the supreme court of that state had occasion to construe their statute upon proceedings taken to enforce a lien for materials furnished for the construction or repair of a railroad. It was held that the statute could not be extended to include a railroad. It was admitted that a railroad was a "structure," in a general sense, but that, giving effect to the implications to be drawn from the context, it could not be held to be such within the intention of the legislature; and it was said, among other things, that to call a strip of land for a right of way for a railroad from Cincinnati to Portsmouth a "lot of land" would be a misnomer. The statute of Kentucky provides a lien for "erecting, altering or repairing a house, building or other structure * * * or for an improvement in any manner of real estate." In *Graham v. Railway Co.*, 14 Bush, 425, it was held that this language did not include a railroad. A like decision was made

by the supreme court of Texas in *Railroad Co. v. Driscoll*, 52 Tex. 13, upon a statute providing "that any person or firm, lumber dealer, artisan or mechanic who may labor or furnish material, machinery, fixtures and tools to erect any house, improvement, or to repair any building or any improvement whatever, shall have a lien thereon and shall also have a lien on the lot or lots of land necessarily connected therewith." A similar opinion, upon a statute with like restrictions, was expressed in *Railroad Co. v. Vanderpool*, 11 Wis. 124, with reference to a railroad bridge.

Contrasted with the foregoing decisions are several which are cited by counsel for appellant upon statutes of a somewhat different character. In the case of *Giant Powder Co. v. Oregon Pac. Ry. Co.*, 42 Fed. 470, the court had under consideration the statute of Oregon, which gave a lien for "furnishing material to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery or aqueduct, or any other structure or superstructure." The bill was filed to enforce a supposed lien on the defendant's railroad for explosives furnished in aid of its construction. Upon the construction which the court put upon the language of the act, the lien was sustained. That case is much relied upon by counsel as supporting his contention for a lien in this. But the drift of the discussion by Judge Deady tends rather to defeat than to support the complainant here. Referring to the statute, he says: "If the language of the act was 'building or other structure' only, then it might not be construed as including a railroad; but the words 'a ditch or any other structure' cannot be held to exclude a railroad." He quotes and applies the maxim of construction "*noscitur a sociis*," and from such application it appeared plainly that the words "or any other structure," following immediately such words as "ditch, flume, tunnel, aqueduct," were intended to include structures of a similar character. It was by the application of the same maxim that the supreme court of Ohio, in the case before referred to, held that the word "structure," interpreted by reference to the more restricted words in their statute, did not include railroads. Indeed, it would seem that the application of this rule of construction has been quite generally decisive of the interpretation to be given to the general words in these statutes. The supreme court of Oregon, in *Forbes v. Electric Co.*, 19 Or. 61, 23 Pac. 670, held that under their act (already quoted) a lien could be maintained for the labor involved in the erection of poles and stringing the wires for an electric light plant. The court was of opinion that, in view of the phraseology of the act, the poles and wires were part of a structure. This is in harmony with the decision of Judge Deady in 42 Fed. 470. The case of *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352, is also cited. That was a proceeding to foreclose a lien upon a mining claim for work in quarrying rock and working in slopes and leads in the operation and improvement of the mine. The court held that the mine was a "structure," within the meaning of the California statute, which gave a lien "for performing labor or furnishing materials to be used in the construction, alteration or repair of any building,

wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road or other structure." There it will be observed that the words in context with the term "other structure" were very widely inclusive. In *Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co.*, 42 Fed. 106, it was held by the United States circuit court in Alabama that the words of the statute there, giving a lien "for any building or improvement on land," were wide enough to include a coal mine, and that coal cars furnished for use therein were materials for the improvement. The case of *Neilson v. Railway Co.*, 44 Iowa, 71, does not furnish much aid, as railroads were expressly subjected to liens by the laws of Iowa. The Iowa statute was also under examination in the case of *Brooks v. Railway Co.*, 101 U. S. 443, referred to in 115 U. S., at page 129, and 5 Sup. Ct. 626, 1186, where it is said, quoting the express terms of the act: "The legislative will was there expressed so clearly as to give no room for interpretation." The other cases cited by counsel for complainant are: *Ex parte Schmidt*, 62 Ala. 252; *Dewitt v. Smith*, 63 Mo. 263; *Taggard v. Buckmore*, 42 Me. 77; *Buchanan v. Smith*, 43 Miss. 90; *Weathersby v. Sinclair*, Id. 189; *Putnam v. Ross*, 46 Mo. 337; *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737. We have examined them all, but find none of them more in point than those already considered.

In most of the statutes of the several states, the subject of the lien is localized within restricted limits; in others, it is of an extended character; and in some, railroads are expressly mentioned. We are not disposed to question the proposition that such statutes, though they are in contravention of the common law, should be fairly and liberally construed; but we cannot extend them beyond the bounds of the purpose of the legislature, as gathered from the words employed. Upon general principles of construction, we do not think that the words "other structure," following, as they do, in the Michigan statute, such limited and localizing words as "house, building, machinery, wharf," can reasonably be held to include a railroad. This conclusion appears to us to be strongly fortified by the restriction of the lien in the latter part of the section to "the lot or piece of land not exceeding one quarter section of land, or if in a village not exceeding the lot or lots" on which the improvement is made. Giving all these considerations their just weight, it seems clear to us that the complainant has no lien, and therefore that his suit must fail.

It is suggested by counsel for complainant that the statute gives an independent lien upon the "structure," and a further one upon the land upon which it is built. We do not find it necessary to decide this point, or whether, if it is well taken, the statement of lien which was filed would support the claim of a lien upon the material composing the structure; for we are of the opinion that the structure for which the complainant furnished the material is not such a one as the statute contemplates, and it is only for material furnished for such a purpose that a lien is afforded. The result of these views is in accordance with the conclusion of the court below, and its decree is therefore affirmed.

DOUGLASS et al. v. BYRNES et al.

(Circuit Court, D. Nevada. July 9, 1894.)

No. 574.

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS — MISCONDUCT OF COMMISSIONER—VACATING REPORT.

The report of commissioners to assess damages in condemnation proceedings will be set aside where it appears that one of the commissioners, after entering upon his duties, was retained by one of the parties to the proceeding as attorney, to defend a suit against him, even though the attorney for the other party may have known the fact, and did not complain until the report was filed.

This was a petition by J. M. Douglass and others against J. D. Brynes and others for the condemnation of a right of way for the construction of a mining tunnel. Petitioners moved to set aside the report of the commissioners.

F. M. Huffaker and J. L. Wines, for plaintiffs.

W. E. F. Deal and E. L. Campbell, for defendants.

HAWLEY, District Judge. Petitioners move the court to set aside the report (there is a majority and minority report) of the commissioners herein, upon the ground, among others, of irregularity in the proceedings of Commissioner C. E. Mack, who was selected by defendants, and appointed by the court, as a "disinterested person," to ascertain and assess the compensation to be paid defendants by petitioners for the right of way condemned for the purpose of constructing a tunnel under the provisions of the "Act to encourage the mining, milling, smelting or other reduction of ores in the state of Nevada." Gen. St. Nev. § 261; Douglass v. Brynes, 59 Fed. 29.

The fact is that this commissioner, previous to the time of his appointment, had acted as an attorney for one of the defendants, which was unknown to petitioners or their attorneys, or to the court; but it affirmatively appears that said commissioner was not regularly employed for said defendant, and had only been specially retained to try two cases in the justice's court, and that his employment for, and business with, the defendant was ended and settled prior to his appointment as a commissioner. If the conduct of this commissioner had been in all other respects fair, impartial, and disinterested, this alleged irregularity would not be of sufficient gravity to justify the court in setting aside the report upon this ground; but the further fact appears that after his appointment as a commissioner, and after he had taken the oath to "honestly, faithfully, and impartially perform the duties imposed" upon him as a commissioner (Gen. St. Nev. § 262), and after all the testimony in this proceeding had been taken, but before the final argument, he accepted a retainer and acted as an attorney for the same defendant in the trial of another cause in the justice's court. The fact of such employment was known to petitioners' counsel. No objection was made to this conduct upon the part of

the commissioner until after the report of the commissioners was filed. It is, of course, conceded by defendants' counsel that the acts of the commissioner were such as to justify this court in setting the report aside, and that it would be its duty, in the interest of public justice, to do so, were it not for the fact that petitioners' counsel were fully advised of the employment of the commissioner, and made no objection thereto; but for this reason it is earnestly argued that the objection goes only to the competency of the commissioner, and that it was waived by the failure of petitioners' counsel to object at the time to any further proceedings being taken in the case. This position is sought to be maintained upon the general and familiar principle, almost universally acknowledged, that parties in trials before a jury or court, or in other proceedings, having knowledge of the disqualification of a juror, judge, commissioner, referee, or arbitrator, must object to his acting as such when informed of such disqualification, or else they will thereafter be considered as having waived the same.

All the authorities cited by defendants' counsel relate to the disqualification of the juror or commissioner at the time of his acceptance or appointment, by reason of his relationship to one of the parties (*Groton v. Hurlburt*, 22 Conn. 194; *Towns v. Stoddard*, 30 N. H. 24; *Robb v. Brachman*, 38 Ohio St. 425), or interest in the result of the controversy (*Davis v. Allen*, 11 Pick. 468), or not possessing the qualifications required by the statute (*Inhabitants of Whately v. County Com'rs*, 1 Metc. [Mass.] 336; *Walker v. Railroad Co.*, 3 Cush. 1; *In re Wells County Road*, 7 Ohio St. 17; *Steele's Petition*, 44 N. H. 220; *Supervisors v. Stout*, 9 W. Va. 703). A fair type of the cases relied upon by defendants is that of *Inhabitants of Ipswich v. County Com'rs of Essex Co.*, 10 Pick. 519, where one of the commissioners, in proceedings taken to lay out a highway, was the owner of land in Ipswich through which the road passed; and it was claimed that he was not a disinterested person, within the contemplation of the law. The court said:

"It was well known to the town that Mr. Wildes was a freeholder there, because they had taxed him. They were parties to the proceedings, and might have objected to his sitting if they thought fit; but they might also waive the exception if they chose, and if they were satisfied that the decision would be impartial. By consenting to proceed, with a full knowledge of the ground of exception, the exception was waived. It would be attended with great injustice were we to hold otherwise. A party might take his chance for a favorable decision, knowing of an exception which would invalidate the proceedings if unfavorable, and intending in that event to rely upon it. Besides, if the exception had been seasonably taken, the commissioner might have withdrawn, or been replaced by one against whom no exception would lie."

Thomp. & M. Jur. § 275 (2), and authorities there cited.

But it will readily be seen that this principle falls short of determining the question involved in this case. If the objection rested solely upon the fact that the commissioner, prior to his appointment, had been employed by one of the defendants, and that fact was known to petitioners, then the cases cited and relied upon by defendants would be directly applicable; but the affidavits show that

that fact was not known to petitioners until the report of the commissioners was filed. The real objection, however, is the subsequent conduct of one of the defendants and of the commissioner. A juror not disqualified by statutory grounds, or, even if disqualified, accepted, is bound to so act as to be entirely free from any line of conduct which might have a tendency to influence his action as a fair and impartial juror. This is a duty which he owes to himself, to the parties to the suit, and to the court. Where there has been any such misconduct on the part of a juror as might affect his impartiality, or disqualify him for the proper exercise of his reason or judgment, the verdict should be set aside. This rule has been frequently announced in criminal cases. *Com. v. Roby*, 12 Pick. 519; *McCann v. State*, 9 Smedes & M. 468; *Davis v. State*, 35 Ind. 496; *People v. Brannigan*, 21 Cal. 340; *People v. Turner*, 39 Cal. 375; *People v. Myers*, 70 Cal. 583, 12 Pac. 719. In the trial of civil cases, if the rights of the litigants were alone concerned, it might with some force be argued that the losing party, with full knowledge of all the facts, who made no objection, but took his chances of a favorable verdict, should be estopped to complain of the improper conduct of the commissioner. In cases where the conduct of a juror or commissioner, although improper and censurable, is not such as to prevent a fair and impartial administration of justice, this would undoubtedly be a proper course to pursue; but under all the facts and circumstances of this case, even if the court should confine itself solely to the question of protecting the rights and interests of the parties, it is questionable whether petitioners should be estopped from complaining upon the ground that they had waived their rights by not making the objection before the commissioners, for it might perhaps be said that petitioners had no opportunity to object without prejudicing their case. *Petition for Highway in Newport*, 48 N. H. 433; *McDaniels v. McDaniels*, 40 Vt. 363; *Peterson v. Siglinger* (S. D.) 52 N. W. 1060. If the agent of the defendant corporation, who was a witness in the case, had informed both parties to the proceedings, or their counsel, that he desired to employ the commissioner to try a small case in the justice's court, and asked if there were any objections, and both parties had willingly given their consent, then the case would be deprived of one of its most unpleasant and suspicious features. But no such request was made. The agent employed the commissioner, so far as the record shows, without the knowledge or consent of either of the counsel in this proceeding. It does, however, appear that Mr. Huffaker, one of petitioners' counsel, who was attorney for the plaintiff in the justice's court, knew, on the day the suit was brought, that the commissioner had been employed to defend the suit; it further appears that, on the day of the trial before the justice, this attorney accompanied the commissioner from Virginia to Silver City, and return; and upon this ground strong contention is made that petitioners gave their consent to the employment of the commissioner. But, without pursuing this particular branch of the question further, the decision will be based upon other and stronger grounds.

The court's duty does not necessarily end by simply protecting the litigants. In order to preserve public confidence in the administration of justice it is essential that all judicial trials and proceedings should be kept absolutely free from any suspicion of improper or undue influence. The business of the court should be so conducted as to inspire and demand the confidence and support of the public; otherwise, the trial of causes would be a mere mockery. Justice would be subverted, and become a byword of reproach. Even bribery and corruption would be encouraged and promoted by the direct approval of the courts. The amount of the fee received by the commissioner is immaterial. It is the principle of the thing that controls. If he had the right to receive \$30 from the defendant to try a case one day, he had the right to receive \$50 from the petitioners the next day, provided the petitioners had a case and were willing to employ him. It requires no argument to show what results would be likely to follow if this principle should be recognized or sanctioned by the courts. To prevent such methods in the trial of causes being carried out, courts are justified in looking at the principle involved, independent of the rights of parties, and should so act as to protect the fountains of justice, and keep them pure and free from suspicion, irrespective of the question whether the objections were timely made. The courts, in so acting, are not confined to extreme cases of bribery or corruption, or of actual prejudice or bias. No wrong may have been intended. No thought of improper influence may have entered the mind of the defendant who employed the commissioner, and the commissioner may have been entirely free from any prejudice in favor of the defendants. But the defendant had no right to employ the commissioner while he was acting as a "disinterested person" in said proceedings, and the commissioner should have held himself aloof from accepting employment and receiving pay therefor while he was so engaged. It is the duty of the court to set aside the report, in justice to itself, as well as to the petitioners, so that whatever proceedings may be had herein shall be conducted impartially and fairly, and that the report of the commissioners, when filed, may be entitled to respect, and merit the confidence of the court that it is free from any bias or prejudice upon the part of any commissioner, and not clouded by the misconduct of either of the parties. Litigants in courts of justice must learn, if they do not already know, that their interests cannot be promoted, upheld, or sustained by any conduct of this sort; and it is the duty of the court to let the general public know that such misconduct will not be tolerated in any case. Jurors, commissioners, arbitrators, and referees, as well as courts, should so conduct themselves that neither the parties nor the general public could have any just cause of complaint or any reasonable ground for suspicion against their fairness, impartiality, and disinterestedness. Where there has been any conduct upon their part which might have a tendency to disqualify them from the exercise of a fair and impartial consideration of the case, and it does not affirmatively appear to the satisfaction of the court that it did not have that result, it is the duty of the courts to set their verdicts

and reports aside. The views herein expressed are sustained by abundant authority. *Mining Co. v. Showers*, 6 Nev. 602, and authorities there cited; *Railroad Co. v. Porter*, 32 Ohio St. 333; *In re Buffalo, etc., R. Co.*, 32 Hun, 292; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73; *Bowler v. Washington*, 62 Me. 302; *Palmer v. Railroad Co.*, 2 Idaho, 298, 13 Pac. 429; *McDaniels v. McDaniels*, supra; *Doud v. Guthrie*, 13 Ill. App. 658; *Johnson v. Hobart*, 45 Fed. 542; *Burke v. McDonald (Idaho)* 29 Pac. 100; *Patten's Petition*, 16 N. H. 283; *Deacon v. Shreve*, 22 N. J. Law, 183; *Blake v. County Com'rs*, 114 Mass. 585; *Peavey v. Wolfborough*, 37 N. H. 293; *Bank v. Fulmer*, 31 N. J. Law, 57; *Burrows v. Dickinson*, 35 Hun, 500; *Thomp. & M. Jur.* § 364 (5), (7), pp. 438, 439, and authorities there cited.

In *Mining Co. v. Showers*, in an able and carefully prepared opinion, the law upon this subject was clearly expressed. There the prevailing party had treated the jury. The court, after reference to the rule of the common law which prohibited the separation of jurors and the changes that had been made in this rule, said:

"But so much of the common law as was essential to its wise policy in this behalf, and consistent with the practical administration of justice under the changed conditions wrought by advancing civilization, remains in full force, and must so remain until abrogated by legislative enactment. That policy was to obtain twelve impartial and competent jurors, and, after their selection, to keep them so by securing them, as far as might be, from the possibility of improper intercourse or undue influence. * * * To permit eating and drinking at the expense of the prevailing party is now, as it ever was, impolitic, unsafe, and unnecessary. The weak and facile may be influenced by such attentions, and though it appears in a given case that none have been influenced, still the practice breeds suspicion and dislike of a mode of trial most admirable and useful if it attain and deserve the confidence and respect of the public; worse than useless if it fall of either such attainment or desert."

In *Ensign v. Harney*, two of the jurors requested as a favor, and obtained from the attorney of one of the parties, his horse and buggy to carry them home and return on the following Monday. A verdict having been rendered in favor of the attorney's client, it was set aside, and a new trial awarded. Affidavits were filed showing that the transaction was open and above board, and was not done with the intention of exercising an influence on the jurors, and that the opposing attorneys had been in the habit of extending like favors to the jurors, and that no complaint was made. The court said:

"Unless fair-minded, unblased jurors can be selected, a trial becomes a mere farce, dependent, not upon the merits of the case, but the extraneous circumstances, such as the bias, prejudice, or interest of the jury. * * * Where a juror is accepted as being impartial, he must remain so during the trial. To permit him to accept favors from either party is to put him under obligations to such party, the tendency of which is to bias his judgment. Nor is it material that such favors were not intended to influence the juror, as it cannot be determined how far they may have had that effect, and such misconduct will vitiate the verdict."

In *Re Buffalo, etc., R. Co.*, where there was a motion to set aside the report of the commissioners awarding to the respondent damages for the right of way through his land, it appeared, among other things, that the commissioners rode to respondent's farm in a carriage provided by him to enable them to view the premises; that

one of them took supper with him, and was sent home in a carriage provided by the respondent; that another one of the commissioners, after the report was signed, accepted from respondent a sum of money for his services and expenses in excess of the amount allowed by statute. The court said:

"The acts referred to probably had no effect upon the result in the present case, but it will not do to make a precedent of them, for, if such practices were to become common, it would be easy for designing men to make them a cover for corruption."

In *Thompson & Merriam on Juries* the authors, in treating of the subject of tampering with the jury by the successful party, say:

"Where the successful party to the suit is shown to have attempted, by improper means, to influence the verdict in his favor, whether by corrupting or intimidating particular jurors, by arousing prejudice in their minds against the opposite party or his cause, or by undue hospitalities or civilities, the verdict will be set aside, on grounds of public policy, as a punishment to the offender, and as an example to others, without reference to the merits of the controversy, and without considering whether the attempt was successful or not." *Thomp. & M. Jur.* § 348 (3), p. 406, and numerous authorities there cited; *Hayne, New Trial*, § 48, and authorities there cited.

Petitioners' counsel cited no authorities whatever in relation to the questions discussed in this opinion. Their contention was that the report should be set aside upon the grounds of excessive damages appearing to have been given under the influence of passion or prejudice; insufficiency of the evidence to justify the report; that it was against the weight of evidence, and contrary to law. But the conduct of one of the parties and of the commissioner has placed it beyond my power to examine the report upon the merits, further than to say that the reading of it has not removed the impression that the conduct of defendant may have biased the commissioner in his favor, whether it was so intended or not.

The report of the commissioners is set aside, and the commissioners are discharged. Upon proper application, three disinterested persons will be appointed as commissioners herein, as provided by statute, and they will be admonished to keep themselves "disinterested" until their duty in the proceedings is fully performed.

CLYDE et al. v. RICHMOND & D. R. CO. et al.

CENTRAL TRUST CO. OF NEW YORK v. SAME.

Ex parte CHESTER & L. N. G. R. CO.

Ex parte HARDEN.

(Circuit Court, D. South Carolina. August 9, 1894.)

RAILROAD RECEIVERS—LEASED LINES—DIVERSION OF MONEY—TAXES.

Receivers who take possession of and operate leased lines for more than a year, and receive the earnings thereof, are bound to disburse the same in accordance with the terms of the lease; and where they apply such earnings to the payment of interest on the bonds, when the lease requires that the taxes shall be first paid, the court will require them, even after the leased roads have been surrendered, to restore the diverted money by paying the taxes in question.

These were petitions filed, respectively, by the Chester & Lenoir Narrow-Gauge Railroad Company and William Henry Harden, receiver of the Cheraw & Chester Narrow-Gauge Railroad Company, against the receivers appointed in the suits brought against the Richmond & Danville Railroad Company by William P. Clyde and others and by the Central Trust Company of New York. The object of the petitions was to require the said receivers to pay certain arrears of taxes upon the roads of the petitioners.

A. G. Brice, for Chester & L. N. G. R. Co.

J. S. Glenn, for Cheraw & C. N. G. R. Co.

H. L. Bond, Jr., for receivers.

SIMONTON, Circuit Judge. These two petitions, presenting similar facts and the same questions of law, were heard and will be decided together.

The Charlotte, Columbia & Augusta Railroad Company controlled a railroad having its termini in Charlotte, N. C., and Augusta, Ga. It passed through the town of Chester, S. C., and at that point met the two narrow-gauge railroads owned by the petitioners above named, respectively. On 22d September, 1882, a lease was executed by the Chester & Lenoir Narrow-Gauge Railroad Company to the Charlotte, Columbia & Augusta Railroad Company, of all its track, rolling stock, and property, for the term of 99 years. On 29th September of the same year a lease for the same period and for the same purpose was executed to the same lessee by the Cheraw & Chester Narrow-Gauge Railroad Company. The leases are identical in their terms. Under them, the Charlotte, Columbia & Augusta Railroad Company binds itself to pay a dividend of $1\frac{1}{2}$ per cent. to the stockholders of the leasing companies, annually; to pay the coupons on the mortgage debt of each of them as they mature, to protect the principal of the mortgage debt; and, in case the earnings can pay all the current expenses, dividends, insurance, and debt, to divide the surplus among the stockholders of the leasing companies. Under the fourth covenant in each lease, the lessee "assumes to pay the floating indebtedness of the lessor," and all its valid obligations, of every kind and character, and also all unpaid state, county, and municipal taxes. These leases being in full force, and the lessee in possession thereunder, the Charlotte, Columbia & Augusta Railroad Company, on 1st May, 1886, executed to the Richmond & Danville Railroad Company a lease for 99 years of all its own main line, and also all the estate, etc., of the lessor in and to the railroad, etc., of the Chester & Lenoir Narrow-Gauge Railroad Company, and also of the Cheraw & Chester Narrow-Gauge Railroad Company, under these leases, respectively, and all the estate, etc., of every nature, in each and every of said main lines and their leased lines of road. The lease contains many covenants. Those bearing upon the issues now under consideration are third, fourth, and sixth. The third and fourth appropriate the whole of the receipts, income, and revenues derived or received from the use and operation of the said demised lines of railways and property in a definite and fixed

order, apparently settling the priorities of the objects appropriated for: First, the payment of current costs and expenses of maintaining, repairing, and perpetuating during the term, for public use, the said lines of railway; all liabilities growing out of the operation and management of the said lines of railway; premiums of insurance, "and all taxes, rates, charges, liens, and assessments, ordinary and extraordinary, which now are, or may at any time during the said demised term be, by the United States of America or by the states of South Carolina, Georgia, and North Carolina, or other competent authority, charged or unpaid on all or any part of said demised lines of railway." Then come provisions for the payment of interest on the several mortgages according to their relative rank, and for the disposition of a surplus.

In the sixth clause of the lease the lessee agrees to assume and perform all existing contracts of the lessor relating to the operation and traffic of the demised lines of railway, so far as it is lawfully bound or required to perform the same. Under this lease the Richmond & Danville Railroad Company entered upon all the lines of railway, including these two narrow-gauge roads, and received all the earnings of the whole system, performing the covenants in the lease. In June, 1892, under a bill filed by William P. Clyde and others, stockholders and creditors, against the Richmond & Danville Railroad Company, in the circuit court of the United States for the eastern district of Virginia, Reuben Foster and Frederick W. Huidekoper were appointed receivers of all the property of the Richmond & Danville system, and, as such receivers, entered into possession of all of it, including this lease of the Charlotte, Columbia & Augusta Railroad, and in auxiliary proceedings in this court this appointment was confirmed and recognized. Subsequently, the Central Trust Company of New York, representing mortgage creditors of the Richmond & Danville Railroad Company, instituted proceedings in the same court, in the eastern district of Virginia, against that company; and Reuben Foster, Frederick W. Huidekoper, and Samuel Spencer were appointed receivers of all the property, of every kind, of the Richmond & Danville Railroad Company, including this lease aforesaid, and on 1st August, 1893, entered into possession and control thereof. But on the same day proceedings for foreclosure were instituted in this court by the Central Trust Company of New York, on behalf of mortgage creditors of the Charlotte, Columbia & Augusta Railroad Company, against that company; and under these proceedings Samuel Spencer, Frederick W. Huidekoper, and Reuben Foster were appointed receivers of all the property of the Charlotte, Columbia & Augusta Railroad Company, except these leases of these two narrow-gauge railroads. As these mortgages bore date anterior to the lease, and were paramount thereto, these last-mentioned proceedings, in effect, abrogated the lease, and thenceforward the system of the Charlotte, Columbia & Augusta Railroad Company was separated; the receivers in the last-named case being in possession and control of the main line, representing mortgage creditors of the Charlotte, Columbia & Augusta Railroad Company, and the receivers appoint-

ed in the case of *The Central Trust Company v. The Richmond & Danville Railroad Company* holding the narrow-gauge roads for the owner of the one and the receiver of the other until December, 1893, when they formally released them,—the Chester & Lenoir Narrow-Gauge Railroad to its stockholders, and the Cheraw & Chester Narrow-Gauge Railroad to its receiver appointed by the state court.

It is well to recapitulate the dates. The leases of the narrow-gauge railroads to the Charlotte, Columbia & Augusta Railroad bore date September, 1882. The lease of the Charlotte, Columbia & Augusta Railroad Company, including its main line and these two narrow-gauge railroads, to the Richmond & Danville Railroad Company bore date May 1, 1886. The receivers under *Clyde v. Richmond & Danville Railroad Company* were appointed June, 1892, and administered the whole property, receiving all its earnings, until 1st August, 1893. On 1st August, 1893, the receivers in the case of *The Central Trust Company of New York v. The Charlotte, Columbia & Augusta Railroad Company* took charge of the main line, and not of the two leased narrow-gauge railroads. On 1st December, 1893, these two narrow-gauge roads passed out of the control of the receivers appointed in the case against the Richmond & Danville Railroad Company.

The petitions we are considering aver that there remain due and unpaid balances of taxes on these narrow-gauge railroads for the fiscal years 1890-91, 1891-92, and 1892-93, and they claim that under the terms of the lease the receivers of the Richmond & Danville Railroad Company are bound to pay these unpaid taxes.

When receivers are appointed for a line of railroad embracing leased lines, they do not necessarily assume the responsibility for the covenants of any of the leases, nor take the place of the lessees. They must have reasonable time within which to determine what they will do, and whether it is for the interest of the trusts committed to them to undertake the leases. *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 289, 14 Sup. Ct. 86; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787. But if the receiver, after a reasonable time, continues to use and operate the leased lines, he is bound by the terms of the lease (*Woodruff v. Railway Co.*, 93 N. Y. 609; *Brown v. Railroad Co.*, 35 Fed. 444); certainly, to the extent of the earnings of the lines (*Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 259). In the present case the receivers took possession of all these leased lines, operated them, received and disbursed the earnings, from June, 1892, to August, 1893. They practically, by payments, recognized the terms of the lease, and acted under them. They paid operating expenses, a large part of the taxes, and the interest on the mortgages. By their report in evidence, they were in receipt of earnings from the system large enough to pay all operating expenses, insurance, and taxes, and a large part of the interest. These earnings went into their hands because of this lease. Whether they received them as lessees, or in any other capacity, they were bound to disburse these earnings in accordance with the terms of the instrument under

which the earnings were received. Under the lease, these earnings were to be applied first to the operating expenses, insurance, and taxes, before they were applied to the coupons on the mortgage bonds. The payment of the latter was diversion of moneys appropriated to the taxes, and this diversion must be restored. These receivers must pay all balances of taxes for the periods stated which are lawfully due, and it is so ordered.

NATIONAL BANK OF AUGUSTA et al. v. CAROLINA, K. & W. R. CO.
(HUMBERT, Intervener).

(Circuit Court, D. South Carolina. September 3, 1894.)

RAILROADS—INSOLVENCY—ALLOWANCE OF PRESIDENT'S SALARY.

Where a railroad goes into the hands of a receiver without funds, and the earnings under the receiver are barely enough to pay current operating expenses, arrears of salary of the president will not be paid in preference to the mortgage debt out of the proceeds of the road, the mortgage giving the debt secured a first lien.

Action by the National Bank of Augusta, Ga., and others, against the Carolina, Knoxville & Western Railroad Company. Joseph B. Humbert intervenes, and asks for the allowance of a claim. Claim disallowed.

Cothran, Wells, Ansel & Cothran, for petitioner.
Joseph Ganahl, for respondent.

SIMONTON, Circuit Judge. This is an intervention of Joseph B. Humbert, Esq., late the president of the defendant company, seeking payment of arrears of salary due to him as president. The petition, confirmed by the testimony, shows long and valuable service by Mr. Humbert, prompted chiefly by a desire to promote a public enterprise for the public good. There can be no doubt that good service was rendered, and that the amount claimed is justly due; but as the railroad company went into the hands of the receiver utterly insolvent, possessing no funds whatever, and as the receiver has barely paid current operating expenses, the earnings being insufficient to pay him any compensation, the question we are to meet is, shall these arrears of salary of the president be paid out of the proceeds of sale prior to and in preference over the mortgage debt? By the terms of the mortgage, the bonds secured by which were floated during Mr. Humbert's presidency and under his action, a first lien before all other liens is secured to these bonds. This is the contract between the parties, and all courts are bound by its terms. In *Fosdick v. Schall*, 99 U. S. 235, the supreme court of the United States recognized the equity of a certain class of claims controlling the conscience of the mortgage creditor seeking the aid of a court of equity, and to this class priority was given over the mortgage debt. The theory of this equity is this: It is the interest as well of the public as of all parties interested in a railroad that it be kept a going concern. To do this, there must be a ready

supply of labor and materials necessary to this end. If persons who give labor and materials were required in every instance to make careful examination into the condition of the company, so as to ascertain its solvent capacity for paying debts, all of its operations might be brought to a standstill. For this reason, persons dealing with a company are encouraged to do so, with the knowledge that the court will see that all such supplies of labor and material given, and not paid for within a reasonable period before the appointment of a receiver, will be provided for by the court. This period never is beyond six months. But, in exercising this equity, the court goes upon dangerous ground, and therefore proceeds cautiously, keeping rigidly within prescribed limits. No case can yet be found which extends the equity to the president of the insolvent company. He knows exactly its condition. He has full notice of the liens existing. He is not bound to furnish his services a day after his remuneration seems uncertain. He cannot be included among that class of employes who have no means of ascertaining whether a short credit to the company is safe or not. Fosdick v. Schall goes upon the idea that services for labor and material should be first paid, and, if anything else be paid from which the mortgagees derive any substantial benefit, this is a diversion which they must supply. But, were there any diversion of this kind in this case, it was made by and under the direction of the president himself, and now he cannot complain. In the absence of all authority for its allowance, the claim must be disallowed; and it is so ordered.

BOHL v. CARSON.¹

(Circuit Court of Appeals, Sixth Circuit. May 28, 1894.)

No. 126.

1. NOTE—CONSIDERATION—EVIDENCE.

On an issue as to whether a note for \$8,000 executed by C. to his own order, indorsed by him in blank, and held by a bank, was for a consideration, or, as claimed by him, was an accommodation for the bank, C. testified that having money in the bank, drawing no interest, A., the cashier, said "I" or "we" (by which C. said he understood reference was made to the bank) "can use" it, and that a loan of \$8,000 was made accordingly; that, on his asking repayment, A. told him to draw on the bank, which he did June 26th; that, three days later, A. asked him to execute an accommodation note of \$8,000 for the bank, antedated June 26th, which he did, the note in question being the last of the renewals of it. It was not claimed, however, that he thought the bank was using his name to borrow money. A., who was discredited as a witness by reason of misappropriation of the bank's money, testified that C. made his loan expressly to him and S., partners in a coal-land speculation, and that when C. demanded repayment he said he had not the money, but could procure it for C. from the bank on C.'s note, he agreeing that he and S. would take care of it, and pay the interest on it, and that accordingly, on June 26th, C. executed the note for \$8,000, and A., as cashier, discounted it, and placed the proceeds to the account of C. A. used in the coal-land speculation the \$8,000 loaned by C., and at the same time exe-

¹ Rehearing denied.

cuted the note of himself and S. to C., and placed it in an envelope in the bank vault, where C. kept his private papers. A. testified that C. knew of it at the time. C. denied any knowledge of it till two years later. C. knew of the speculation of A. and S., and S. testified that, a few days after the loan, C. asked him how it was coming on, and remarked to him that they were using \$8,000 of his, C.'s, money in the enterprise. C.'s pass book showed a charge to his account at that time, "Note \$8,000." C. produced the bank's vouchers for every other charge against him, covering a period of several years, except this one. Where the word "note" was used in other charges, the voucher was a check drawn as a loan on a note. Not only did C.'s pass book show a discount by the bank of his note for \$8,000 on June 26th, but the bank's books showed such an entry between entries of the same date made by clerks whose integrity was not questioned. A. also placed in C.'s private envelope in the bank, as collateral security for the note of himself and S., notes secured by mortgage on the coal land. C. denied knowledge of their existence. C. was slipshod in business, his pass book lay at the bank nearly all the time, and it was claimed that he was a child in A.'s hands. *Held*, that the evidence sustained the statement of A., and showed that the note was for a consideration.

2. BANKS—SPECIAL DEPOSIT—FAILURE TO PROTEST.

Where a cashier of a bank places his indorsed note in the private envelope of a depositor, in the vault of the bank, as collateral security for his individual note to the depositor, the bank is not liable for release of the indorser by failure to present the note for payment, and to notify the indorser of nonpayment; the note being merely a special deposit with the bank, and constructively in the depositor's possession.

3. SAME—ESTOPPEL—OPINION OF OFFICERS.

The fact that the officers of a bank whose cashier had recently absconded, believing the statement of one whose note it held that it was merely a note given at the cashier's request for the accommodation of the bank, expressed an opinion to C. that the note was without consideration, will not estop the bank from showing that there was a consideration, and enforcing the note.

4. SAME—USE OF COLLATERAL.

Nor is the bank estopped from enforcing the note by reason of the fact that on the statement of C. that the note was without consideration, and that he had no interest in a mortgage in his private envelope in the bank's vault, executed by the cashier, and purporting to be collateral security to a note of the cashier to C., the bank assumed ownership over it, though, on its being shown that it was C.'s property, he is entitled to a credit for the amount realized by the bank from it.

5. SAME—CREDITS.

Where a bank cashier sent money of his to C., to be applied on his note to C., and C., claiming that neither the cashier owed him, nor he the bank, turned the money over to the bank, he should, on its being shown that he owed the bank and the cashier owed him, be allowed credit on his debt to the bank for the amount, with interest from its receipt by the bank.

Appeal from District Court for the Southern District of Ohio.

Action by Henry Bohl, agent of the Second National Bank of Xenia, Ohio, against James Carson, on a note. Decree for defendant. Plaintiff appeals. Reversed.

Henry Bohl, as receiver of the Second National Bank of Xenia, Ohio, brought an action against James Carson on a promissory note dated March 17, 1884, for \$8,000, payable four months after date, made by Carson to his own order, and indorsed by him in blank. Pending the action the debts of the bank were paid. Bohl was discharged as receiver, and was duly appointed by the stockholders of the bank as agent, in pursuance of the national banking act, and the action was proceeded with in the name of Henry Bohl, as agent. Carson filed an ancillary bill on the equity side of the district court, seeking to enjoin Bohl from further proceeding in his action at law, on the

ground that he had an equitable defense to the note, which could not be set up in an action at law. The defenses which he set up in the bill to the note were: First, that the note was given to the bank as a mere accommodation to the bank, and not for any consideration; second, that, even if there was a consideration for the note, the bank had had in its possession, as collateral for its payment, notes for \$13,000, with a solvent indorser, whom it had released from liability through negligence in presentment, protest, and notice; and, third, that the bank and its successors in title were estopped by matter in pais from seeking to hold the plaintiff, in any way, liable on the note. The district court found the equities with Carson, and entered a decree perpetually enjoining Bohl, as agent of the bank, from further prosecution of his action at law on the note. This is an appeal by Bohl from that decree.

John S. Ankeney was in 1882, and had been since 1864, cashier and chief executive officer of the Second National Bank of Xenia. In 1880 he and one W. M. Smart, partners as Smart & Ankeney, purchased a tract of coal land in Hocking county, Ohio, for about \$16,000. Neither partner had any capital, but Ankeney assumed the task of raising it. He secured enough for the first payment of \$8,000, by indorsing the firm note with his signature as cashier of his bank, and, on the faith of the credit of his bank, procured its discount by the Farmers' & Traders' Bank at Jamestown, Ohio. The second payment came due in January, 1882, and he obtained the money for it from J. H. Cooper, county treasurer. Whether this was on his own credit, or on that of the bank, is disputed. Cooper called for repayment in February, 1882, and Ankeney was obliged to secure the money elsewhere. Carson, the complainant and appellee, had long been a depositor at the Second National Bank, and intimate with its officers. Much to his disappointment, the maker of a note held by him for \$8,500 had paid it to the bank. This increased his deposit account early in February, 1882, to about \$11,000. He complained to Ankeney that the payment of the note prevented its earning the interest he had expected. Ankeney said that he or they could use the money for a few days. Carson replied that this would be satisfactory, if he could have the money when he wished it, because he expected to use the money, later on, to purchase a business. A loan was accordingly made. Carson says that he understood Ankeney, in this conversation, to be speaking for the bank, as its cashier, and that he lent the money, not to Ankeney, but to the bank. Ankeney swears that the loan was made expressly to himself and Smart, to assist them in their coal-land speculation, and that he offered to Carson, as security for the loan, some coal-land securities to be thereafter given him, which offer Carson accepted. Carson says he knew that Smart & Ankeney were engaged in a coal-land speculation, and admits that Ankeney said something about coal-land securities as collateral to the loan, which he declined, because he was entirely content with the obligation of the bank. He says he supposed that the bank was helping Smart & Ankeney in the coal-land investment. Ankeney used \$8,000 of Carson's deposit to repay Cooper.

It is admitted that at the time Ankeney used this \$8,000 he executed a note of Smart & Ankeney for that amount, payable to himself, and by him indorsed to the order of James Carson, and placed this note in an envelope in the vault of the bank, where Carson kept his private papers. Carson denies that he had any knowledge of the existence of this note until two years or more later, after Ankeney had resigned as cashier and had gone west. Ankeney says that Carson did know of the note when it was executed. Smart (Ankeney's partner), who was called as a witness for Carson, says that this note was always referred to by himself and Ankeney as the "Carson note." He also says that Carson met him on the street shortly after its execution, and asked him how the Smart & Ankeney coal-land investment was getting on, remarking that they were using \$8,000 of his money in the enterprise. This Carson does not deny. Carson was a slipshod business man, and left everything with Ankeney and the bank. His bank pass book lay at the bank almost all the time. The entries in it, covering the period from 1882 to 1884, are nearly all of them in Ankeney's handwriting. At the date of February 6, 1882, appears this debit to Carson's account, "Note \$8,000.00." Carson produces all the bank's vouchers for charges against him in the pass book, except the one corresponding with this entry. For a

similar entry of January 6, 1882, as follows: "Jan. 6. Note T. P. T. \$1,060.00,"—the voucher proves to be a check of Carson to the order of Townsley, the president of the bank, as a loan on Townsley's note. In June, 1882, Carson wished a return of the \$8,000 lent by him in the previous February. He says that he applied to Ankeney for it, and Ankeney told him that all he had to do was to draw his check on the bank for the amount. Accordingly, on June 26th, he did draw his check for \$10,000, and it was paid. Ankeney's statement is that Carson applied to him for a repayment of the loan of \$8,000, and was told by him that he did not have the money; that, upon Carson's pressing him, he said he could procure the money from the bank for Carson by discounting the latter's note for that amount; that Carson thereupon, on June 26th, made a note for \$8,000, payable to himself, and indorsed in blank, which Ankeney, as cashier, discounted, placing the proceeds to Carson's credit on the books of the bank; that he told Carson that he and Smart would take care of the note, and pay the interest on it. Carson's statement is that, some three days after he had drawn his check of June 26th, Ankeney asked him, as an accommodation to the bank, to give his note for \$8,000, and date it back to June 26th, which he did; that from time to time he gave renewals of this note to the bank, at Ankeney's request, without any consideration, the last being the note in suit; that when the note in suit fell due, in July, 1884, he declined to renew it further, although Ankeney offered him \$1,800 in cash to do so. The books of the bank and Carson's pass book contain entries dated June 26, 1882, showing a discount by the bank of Carson's note for \$8,000, and the payment of \$10,000 on his check. The entry of the discount of Carson's note first appears on the daily blotter of June 26, 1882, in Ankeney's handwriting. The entry is preceded and followed by other entries of the same date, in the handwriting of clerks of the bank, whose integrity is not questioned. The entry was transferred to the journal for that date, at the end of the day's business, by one of these same clerks. In July, Carson's note fell due, and it was renewed, Smart & Ankeney paying the interest. On July 31, 1882, Smart & Ankeney executed a mortgage on their coal lands to Samuel W. Smart, a brother of W. M. Smart, Ankeney's partner, to secure notes aggregating \$18,000 in amount, payable to Samuel W. Smart in two years from date. One of these notes, for \$5,000, indorsed in blank by Samuel W. Smart, was given to one King, to whom Smart & Ankeney were indebted in that sum. The remaining notes, for \$13,000 in all, were similarly indorsed, and were placed by Ankeney in Carson's private envelope in the bank, in pursuance, as Ankeney says, of his promise to Carson to give coal-land securities as collateral for the Smart & Ankeney note for \$8,000 executed February 6th. Carson denies any knowledge of these notes, and repudiates ownership of them. They remained in Carson's envelope in the bank until they fell due, early in August, 1884. They were not presented for payment or protested, so that Samuel W. Smart, the indorser, was released from liability, if, indeed, he could otherwise have been held. In July, 1884, Smart & Ankeney's coal property ceased to produce coal, and they abandoned their enterprise, selling their equipment and plant. From this, after the payment of certain debts, they realized about \$1,800. Ankeney's misuse of the funds and credit of the bank becoming suspected, his resignation followed, and he left Xenia for the west. After his departure the affairs of the bank were found to be in bad condition. His use of the credit of the bank to borrow \$8,000 from the Jamestown bank was discovered, and other irregularities. Before Ankeney left Xenia, he took the \$1,800 left from the proceeds of the coal equipment and plant to his partner, W. M. Smart, and, as he says, told Smart to take it to Carson, to apply on Carson's note to the bank. Smart says Ankeney told him to take the money to Carson, to be used in case the bank ever troubled Carson on his note. When Smart took the money to Carson, Carson said it was not his, and that he would not take it; that his \$8,000 note held by the bank was mere accommodation, without consideration; and that he would have nothing to do with Smart & Ankeney's property. The \$1,800 was accordingly turned over to the bank by Carson, who at the time emphatically disclaimed any interest in the Smart & Ankeney note, which was indorsed to his order, and was found in his bank envelope. Carson had several interviews with the president and the new cashier of the bank at the office of an attorney,

who expressed the opinion, after hearing Carson's statement, that the note was not worth the paper it was written on. W. M. Smart, of Smart & Ankeney, who had taken no part in and had no knowledge of the fiscal transactions of the firm, expressed his opinion to the officers of the bank that Carson's note was a mere accommodation note, without consideration. This opinion was based wholly on Carson's statement to him. The bank officers expressed a wish not to hold Carson if the note was merely an accommodation, and made known their belief in Carson's version of the facts; but, though several times requested by him to do so, they declined to return to him his note until, as they expressed it, they had adjusted the affairs of the bank. The board of directors of the bank never authorized their officers to deliver up the note or to release it. Upon Carson's refusal to take them as his, the bank assumed the ownership of the mortgage notes and the Smart & Ankeney note for \$8,000, in order to protect itself against loss by Ankeney. In consideration of the assignment to it of the \$5,000 mortgage note which W. M. Smart procured from King and transferred to the bank, the bank released W. M. Smart from further liability on the Smart & Ankeney note, and then proceeded to foreclose the whole \$18,000 mortgage on the coal lands. A small rent has been received by the bank from the coal lands down to the time of this suit. In his amended answer the defendant below averred that the course of the bank in respect of the mortgage notes and the rents from the coal lands was taken through ignorance that Carson owned the notes, and offered to credit the value of the same on the note in suit, or to do equity in any other way that might be deemed just. The Carson note remained in the bank from 1884 until 1888, when the receiver was appointed. He found the note in an envelope marked "Carson," in the bank vault, and demanded payment of the same from the maker. This was refused, and suit was brought.

Little & Spencer, J. B. Foraker, and L. C. Black, for appellant.
Charles Darlington and Robert Ramsey, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Strictly speaking, the only ground which can support the complainant's bill is that the bank and its successors in title to the note sued on in the action at law are estopped by matter in pais to assert Carson's liability on the note. That there was no consideration for the note, and that through the bank's negligence a solvent indorser of collateral notes was released, are both defenses which could have been set up on the law side of the court, and need no interference by a court of equity to make them effective.

No objection was taken to the averments of the bill setting up these defenses, however, and, as a determination of the issues raised on them will throw light on the defense of estoppel, we shall proceed to consider them in their order. And first as to the defense of a want of consideration. If it be true that Carson's loan of \$8,000, February 6, 1882, was a loan to the bank, the credit which the bank gave him, of about \$8,000, on June 26th, was a mere repayment of that loan; and there could have been no consideration for Carson's note to the bank, given then, or a few days later. If, however, the loan was made to Ankeney & Smart, then there is no explanation of the credit which the bank gave Carson, June 26th, except the discount of his note, and the payment to him of the pro-

ceeds. Our attention, therefore, must first be directed to the transaction of February 6th. Ankeney's evidence is explicit that he borrowed the money from Carson for Smart & Ankeney, and made their note to him for the amount. Carson's evidence is by no means as clear. He does say that he understood that he was lending the money to the bank, but he nowhere states that Ankeney told him this in words. He says that, to him, Ankeney was the bank, and that, when he said "I" or "we" "can use the money," he thought he meant the bank. He concedes, however, that he knew that Smart & Ankeney were engaged in a speculation in coal lands, and that Ankeney said something to him about coal-land securities. While it is true that Ankeney is discredited as a witness by his dishonesty in misusing the credit of the bank, we think that the circumstances of the case so strongly corroborate his statement that Carson's version cannot be credited. Carson's remark to Smart, made shortly after the loan, that they were using his money in their coal investment, is hardly consistent with his claim that his loan was a loan to the bank, unless he thought that Ankeney was pledging the credit of the bank to borrow money for his private investments. If that were his supposition, then he could not hold the bank on the loan, because it was plainly beyond Ankeney's authority as cashier to use the credit of the bank for such a purpose. Smart's statement that the Smart & Ankeney note for \$8,000 was always called between them the "Carson note" makes another circumstance confirming Ankeney's story. It is admitted in the bill that Ankeney put this note in Carson's envelope of private papers on February 6th, when the loan was made. Carson had access to this envelope whenever he chose. Why should Ankeney put such a note there at that time, unless it represented a real transaction? Carson's pass book indicates that a check was drawn by him on February 6th for the \$8,000. He produces every voucher but that one. If that were payable to the bank, his case would be clear. If it were payable to Smart & Ankeney, it would correspond with their note, and establish the truth of Ankeney's story. It is significant that in the entry of the charge to Carson is the memorandum "Note," and that this had been used in previous charges to indicate the drawing of a check to make a loan upon a note. Carson cannot complain if his failure to produce this voucher, so important as evidence on this issue, when he does produce all the others for months before and after, weighs against him. The sequel of June 26th fully confirms Ankeney. The evidential weight of the bank and pass-book entries of June 26th, showing that Carson gave his note to the bank on that day, and received a credit of the proceeds of its discount, cannot be shaken by suggestions of Ankeney's criminal purposes. These entries are so mingled with others made by clerks whose honesty is not impugned that they could only have been made when they purport to have been made. Carson says that he gave the note, at Ankeney's request, three days after June 26th, and dated it back just to accommodate the bank. Which is more consistent with probability,—that Ankeney should make false entries of the discount of Carson's note on the faith

that three days later he could induce Carson foolishly to make, and date back three days, a note for \$8,000 to the bank, without consideration, or that, when Ankeney made the entries on the bank's daily blotter, he then had Carson's note? There is but one answer. Finally, the most convincing evidence that the note of Carson was not a mere accommodation to the bank is the fact that he renewed it half a dozen times during a period of more than two years. It is not claimed that he thought the bank was using his name to borrow money. What, then, was the nature of the accommodation to the bank? He does not say. His counsel cannot answer, except to suggest that he was a child in Ankeney's hands, and did what was asked. That Carson was slipshod in business is doubtless true, but that he was so simple as to go on renewing a note he did not owe, to a bank which made no use of it, we cannot credit. As stated by the learned judge in the court below, when there is an issue of veracity between the two men, Carson's unsupported statement is entitled to the greater weight; but when we find inherent improbability in Carson's story, and every circumstance supporting Ankeney's, we must believe Ankeney.

We come next to the claim that the bank ought not to recover on the note because it failed to present for payment the coal land mortgage note for \$13,000, and to notify the solvent indorser, Samuel W. Smart, of nonpayment, thereby releasing him. Counsel for appellant argues that Samuel W. Smart was a mere trustee, having no interest in the property mortgaged, and receiving no consideration for his indorsement, and that he could not be made liable on the notes. It is not necessary for us to consider this, because we do not think there was any obligation on the bank to present the notes for payment, or to notify the indorser. These mortgage notes were placed by Ankeney in Carson's private envelope in the vault of the bank as collateral to the Smart & Ankeney note for \$8,000. Carson denies all knowledge of their existence. It is not averred either in the bill or the answer, nor does Ankeney anywhere say, that Carson pledged the Smart & Ankeney note and its collateral as security for the payment of Carson's note to the bank. The Smart & Ankeney note and its collateral were not in the possession of the bank. They were in Carson's envelope, and constructively in his possession. They were merely a special deposit with the bank, and imposed no obligation on the bank in the matter of collection and protest. It is true that, on several of Carson's renewal notes, Ankeney had scribbled in pencil, "Coll. to this," but, in the absence of any direct evidence that Carson consented to the use of the Smart & Ankeney note and its collateral to secure his own notes to the bank, we cannot find in this indefinite memorandum proof that he did so. It is probable that, had anything been paid on the Smart & Ankeney note, it would have been applied, with Carson's consent, to his note to the bank; but he was not under any contract, so far as the evidence shows, to permit such application. The debts represented by the two notes were so connected in their origin that it was natural for Ankeney to regard them as the same debt which he owed as prin-

cipal, and Carson only as surety. But, in fact and in law, Carson only was liable to the bank on his note, while Smart & Ankeney were liable on their note to him, but not to the bank. Until Carson should agree with the bank that the one could be held by the bank to secure the other, there was no connection between the notes which charged the bank with any duty to Carson of collecting the Smart & Ankeney note or its collateral.

Finally, we come to the question of estoppel. The president and cashier of the bank expressed their opinion to Carson that his note to the bank was without consideration, but declined to return his note to him until the confused affairs of the bank had been adjusted. If the note in fact represented a real indebtedness, such an expression of opinion on the part of the officers of the bank could not prevent the bank from subsequently enforcing collection. The board of directors never authorized any one to release Carson from his note, and if they had there would have been no consideration to support it. The bank did assume possession of the Smart & Ankeney note and its collateral; foreclosing the mortgage on the coal lands, and releasing W. M. Smart from liability on the principal note. But nowhere does it appear that these securities were taken by the bank as a consideration for a release of Carson on his note. These securities belonged to Carson, and the bank's conduct in assuming ownership over them is said to estop it from now maintaining that Carson is liable on his note. That the bank should account to Carson for anything realized by it from his property is clear; but it might be more difficult to show that there was, in law or equity, any such necessary relation between Carson's property in the Smart & Ankeney securities, and his liability on his note to the bank, that the bank's appropriation of the former was inconsistent with the latter, and created the estoppel claimed. Assuming, however, that the bank's acts in respect to the Smart & Ankeney securities were inconsistent with its right to collect the note against Carson, still we are of the opinion that such acts cannot be made the basis of an estoppel, because they were induced solely by the oft-repeated statements of Carson that he had no interest in the securities, and that his own note was wholly without consideration. These statements were made in the absence of Ankeney, and under the shadow of his then recently revealed defalcations and dishonest conduct. Ankeney has now given his evidence. The books of the bank have been critically examined, and we find the fact to be exactly the reverse of that which Carson stated. To allow Carson to rely, as an estoppel, on acts of the bank which he induced by unfounded representations, would be to allow him to take advantage of his own wrong. It is true that the bank officers might have found much in their own books and other circumstances to shake their faith in Carson's denial of his liability, but it does not lie in his mouth to say now that they ought to have known better than to credit his story. If the delay in enforcing this liability against him prevents a restoration of his former position, he cannot complain, for he brought it about.

The appellant and defendant tender to the complainant, in an amended answer, the mortgage notes, and offer to account for whatever rents may have been received from the coal lands by crediting the same with interest on the note. We think that credit should also be given, with interest from the date of its receipt, for the money which Ankeney sent to Carson for credit upon the note, and which Carson declined to receive, but turned over to the bank. The decree of the district court must be reversed, with instructions to enter a decree enjoining the action on the note unless the plaintiff shall make credits upon the note as above.

OVER et al. v. LAKE ERIE & W. R. CO. et al. (No. 9,036.)

(Circuit Court, D. Indiana. September 21, 1894.)

1. INSURANCE COMPANY—SUBROGATION—ASSIGNMENT OF CAUSE OF ACTION.

On payment by insurance companies of policies on goods destroyed in transit they become subrogated pro tanto to the equitable right of action against the railroad, but the full legal title to the cause of action remains in the owner and is not assignable.

2. REMOVAL OF CAUSES.

Where, in an action against a railroad company for goods destroyed in transit, the insurance companies, which have become subrogated to the equitable rights, are joined with the owner, who has the full legal title, so as to defeat the right of the railroad to a removal of the legal cause of action to the federal court on grounds of diverse citizenship, the federal court will separate the legal cause of action, and will not allow the joinder of parties having only equitable claims to defeat the right of removal.

This was an action by Charles H. Over and others against the Lake Erie & Western Railroad Company. The action was removed from the state court by defendant. On motion to remand.

Ryan and Thompson, Bates & Harding, and R. W. Barger, for plaintiff.

Miller, Winter & Elam, W. E. Hackedorn, and John B. Cockrum, for defendant.

BAKER, District Judge. This is an action to recover judgment for damages to the amount of \$75,000 for the alleged negligent destruction by fire of property owned by Charles H. Over, a citizen of the state of Indiana. At the time the property was destroyed, it was insured in his favor, in the sum of about \$38,000, in several different insurance companies, two of which are citizens of the state of Illinois, of which state the railroad company is a citizen. After the destruction of the property the insurance companies severally paid the amount of their respective policies to Over, who gave to each company a written assignment of a part of his claim for loss against the railroad company, the amount so assigned being equal to the amount paid by each company to him. Over and the insurance companies, except one, then brought suit in the state court, as joint parties and owners of the claim for loss, against the railroad company and the insurance company which had declined to become a plaintiff. One of the plaintiff insurance companies and

the defendant insurance company are citizens of the state of Illinois. The railroad company has removed the case into this court on the ground of diverse citizenship, and on the ground that the insurance companies are merely formal, and not necessary or proper, parties to the suit.

The cause of action for the alleged wrong accrued to Over alone. It was a right of action at law, triable by jury. It was not assignable, in whole or in part, so as to invest the assignee with a legal title. By the payment of the policies the insurers became subrogated, pro tanto, to an equitable right in the cause of action. The written assignment executed by Over to the insurance companies gave them nothing beyond an equitable right. Neither at common law nor under our statutes does the assignment of a part of a cause of action for a tort invest the assignee with any part of the legal title. The plaintiff Over still retains the entire legal title to the cause of action. As the owner and holder of the entire legal title to the cause of action, and having also the entire beneficial ownership of the unassigned part of it, he can, in this state, as at common law, maintain in his own name an action for the whole amount of the loss. *Cunningham v. Railroad Co.*, 102 Ind. 478, 1 N. E. 800. His right of action is at law, because his title is purely legal. The title and interest of the insurance companies are wholly equitable, and extend to but a part of the cause of action. Can Over, whose right of action is at law, by joining the insurance companies, whose right of action is in equity, deprive the railroad company of the right of removal? He could have brought his suit originally in this court against the railroad company, but it would have had to be brought in his name alone. His right of action, being legal, and embracing the entire loss, is separable from the equitable causes of action of the insurance companies. The distinction between actions at law and suits in equity is firmly maintained in the federal system of jurisprudence, and state legislation will not be permitted to alter or abridge this distinction. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. If the practice in the state courts permits the joinder of parties having the entire legal title with others having only an equitable title or interest in a part of the cause of action, still, in my opinion, such joinder will not defeat the right of the federal court to separate the parties having a legal cause of action from those having an equitable right; and if, when thus separated and arranged, the action at law is removable, the presence of parties having a mere equitable interest will not defeat such right. If the assignee of an equitable interest in a cause of action of a legal nature is a necessary or proper party with the owner of the entire legal title, then, in every case where a cause of action arises, of which the federal court might rightfully have taken cognizance by removal, this right could be defeated by the assignment, to a citizen residing in the state of the defendant's residence, of a small interest in the claim or cause of action. Such construction would make the defendant's right of removal, in every case, depend on the will of the owner of the cause of action. I think the motion to remand should be overruled, and it is so ordered.

POWER v. MUNGER.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 410.

RELEASE AND DISCHARGE—CONSTRUCTION.

W., who was operating marine ways, agreed with P. to haul the latter's steamer to the ways, and keep it there. In handling the steamer, W. allowed it to collide with a boat belonging to B. Suit was brought in the federal court by B. against P., and a judgment for \$9,572 was rendered. Pending an appeal from the judgment, B. sued W. in the state court, and obtained a judgment of \$4,300, from which an appeal was pending, when W. and P. agreed that if W. would withdraw his appeal, and pay the judgment, P. would contribute one-half thereof, and that, upon the discharge of the judgment, P. would try to have the judgment against him discharged, but that, if he was compelled to pay it, W. should refund him the said amount paid by him and used towards paying the judgment against W., while, if P. should succeed in getting the judgment against him satisfied, the amount so paid by him towards satisfying the judgment against W. should not be refunded. P. eventually had to pay the judgment against him. *Held*, that P. could not recover from W. the amount of such judgment against him, on the ground of W.'s negligence, the agreement having expressly defined W.'s liability, and thereby released him from all other liability growing out of the accident.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Thomas C. Power against Roger S. Munger to recover the amount of a decree rendered against plaintiff in an admiralty suit. Defendant had judgment, and plaintiff brings error. Affirmed.

In the month of November, 1879, the firm of C. S. Weaver & Co., which was composed of C. S. Weaver and Roger S. Munger (the latter of whom is the defendant in error), were in charge of and were operating certain marine ways at Bismarck, in the then territory of Dakota. On the 17th day of November, 1879, the firm entered into two contracts with the respective owners of the steamers Butte and Colonel McLeod to haul the said steamers out of the Missouri river, and to furnish room for the same on the marine ways in question, until the opening of navigation in the spring of the year 1880. In the execution of these contracts, the steamer Butte was first hauled out of the water, and partially up the ways, when work was suspended on her for the time being, and the steamer Colonel McLeod was moved to the foot of the ways for the purpose of being drawn out of the water before ice had formed in the river. While the steamers were in this situation, the Butte slid down the ways, because it was not securely blocked and stayed. It collided with the Colonel McLeod, and caused the latter to sink. Subsequently, in the month of July, 1881, John Baker and others, who were the owners of the steamer Colonel McLeod, filed a libel in personam in the United States district court for the district of Minnesota against Thomas C. Power, the present plaintiff in error, and also against other persons who were at the date of the collision the owners of the steamer Butte, for the damage that had been sustained by the sinking of the steamer Colonel McLeod in the aforesaid collision. This suit in admiralty eventually resulted in a decree against Thomas C. Power for the sum of \$9,572, from which decree he took an appeal to the United States supreme court. While the latter suit was pending and as yet undetermined, to wit, in the month of August, 1883, Baker and others also brought a suit at common law against C. S. Weaver & Co., in the district court for St. Louis county, in the state of Minnesota, to recover the damages sustained by the aforesaid collision, which latter suit

was grounded on the alleged negligence of Weaver & Co. in failing to properly stay and block the steamer Butte while it was resting on the marine ways and was in their charge. The trial of this latter action at common law resulted in a verdict against C. S. Weaver & Co. in the sum of \$4,300, which was rendered on the 24th day of August, 1884. Weaver & Co. obtained a stay of proceedings on this verdict, with leave to file a motion for a new trial, and such motion for a new trial had been filed and was pending and undetermined on the 5th day of March, 1885. In the meantime the suit in admiralty against Power and others had been tried and determined, and on the 5th day of March, 1885, that case was pending on appeal from the decree against Power in the supreme court of the United States. In this posture of affairs, and on the 5th day of March, 1885, Roger S. Munger, the defendant in error, for himself and in behalf of the firm of C. S. Weaver & Co., entered into an agreement with Thomas C. Power, the plaintiff in error, which agreement, after reciting substantially all of the facts aforesaid, contained the following stipulations, to wit: "Therefore it is agreed by and between them that said C. S. Weaver and Roger S. Munger shall discharge the stay of proceedings entered in the case against them, and allow judgment to be entered therein on the verdict; and, when judgment is so entered, the said Thomas C. Power shall contribute and pay one-half the amount of said judgment to the said C. S. Weaver and Company, to be by them used in paying said judgment, which they agree to do at once upon receipt of the same from said Power, and cause said judgment against them to be discharged and satisfied of record. And it is further agreed that, immediately upon the judgment against said C. S. Weaver and Company being discharged of record, the said Thomas C. Power shall commence proceedings to have the said judgment against him discharged and satisfied; and, to accomplish that end, he agrees to exhaust all means known to the law in all courts having jurisdiction, original or appellate, at his own proper costs and expense; and if, after making such efforts to have said judgment against him satisfied of record, he fails, and is compelled to pay the same, then and in that event the said Roger S. Munger and Charles S. Weaver agree to refund and pay over to him the said amount paid by him and used towards paying the said judgment against said C. S. Weaver and Company. And, if the said Power shall succeed in getting the said judgment against him satisfied, the money so paid by him towards satisfying the said judgment against C. S. Weaver and Company shall not be refunded or paid to said Power, nor shall the said Power have any claim or demand against them for or on account therefor." In compliance with the provisions of the foregoing contract, the pending motion for a new trial which had been filed by Weaver & Co. in the suit against that firm in the state court was withdrawn. Judgment was entered on the verdict therein, and the amount of such judgment was paid into court for the use of the plaintiffs. This judgment was by the state court ordered to be entered as satisfied on July 20, 1885. Power did not succeed in obtaining a reversal of the decree in the admiralty suit, but was subsequently compelled to pay the same. The present suit was brought by Thomas C. Power against Roger S. Munger to recover the full amount of the decree rendered against him in the admiralty suit. The action was brought upon the theory that the firm of Charles S. Weaver & Co. was liable to Power for the damages resulting from the collision, which he had been compelled to pay to the owners of the steamer Colonel McLeod, because the firm of C. S. Weaver & Co. became the agents of Power and the other owners of the Butte, by virtue of the contract made to draw the steamer Butte out of the river, and that they were liable to their principals for a negligent performance of that duty. On the trial of the suit in the circuit court, that court appears to have held that the contract entered into between Thomas C. Power and C. S. Weaver & Co. on the 5th day of March, 1885, was in effect a release of the liability sought to be enforced in this suit.

Henry L. Williams (C. D. & T. D. O'Brien, on the brief), for plaintiff in error.

W. P. Warner (Harris Richardson and C. G. Lawrence, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

Having in view the relations existing between the parties to the agreement dated March 5, 1885, the terms of that agreement, and the circumstances under which it was executed, we feel constrained to hold, as the circuit court appears to have ruled, that the agreement in question precludes the plaintiff in error from recovering on the cause of action stated in the present suit. It appears that the owners of the steamer Colonel McLeod had recovered two judgments in different forums for the same wrong and injury,—the one against Thomas C. Power, in the admiralty court, and the other against C. S. Weaver and Roger S. Munger, in the state court. The latter persons questioned the validity of the verdict which had been rendered against them, and were in a position to attack the verdict in the trial court, and to have it reviewed on a writ of error by an appellate tribunal. At this juncture, Power, the plaintiff in error, seems to have intervened for his own protection and advantage, and to have induced Weaver and Munger to abandon the further defense of the suit against them. The proposition to let a judgment be entered against Weaver & Co. in the state court upon the verdict that had then been returned, and to pay that judgment, seems to have come from counsel who were employed by the present plaintiff in error, and the proposition in question appears to have been made, in the belief, that, if the judgment in the state court was paid, it would operate to discharge the decree in the admiralty suit, which was then pending on appeal in the supreme court of the United States. That it did not have the intended operation is a matter of no concern to Weaver & Co., as the opposite party took his chances that it would have such effect, and cannot now be heard to complain if he was misled or was mistaken. It also appears from the record that the money paid into the state court by Weaver & Co., pursuant to the agreement of March 5, 1885, was actually withdrawn under some arrangement between Baker and others and Mr. Power, and that the fund was eventually used to satisfy the decree against the latter in the admiralty court. But it is more important to observe that the very event has now happened which was foreseen by the parties to the agreement of March 5, 1885, and was provided for therein. It was stipulated in that agreement, in substance, that if said Thomas C. Power fails to have the decree against him satisfied, and is compelled to pay the same, "then and in that event the said Roger S. Munger and Charles S. Weaver agree to refund and pay over to him the said amount paid by him, and used towards paying the said judgment against C. S. Weaver & Co." This clause of the agreement, we think, is the measure of the liability which the plaintiff in error can now enforce against the members of the firm of C. S. Weaver & Co., or either of them, inasmuch as the very contingency has arisen which the parties foresaw and provided for. If it was intended

that Weaver & Co. should rest under or assume any other liability to the opposite party to the agreement than the one above expressed, in the event that he was compelled to pay the decree of the admiralty court, that additional or different liability should have been stated. It is a fundamental rule that in the absence of fraud or mistake, when parties see fit to put their engagements in writing, the written agreement is conclusively presumed to express all of the obligations which either party intended to assume towards the other. It is of no importance, therefore, that the contract in question did not expressly declare that Mr. Power would not seek to hold Weaver & Co. liable to him for the full amount of the admiralty decree, if he was eventually compelled to pay it, for that agreement is necessarily implied in what was in fact expressed.

We also consider it very improbable that Munger and Weaver would have consented to abandon the defense of the suit pending against them in the state court, and to pay the judgment therein on the terms mentioned in the agreement of March 5, 1885, if they had understood that Power and the other owners of the steamer Butte claimed that Weaver & Co. were liable over to them for whatever sum they might be compelled to pay in settlement of the existing decree in the federal court, and that such a demand would, in the end, be preferred against the firm of C. S. Weaver & Co. It is far more reasonable to believe that Munger and Weaver acted in the belief that the contract of March 5, 1885, was a release from all further liability on account of the collision between the two steamers, except the liability stated in the agreement to refund to Mr. Power the money which he had advanced to help pay the judgment in the state court, if the latter was unsuccessful in avoiding the payment of the existing judgment in the federal court. Such, we think, was the interpretation placed upon the contract of March 5, 1885, by all of the parties thereto when it was executed; and such, we think, was the necessary legal effect of that agreement. Entertaining that view, it becomes unnecessary to consider some other interesting questions presented by the record which have been discussed by counsel with much thoroughness and ability. The judgment of the circuit court will accordingly be affirmed.

CHICAGO, B. & Q. R. CO. v. HONEY.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 393.

INJURY TO WIFE—ACTION BY HUSBAND—NEGLIGENCE OF WIFE.

Notwithstanding the provision of McClain's Code Iowa, § 3396, that a husband shall not be responsible for civil injuries committed by his wife, and other provisions enabling a wife to hold property, contract, and sue in her own name, a husband, in an action for loss of his wife's services, occasioned by the negligence of another, will be charged with her contributory negligence.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Action by W. O. B. Honey against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

John N. Baldwin and Smith McPherson (J. W. Blythe on the brief), for plaintiff in error.

Charles M. Harl (J. McCabe and J. M. Junkin on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. The question presented by this record and to be decided is accurately stated by counsel for the plaintiff in error, as follows:

"In an action brought by the husband against a third party for damages for the loss of the society of his wife, her aid, and surgical attendance, consequent upon physical injuries received by the wife, is the fact that the wife has been guilty of contributory negligence, and the injuries which she received being the result of the concurring negligence of the wife and the third party, a defense?"

The circuit court answered this question in the negative, holding in effect that the contributory fault of the wife could not be imputed to the husband, and preclude him from recovering, either on the ground that she was acting as his agent or servant at the time of the injury, or because of the existence of the marital relation. The learned judge of the trial court appears to have been of the opinion that a husband suing for the loss of the services of his wife, and for medical expenses, occasioned by the negligence of a third party, is, in the state of Iowa at least, unaffected by the fact that the wife was guilty of contributory negligence, because the laws of that state have abolished the legal fiction of the identity of husband and wife, and have exempted the husband from responsibility for the negligences and misfeasances of the wife. Vide 59 Fed. 423. It becomes necessary, therefore, to determine whether this view is tenable. Whenever the question has heretofore been considered, it seems to have been taken for granted that the relation existing between husband and wife or parent and child is of such character that the plea of contributory negligence on the part of the wife or child, if the latter is of sufficient age and intelligence to be chargeable with negligence, is a good defense, when the husband or parent brings a common-law action to recover for the loss of service or for medical expenses consequent upon physical injuries sustained by the wife or child through the concurring fault of another. The following are some of the cases, and doubtless there are others, where this principle has been recognized and enforced: *Railroad Co. v. Terry*, 8 Ohio St. 570; *Dietrich v. Railway Co.*, 58 Md. 347; *Benton v. Railway Co.*, 55 Iowa, 496, 8 N. W. 330; *Iron Co. v. Brawley* (Ala.) 3 South. 555; *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453. In none of the cases last cited was the reason of the rule stated, nor was the subject much discussed. It seems to have been taken for granted that the concurring negligence

of the injured party was a sufficient defense to a suit by the husband or parent, when suing merely for a loss of the services of the injured party, or for medical expenses incurred and paid by him in the discharge of his obligation as husband or parent. But the weight to be given to these decisions as authority is not impaired by the fact that the rule stated and applied was not much discussed. On the contrary, the fact that the doctrine applied to the decision of the cases in question was assumed to be correct both by court and counsel, may be taken as an expression of the general understanding of the profession that the doctrine is well established and founded in reason. If we look for the true foundation of the rule in question, we apprehend that it will not be difficult to find. When one person occupies such a relation to another rational human being that he is legally entitled to her society and services, and to maintain a suit for the deprivation thereof, he should not be permitted to recover in such an action if the loss was occasioned by the concurring negligence of the person on whose account the right of action is given. If the person from whom the right of service and society is derived is capable of taking ordinary precautions to insure her own safety, and the person to whom the right of service belongs suffers her to go abroad unattended, and to exercise her own faculties of self-preservation, it is no more than reasonable to hold him responsible, in a suit for loss of society and service, for the manner in which such faculties have been exercised. We can conceive of no greater reason for deciding, in a case of this character, that a husband is not accountable for the conduct of his wife in caring for the safety of her own person, than there would be for holding that he was not chargeable with her contributory negligence in the management of a horse and carriage belonging to the husband, which she had been permitted to use for her own pleasure and convenience. In either case the fact that the husband has permitted the wife to control her own movements and to provide for her own safety, upon the evident assumption that she is competent to do so, should preclude him from asserting, in a suit against a third party for loss of service or society or for a loss of property, that he is not responsible for her contributory fault whereby the loss was occasioned. In this connection it is worthy of notice that in the state of Iowa, where this case originated, and in some other states as well, it is held that the husband's contributory fault is imputable to the wife in a suit brought by her against a third party for injuries sustained through the concurrent negligence of such third party and her husband. By the Iowa courts, it is said that the husband's negligence is imputable to the wife under such circumstances, because of the marital relation which entitles her to his care and protection. *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257, as explained in *Nisbit v. Town of Garner*, 75 Iowa, 314, 317, 39 N. W. 516; *Peck v. Railroad Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440, 447. In other jurisdictions it has been decided that the husband's contributory negligence is not thus imputable to the wife when she sues in her own right for injuries sustained under the circumstances last men-

tioned. *Shaw v. Craft*, 37 Fed. 317; *Sheffield v. Telephone Co.*, 36 Fed. 164; *Flori v. City of St. Louis*, 3 Mo. App. 231, 240; *Railway Co. v. Creek* (Ind. Sup.) 29 N. E. 481.

We do not regard it as material to the decision of the case at bar to determine what the true doctrine is with reference to the point last mentioned, for, even if we should concede it to be the better view that the husband's contributory negligence is not imputable to the wife when she sues in her own right for an injury sustained, still we think that it would not be a reasonable deduction from this rule that the husband is likewise unaffected by the wife's negligence when he sues for loss of services and medical expenses; for, when the wife brings an action for personal injuries which she has sustained, the right of action is in no wise dependent upon the marital relation. She does not derive her right to sue from that relation, but brings suit like any other person for an injury sustained through the fault of another. At common law it was necessary for the wife to be joined as plaintiff in such a suit, because she was regarded as the meritorious cause of action. *Bing. Inf. & Cov.* (Am. Ed.) 247, and cases there cited. But on the other hand, the husband's right to sue for loss of society and services grows out of the marital relation, and is incident to the rights thereby acquired. It has its origin in the existence of a valid marriage, which relation entitles him to the benefit of the wife's services and society, and which also imposes on him the duty of providing her with medical attendance in case of sickness or accident. When the husband loses the services of his wife, or is compelled to incur medical expenses, through the fault of another, then he may sue the wrongdoer. The right of action is incident to the marriage relation, and cannot exist without it. We think, therefore, that, even if it is the better view that the husband's contributory negligence cannot be imputed to the wife when she sues for her own injuries, yet that when the husband brings an action for the loss of society and services, which loss was due to the contributory fault of the wife, her want of ordinary care should nevertheless be imputed to the husband on the grounds heretofore indicated. As the respective rights of action are predicated on different grounds,—the one growing out of the marriage relation, and the other existing entirely independent of that relation,—there is no logical difficulty in holding the husband accountable for the contributory negligence of the wife, although the latter is not responsible for the contributory fault of her husband.

With reference to the cases of *Davis v. Guarnieri*, 45 Ohio St. 470, 487, 15 N. E. 350, and *Williams v. Railroad Co.* (Ala.) 9 South. 77, to which our attention has been particularly called, it is only necessary to say that these cases turned upon the construction of local damage acts. In the Ohio case the husband sued as administrator of the wife, under a statute which gave the amount of the recovery to the wife's children and husband. It was held that under the statute the administrator was only subject to those defenses which could have been made as against his intestate if she had survived and brought suit for the injury, and that in a suit by her in her

own right the plea of contributory negligence on the part of the husband would not have been a valid defense, although it was conceded that, if it had been proven that in the matter in which the husband was negligent he had acted as agent of the wife, it would have been a good defense, even as against the husband suing in the capacity of administrator. The Alabama case was likewise a suit under a local statute, by a father, for the death of his minor son, which had been occasioned by the defendant's negligence. It appears to have been ruled that, under the terms of the statute, contributory negligence by the minor was not a valid defense as against the father. We do not see that either of these cases has any marked bearing on the question at issue in the present suit, which concerns the right of the husband to maintain a common-law action for the loss of the society and services of his wife, when she is shown to have been guilty of culpable negligence which immediately contributed to the injury. In cases of the latter character, we are of the opinion that the contributory fault of the wife is a valid defense, unless it can be made to appear that the rule of the common law in this respect has been changed by some local statute. The Iowa statute which is chiefly relied upon to exempt the husband from the plea of contributory negligence is section 3396, McClain's Code of Iowa, and is as follows:

"For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor; except in cases where he would be jointly responsible with her if the marriage did not exist."

There are other statutes in force in that state, similar to those which now prevail in some other states, by virtue of which a married woman can hold property in her own name, sell and convey the same, make contracts in her own name, prosecute and defend suits in her own name for the protection of her property and personal rights, and by virtue of which she may also receive wages for her own labor and maintain suits therefor. Vide McClain's Code Iowa, §§ 3393, 3402, 3404. These laws have emancipated the wife from many of her common-law disabilities, and have given her an individuality, apart from her husband, which she did not before possess in the eye of the law. But we think that it is a mistake to suppose that these statutes were intended to or that they have in fact utterly extinguished the reciprocal obligations and rights of husband and wife which were formerly incident to the marriage relation. If it is true, as has been intimated, that the statutes in question free the parties to the marriage contract from all obligations to each other, save those of affection and loyalty, then it would be pertinent to inquire upon what theory the husband can be permitted to prosecute a suit like the one now in hand. It certainly cannot be maintained that the husband is entitled to sue for damages consequent upon the loss of his wife's services and society, unless she is still under an obligation to the husband, as at common law, to care for his home, attend to the wants of his family, and do whatever else is within her power which is conducive to his comfort, happiness, and prosperity. That a married woman is still under an

obligation to discharge these duties, notwithstanding the existence of a statute such as prevails in Iowa, and that a husband is still entitled, as at common law, to recover damages for the loss of her society and services, was recently decided by this court in *Railway Co. v. Henson*, 7 C. C. A. 349, 58 Fed. 531, 533, where Judge Caldwell, speaking for the court, said:

"The contention of the plaintiff in error is that under this act the husband has no valuable right in the services of his wife, and that he suffers no pecuniary loss by her death. This act does not put the wife on the footing of a concubine to her husband. It does not relieve her from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all Christian peoples. The statute does not purport to relieve a wife, and was not intended to relieve her, from the legal duty of performing these services which it is the pleasure of every good housewife to render to her husband in sickness and in health, independently of any mere technical legal obligation, and which she would render despite any statute that could be enacted to the contrary. These rights and duties are imposed by a law having a much higher and better source than the common law, which simply imparts to them that legal sanction essential to their maintenance and protection in a court of law against invasion from any quarter."

The supreme court of Iowa has also recently held that the statutes above referred to have not abrogated the common-law rule that the wife will not be presumed to have acted voluntarily in doing an unlawful act in the presence of her husband, and that notwithstanding the statutes in question the common-law presumption of compulsion on the part of the husband still prevails. *State v. Kelly*, 74 Iowa, 589, 38 N. W. 503. It would seem, therefore, that the relations existing between husband and wife, and the responsibility of the former for the conduct and acts of the latter, remain as they were at common law, except in so far as they have been changed by express statutory enactment, or by necessary legal intendment. It seems manifest from the phraseology of the statute above quoted (section 3396) that the purpose of the legislature in enacting that section was to exempt the husband from liability in suits brought against him by third parties for the torts of the wife, when they were committed by the wife, of her own volition, without the aid, advice, or sanction of her husband. We can discover nothing in the language of the statute which gives it any greater scope, or which fairly indicates that the legislature intended to deprive a third party of the benefit of the plea of contributory negligence when he is sued by the husband for an injury sustained by the wife in consequence of her own and such third party's negligence. We are furthermore of the opinion that such a construction of the statute would give it an effect which was not within the intent of the lawmaker. If a husband is still entitled, under the laws of Iowa,—as we have no doubt he is,—to maintain a common-law action for the loss of his wife's services and society, we know of no sufficient reason why he should not be chargeable in such an action with the wife's contributory fault. Entertaining these views, the judgment of the circuit court is reversed and the case is remanded, with directions to award a new trial.

NORTHERN PAC. R. CO. v. BLAKE.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 381.

INJURY TO BRAKEMAN — NEGLIGENCE OF RAILROAD — RECEIVING CARS WITH DOUBLE BUFFERS.

For a railroad to receive from a connecting line, and transport, cars with double buffers or deadwoods, in good condition, is not negligence making it liable to a brakeman for injury received in coupling, they being in use on other well-managed roads.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by J. E. Blake against the Northern Pacific Railroad Company for injury received by plaintiff as a brakeman. Judgment for plaintiff. Defendant brings error. Reversed.

Tilden R. Selmes (J. H. Mitchell, Jr., with him on brief), for plaintiff in error.

M. D. Munn, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. The only question arising upon this record, which we deem it necessary to consider, is whether the trial court properly allowed the jury to determine, as it seems to have done, whether the use by the defendant company of cars having double buffers, or "double deadwoods," as they are more frequently termed, was an act of culpable negligence, such as would justify a recovery. The defendant in error brought a suit against the plaintiff in error, the Northern Pacific Railroad Company, for injuries which he had sustained while in its employ, as a brakeman, in attempting to couple together two foreign freight cars that were provided with double buffers. The complaint, as originally drawn, did not allege that the railroad company was at fault in receiving and hauling cars of that construction. But shortly after the trial began the plaintiff was permitted, over an objection made by the defendant, to amend his complaint so as to charge that the defendant was guilty of negligence in using cars with double deadwoods; and considerable testimony was thereafter introduced which tended to show that the use of double deadwoods enhances the risk of making a coupling, and that more care must be exercised in handling cars that are thus constructed. At the conclusion of the testimony the court, among other things, charged the jury as follows:

"Although cars come from other roads, and may be more dangerous, he is required to handle them; and although cars belonging to the defendant, and used on its road, were different in their construction, the plaintiff is supposed to be competent to handle all cars which the company is bound to receive and haul over its road. So that one of the questions which is involved in this allegation of negligence is, did the defendant company have in this train of cars certain cars which were not adequately and reasonably safe for the purposes for which they were used, in connection with the duty which the plaintiff was

required to perform? * * * The use of double-deadwood cars upon the defendant's railroad is not per se negligence, but they may be constructed in such a way or in such a mode as would render them not reasonably safe appliances under the circumstances; and it is for you to determine whether, under the circumstances of this case, the defendant company exercised reasonable care and caution to furnish reasonably safe appliances for this plaintiff to do his work with when coupling cars."

As there was no evidence in the case which tended to show that the cars in question differed in any respect, as to their mode of construction, from other cars having double deadwoods, we are forced to regard this portion of the charge as leaving the jury at liberty to find that the mere fact that the company had these particular cars in use on its road was an act of negligence, for which it might be held responsible. If this was not the meaning which the court intended to convey, it is certainly true that the language employed was open to that construction; and, after a careful perusal of the evidence, we are satisfied that the jury must have held the company responsible for the plaintiff's injuries solely on the ground that it did not exercise reasonable care on the occasion of the accident, in using cars with double deadwoods. It is true that there was some evidence tending to show that one of the projections forming a part of the deadwood on one of these cars had been broken off prior to the accident, but, as this was on the side of the car opposite to that on which the plaintiff was standing when he was injured, it does not seem to us at all probable that such defect in the deadwood was the proximate cause of the accident. Indeed, we can hardly conceive it to be possible that the last-mentioned defect contributed in any way to occasion the injury, or that the jury so found. It is far more probable, we think, that the jury understood that part of the charge to which we have above referred as leaving them at full liberty to find—and that they did in fact ultimately find—that the railway company was at fault, in view of all the circumstances of the case, merely because it used cars with double deadwoods. It accordingly becomes necessary to consider the case from that standpoint, and to determine whether it was the legitimate function of the jury to decide that the railroad company violated its duty to the plaintiff, in receiving and hauling cars which were equipped with such coupling appliances. With reference to this question, we think that it may be safely said that none of the adjudged cases go to the extent of holding that a railway company is guilty of culpable negligence in using cars that are provided with double buffers, whether they are cars of its own construction, or cars that have been received from some connecting carrier. The generally accepted doctrine is that a railway company is not bound to use upon all of the cars in its possession the safest possible coupling appliances, or appliances of the latest and most improved pattern. It is at liberty to use such coupling appliances as are in use at the time by other well-managed roads, and such as are regarded by competent railroad men as ordinarily safe and fit to be used. This court recently had occasion to approve that doctrine in the case of *Railway Co. v. Linney*, 7 C. C. A. 656, 59 Fed. 45, 48.

The fact that railroad companies are now very generally required by statutory enactments to receive and transport cars which are tendered to them by connecting carriers has led several courts to decide, after a very full and careful consideration of the question, that it is the right and duty of a railway company to receive and transport double-deadwood cars, such as are at the time in use on other railroads, if they are in good condition and free from defects, even though the use of such cars may enhance the risk to which a brakeman is exposed in the act of making couplings. It has been held, in effect, that the necessities of commerce and public policy alike demand that such cars should be received and transported by a railway company, even though it does not make use of such coupling appliances on cars of its own construction, so long as such cars are in general use on other leading lines of railroad, and so long as many competent persons justify the use of such coupling appliances on the ground that they are not unnecessarily dangerous, and that certain advantages result from that method of construction. In line with these views it is also very generally held that the risk of getting hurt while coupling cars having double deadwoods is one of those ordinary risks of the employment which a brakeman assumes on taking service, especially if, as in the case at bar, he is an old and experienced railroad operative. *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Baldwin v. Railway Co.*, 50 Iowa, 680; *Railroad Co. v. Flanigan*, 77 Ill. 365; *Hathaway v. Railroad Co.*, 51 Mich. 253, 16 N. W. 634; *Thomas v. Railway Co.*, 109 Mo. 187, 18 S. W. 980. The doctrine of these cases has been recently cited and approved by the supreme court of the United States in *Kohn v. McNulta*, 147 U. S. 238, 241, 13 Sup. Ct. 298. It is proper to note in this connection that our attention has been directed by counsel for the defendant in error to certain cases, notably *Reynolds v. Railroad Co. (Vt.)* 24 Atl. 135; *Railway Co. v. Frawley (Ind.)* 9 N. E. 594; *Railway Co. v. Callbreath*, 66 Tex. 528, 1 S. W. 622; and *Hungerford v. Railway Co.*, 41 Minn. 444, 43 N. W. 324,—in support of the contention that it was the duty of the defendant company to have given the plaintiff special notice to be on the lookout for cars having double deadwoods, and that it was guilty of culpable negligence in failing to give such notice. The cases last referred to do indeed support the proposition that it is the duty of a railway company to give special warning to young and inexperienced persons in its employ, when it proposes to make use of cars that are not in general use on its road, and that are more than ordinarily dangerous. They also show that it is likewise the duty of a railway company to give like notice when it proposes to make some special and unusual use of a peculiar form of coupling appliance, especially if such unusual use of a peculiar form of coupling appliance renders the act of coupling more dangerous. These cases merely illustrate the general doctrine that where an employé is young and inexperienced, or the risk is a latent or unusual one, and for either reason there is more than ordinary danger of getting hurt, the employé should be specially warned. In such cases the employé should not be left to rely upon

his experience of the dangers ordinarily incident to his calling. But we do not see that the doctrine in question has any special application to the case at bar. The plaintiff was an experienced brakeman, who had been in service, either as brakeman or conductor, for fully 17 years. It was shown that at least 10 double-deadwood cars daily passed through the yards at the eastern terminus of the defendant's railroad at St. Paul. It was further shown, by the plaintiff's own admission, that he was familiar with one of the defendant company's rules, which contained the following warning to all of its employés:

"Great care must be exercised by all persons in coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size or strength, and is liable to be broken, and as, from various causes, it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employés are enjoined, before coupling cars or engines, to examine so as to know the kind and condition of the draw-heads, drawbars, links, and coupling apparatus, and they are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yardmaster or conductor."

Moreover, the trial court did not submit an issue to the jury, nor was it asked to do so, touching the question whether the plaintiff was entitled to special notice of the use by the company of double-deadwood cars by reason of his lack of experience in handling such cars. On the contrary, and as heretofore stated, the case was submitted to the jury under instructions which, in our judgment, gave them full liberty to find that the company was at fault in receiving and using cars with double buffers, and upon this erroneous ground a verdict against the company in the sum of \$10,000 evidently rests. The judgment of the circuit court must therefore be reversed, and the cause remanded, with directions to award a new trial. It is so ordered.

SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA v. FIDELITY
& CASUALTY CO. OF NEW YORK.¹

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 162.

1. BOND FOR FIDELITY OF EMPLOYE—EXTENT OF LIABILITY—ADMISSIONS OF RECEIPTS.

On the reappointment of the treasurer of a beneficial association for a new term, a surety company gave to the association its bond to make good "such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny, which was committed and discovered during the continuance of said term, or any renewal thereof." *Held*, that entries, receipts, and reports made by him during the life of the bond, in the ordinary course of his duty as treasurer, charging himself with certain items, were not conclusive against the surety as to the time when such items were received, there being no circumstances creating an estoppel in pais.

¹ Rehearing denied.

2. **SAME—USE OF FUNDS TO MAKE GOOD EMBEZZLEMENTS OF FORMER TERM.**
Obligations of the association, which should have been paid by the treasurer during his former term, were carried forward by him into his new term, and paid out of current receipts. *Held* that, as such obligations were not discharged when assessments were made sufficient to meet them, but continued obligations until paid, their payment out of funds of the association did not amount to embezzlement or larceny committed during the new term, and the surety was not liable for the misappropriation.
3. **SAME—MISREPRESENTATION AND CONCEALMENT.**
Such bond recited that the association had delivered to the company certain statements relative to the duties and accounts of the treasurer, which it was agreed should form the basis of the contract expressed in the bond. *Held* that, if such statements involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; nor by conversations, as to laws of the association, with its vice president, at the time of application for the bond, it not appearing that he had authority to make any representations on the subject; nor by the fact that at the time of such application the treasurer was in default to the association, there being no representation to the contrary in the statements delivered, and nothing to show that at that time the fact was known to any officer of the association.
4. **SAME—CONSTRUCTION—TIME OF TAKING EFFECT.**
Such bond recited that it was made July 1, 1891, and stated that it was for a term ending July 1, 1892, and an indorsement on its back stated those days to be the dates of the bond and of its expiration; but the bond was dated July 10, 1891. The premium received covered one year. *Held*, that the bond was properly construed as in effect from July 1, 1891, without regard to evidence as to when it was accepted.
5. **PLEADING—DUPLICITY—FRAUD IN PROCURING BOND.**
In an action on a bond to make good loss by embezzlement of an employé, a plea seeking to avoid the bond, as procured by misrepresentations as to the previous state of his accounts by the employer, averred that the employé was then a defaulter, and that the employer knew it, or could have known it by the exercise of diligence. *Held*, that this was bad, as a double plea.
6. **APPEAL—ASSIGNMENTS OF ERROR—STRIKING OUT PLEAS.**
An assignment that the court erred in striking out pleas to plaintiff's declaration is too general, under a rule of court requiring each error relied upon to be set out separately.
7. **SAME—RULINGS ON EVIDENCE.**
Errors assigned in admission or rejection of evidence cannot be considered where a rule of court requiring such assignments of error to quote the full substance of the evidence admitted or rejected is not complied with.
8. **SAME—OBJECTIONS NOT RAISED BELOW—VARIANCE.**
An objection to a bond as evidence, because it varies from the one declared on, where no exception was taken, and the variance—merely a clerical error in the declaration, in stating the date of termination of the bond—is not pointed out, will not be considered on appeal.
9. **SAME—EVIDENCE SUBJECT TO EXCEPTION.**
Where a party consents to treat a document as read in evidence subject to exception, but no ground of objection is stated, and no exception is taken afterwards, no objection thereto can be presented on appeal.
10. **SAME—HARMLESS ERROR—STRIKING OUT PLEAS.**
Striking out pleas to the declaration is not prejudicial where any evidence competent under them would have been equally competent under other pleas.
11. **SAME—REJECTION OF EVIDENCE.**
Exclusion of evidence tending to show fraud in procuring the bond sued on is not prejudicial where neither the pleas stricken out nor those on which the case was tried were sufficient to present any issue of fraud going to the validity of the contract.

12. TRIAL—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

There is no error in withdrawing from the consideration of the jury a particular defense, where there is no competent evidence in support of it, on which a verdict could be based.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action by the Supreme Council Catholic Knights of America against the Fidelity & Casualty Company of New York on a bond. At the trial the jury found for plaintiff. Judgment for plaintiff was entered on the verdict. Both parties brought error.

Xenophon Wheeler and Thomas McDermott, for plaintiff.

Creed F. Bates, Charles C. Hadal, Edwin R. Thurman, and J. Washington Moore, for defendant.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

LURTON, Circuit Judge. The appellant here and plaintiff below is the Supreme Council Catholic Knights of America, a corporation under the laws of Kentucky. In general terms it may be described as a fraternal and beneficiary association of the members of the Catholic Church. Its chief purpose seems to have been the establishment and maintenance of a life insurance feature, by means of which a sum not exceeding \$5,000 was to be paid to the family of each member out of funds raised by death assessments and paid into the common treasury, and then, under the laws of the order, paid to the beneficiary entitled. The defendant corporation, the Fidelity & Casualty Company of New York, is a corporation of the state of New York, and is engaged in the business of guarantying the fidelity and honesty of officers, agents, and employes.

This suit was an action on a bond for \$50,000, executed by the defendant company to the plaintiff corporation, insuring the fidelity and honesty of Michael J. O'Brien as supreme treasurer of the Supreme Council Catholic Knights of America. So much of said bond as is involved in the questions presented by the assignment of errors is as follows:

"This bond, made the first day of July, in the year of our Lord one thousand eight hundred and ninety-one, between the Fidelity and Casualty Company of New York, hereinafter called 'the company,' of the first part, and Michael J. O'Brien, of Chattanooga, Tenn., hereinafter called the 'employed,' of the second part, and Supreme Council Catholic Knights of America, hereinafter called 'the employer,' of the third part. Whereas, the employed has been appointed supreme treasurer at Chattanooga, Tenn., in the service of the employer, and has applied to the company for the grant by them of this bond, and whereas, the employed has heretofore delivered to the company certain statements and a declaration relative to the duties and accounts of the employed, and other matters, it is hereby understood and agreed that those statements and such declaration, and any subsequent statements or declaration hereinafter required by or lodged with the company, shall constitute an essential part and form the basis of the contract hereinafter expressed: Now, in consideration of the sum of three hundred and seventy-five dollars, as a premium for the term ending on the first day of July, eighteen hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed that during such term, or any subsequent renewal of such term, and

subject to the conditions and provisions herein contained, the company shall, at the expiration of three months next after proof satisfactory to its officers of a loss as hereinafter mentioned, make good and reimburse to the employer, to the extent of the sum of fifty thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny, which was committed and discovered during the continuance of said term or any renewal thereof, and within three months from the death, dismissal, or retirement of the employed: provided, that on the discovery of any such fraud or dishonesty as aforesaid the employer shall immediately give notice thereof to the company, and that full particulars of any claim made under this bond shall be given in writing, addressed to the company's secretary, at its office in the city of New York, within three months after such discovery as aforesaid, and within three months after the expiration of this bond, and the company shall be entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness of such claim, and of the correctness of the statements made at the time of effecting this bond, or made at any time of the payment of any renewal premium, as may be required by the officers of the company, and to have the same particulars, or any of them, verified by statutory declaration; and any claim made under this bond, or any renewal thereof, shall embrace and cover only acts and defaults committed during its currency, and within twelve months next before the date of the discovery of the act or default upon which such claim is based, and upon the making of any claim this bond shall wholly cease and determine, and shall be surrendered to the company on the payment of such claim. And this bond is entered into on the condition that the business of the employer shall be continued to be conducted, and the duties and remuneration of the employed shall remain in accordance with the statements hereinbefore referred to; and if, during the continuance of this bond, any circumstance shall occur or change be made which shall have the effect of making the actual facts differ from such statements, or any of them, without notice thereof being given to the company at its office in New York, and the consent and approval in writing of the company being obtained, or if any willful suppression or misstatement be made in any claim under this bond, or any fact affecting the risk of the company at any time, or if the employer shall fail to notify the company of the occurrence of any act of dishonesty on the part of the employed as soon as it shall have come to the knowledge of the employer, or shall continue to intrust the employed with valuable property after such discovery, this bond shall be void from the beginning."

O'Brien succeeded himself as treasurer, having held the same office for two preceding terms of two years each. The defendant company was surety only from July 1, 1891, the date when his third and last term began. O'Brien acted under defendant's bond only from July 1, 1891, to September 10, 1891, when he abandoned his trust and fled the country. There was a jury and verdict against the defendant, as surety, for \$15,722. From the judgment on this verdict both the plaintiff and defendant have sued out writs of error.

The principal question arising upon the plaintiff's assignment of error is as to the liability of the surety for certain items of receipt, aggregating \$21,000, and with which O'Brien charged himself as of various dates between July 1 and 10, 1891. The contention of the defendant was and is that the charges so made by O'Brien against himself were misdated; that the moneys so charged were in fact received and paid out before July 1st, and were not, therefore, embezzled by O'Brien during the currency of its bond. The contention of the plaintiff was and is that the charges so made by O'Brien against himself were made during the life of the bond, and in the

ordinary course of his duty as treasurer, and are therefore conclusive upon him and upon his surety.

Evidence tending to show that these items had been received during the latter part of June, and paid out before July 1st, was admitted over objection. There was also evidence tending to show that O'Brien had a habit of dating his entries, letters of advice, and receipts about 10 days after the date of actual receipt. The court, in substance, instructed the jury that while admissions, entries, receipts, and reports made to other officials of the order during the life of the bond, and in the usual and ordinary course of his duty as treasurer, would be evidence affecting O'Brien's surety, yet such admissions or reports would not be conclusive, and might be contradicted and explained, and that it was for the jury to say, upon the whole evidence submitted to them, whether the items in controversy had been received before or after the execution of the bond in suit, and before or after the beginning of his third term; that, on the evidence, it was for them to say whether the sums so received were paid out before the currency of defendant's bond. The court also charged that the defendant surety would not be liable for any moneys received by O'Brien before July 1st, which were not in his hands when the defendant became bound as his surety; that for any defalcation before July 1, 1891, the defendant surety could not be made liable under the bond exhibited.

There has been a wide difference of opinion entertained by American courts as to the conclusiveness of official reports, or entries made by public officials in the ordinary course of official duty. There is a respectable line of authority, beginning with the case of *Baker v. Preston*, 1 Gilmer, 235, holding that such entries and reports are conclusive both upon the official making them and the sureties upon his official bond. That case involved the liability of the sureties upon the bond of a state treasurer who at the beginning of a second term had on hand, according to his own books, a large balance brought forward from a preceding term. The sureties were held concluded by the book balance thus brought forward, and not suffered to show that in fact the balance on hand was much less, by reason of a defalcation committed during the former term, and not appearing upon the books. The decision was by a divided court. Judge White dissented in a very able opinion, based upon the total want of authority to support the conclusion of the court. The decision has been much criticised in subsequent opinions of the Virginia supreme court. *Munford v. Overseers*, 2 Rand. 314; *Craddock v. Turner's Adm'r*, 6 Leigh, 116. It has been followed in *State v. Grammer*, 29 Ind. 530; *Morley v. Town of Metamora*, 78 Ill. 394; *City of Chicago v. Gage*, 95 Ill. 593; *Boone Co. v. Jones*, 54 Iowa, 699, 2 N. W. 987, and 7 N. W. 155,—and perhaps others. The doctrine has been repudiated, and such reports and entries held to be only *prima facie* evidence, and open to contradiction, by a decided weight of judicial opinion. *U. S. v. Eckford*, 1 How. 250; *U. S. v. Boyd*, 15 Pet. 187; *U. S. v. Boyd*, 5 How. 29; *Arkansas v. Newton*, 33 Ark. 277; *Bissell v. Saxton*, 66 N. Y. 55; *Mann v. Yazoo City*, 31 Miss. 574; *Hatch v. Attleborough*, 97 Mass. 537; *Nolley v. Calla-*

way Co., 11 Mo. 447; Nevada v. Rhoades, 6 Nev. 352; Townsend v. Everett, 4 Ala. 607; Vivian v. Otis, 24 Wis. 518.

Undoubtedly, there may occur cases in which the official should be estopped by his entries and reports, in consequence of special circumstances appearing constituting an estoppel in pais. In such cases the surety would be bound by the evidence which concluded his principal. But such estoppel could only arise under bonds conditioned for the faithful discharge of the duties of the office. Some of the cases cited above as following Baker v. Preston were in part based upon facts constituting estoppel in pais. So, under bonds obligating the surety for the faithful discharge of official duty by his principal, the evidence offered to show fabricated entries or false reports may show such official dereliction or fraud as in itself would constitute a breach of the obligation of the bond. Such was the case of U. S. v. Girault, 11 How. 22,—a case which counsel for plaintiff have urged was in conflict with U. S. v. Boyd, 5 How. 29. The opinion in each case was by Mr. Justice Nelson, and, when rightly understood, is in harmony and in accord with the earlier case of U. S. v. Eckford, 1 How. 250. In the case last cited the suit was upon the bond of a collector who had succeeded himself, and stood charged, when the bond in suit was given, with large balances, which were carried forward in subsequent reports as cash on hand. As to the effect of such charges, the court said:

“The amount charged to the collector at the commencement of the term is only prima facie evidence against the sureties. If they can show by circumstances or otherwise that the balance charged, in whole or in part, has been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied.”

In the Boyd Case, which was an action on the bond of a receiver of public moneys arising from sale of the public lands, it appeared that during the term of the bond he reported in his official reports the receipt of large sums as from the sale of public lands. Upon default his sureties were sued for the sums so reported. Their defense was that Boyd had never received the money so reported; that the charges so made were for lands which Boyd had entered in his own name, or in the name of others for his benefit, after his term of office began, but before the execution of his bond; that the lands so sold had never been paid for, Boyd simply charging himself as receiver in his accounts, as if the money had been paid, and carrying forward these charges in his subsequent reports. It was contended in that case, as in this, that any evidence contradicting the entries against himself and his official reports should be excluded as incompetent. Upon that point the court said:

“It has been contended that the returns of the receiver to the treasury department, after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department, of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties, but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into his hands afterwards, and not properly accounted for, but not for moneys which the officer

may choose falsely to admit, in his hands, in his accounts with the government. The sureties cannot be concluded by a fabricated account of their principal with his creditors. They may also inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases."

It will be observed that in the Boyd Case the fraud by which lands had been entered without the actual payment of the entry money—a thing absolutely prohibited by law—had been committed before the obligation of his sureties began. They were therefore not liable for a violation of law committed before his bond was given.

In Girault's Case, who was also a receiver, the facts were the same as in the Boyd Case, with this important distinction: Girault's fraud in entering lands without actual payment was committed during the currency of his bond. The bond was conditioned that he should faithfully discharge the duties of his office. While the sureties were not estopped to show that in fact he had received no money, and that his reports to the contrary were false and untrue, yet the proof which established this fact established a fraud for which his sureties were liable. In Girault's Case the question arose upon the sufficiency of a plea which set out the manner in which Girault had defrauded the government, and the circumstances under which he had charged himself for money which in fact he had never received. The plea was held bad because, as the court said:

"The condition of the bond is that Girault shall faithfully execute and discharge the duties of his office as a receiver of the public moneys. The defendants have bound themselves for the fulfillment of those duties, and are, of course, responsible for the very fraud committed by that officer, which is sought to be set up here in bar of the action on the bond."

Proceeding, the court distinguishes the case from Boyd's by saying:

"There the receipts which had been returned to the treasury department, upon which the indebtedness was founded, and which had been given on entries of the public lands without exacting the money, in fraud of the government, were all given before the execution of the official bond upon which the suit was brought. Their sureties were therefore not responsible for the fraud, and it was those transactions on the part of the receiver which had transpired anterior to the time when the sureties became answerable for the faithful execution of his duties, in respect to which it was held that they could not be estopped by his returns to the government." 11 How. 30.

The bond now in suit is not the bond of a sworn public official. In a more important particular still is it distinguishable from the bonds involved in all the cases cited above. It is this: All those bonds bound the sureties for the faithful discharge of the duties of the office occupied by their principal. The bond in suit is remarkable in that the only obligation of the surety is that it will make good and reimburse "such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny, which may be committed and discovered during the continuance of said term or any renewal thereof, and within three months from the death, dismissal, or retirement

of the employed." No circumstance tending to make out any estoppel in pais appears in the case. The general secretary of the order, who audited claims and drew drafts on the treasurer for their payment, was not dependent alone upon the reports of the treasurer as to either amount or date of his receipts. Under the laws of the association the subordinate lodges, called "branches," sent to the secretary duplicates of all letters of remittance to the treasurer on printed forms required to be used. From these duplicate notices the treasurer was enabled to learn when and what remittances had been received by O'Brien.

The insistence of the plaintiff is barren of all circumstances which would tend to move the conscience of a court, and is, in substance, this:

"It may be true that the \$21,000 with which I seek to charge you, in addition to the sum adjudged against you, did not come to O'Brien's hands during the term covered by your bond, and that he in fact embezzled that sum before you undertook to guaranty his honesty, yet he has made entries on my books, and executed receipts and written letters of advice, while you were on his bond, whereby he admitted this sum did come to his hands during the currency of the bond, and you should not be now allowed to show that he did not receive and embezzle that money at the dates he has admitted he received it."

There is neither sound morals nor natural justice in this effort to shut out the truth and fix a liability upon the defendant for a defalcation occurring before it became obligated as a surety. Neither is there any principle of public policy or of settled law which would close the door to the truth under a bond such as that here involved.

We pass to another question: During O'Brien's preceding term he failed to pay certain drafts drawn during that term. These drafts were carried forward into the new term, and then paid out of current receipts. The contention of plaintiff is that these drafts should have been paid out of balances which should have been in his hands at the end of the preceding term; that, if the funds which ought to have been in his hands for that purpose had been theretofore embezzled, he could not make good a former defalcation out of the funds of his new term; and that the payment of these obligations out of the funds which came to his hands during the new term was in itself such a misappropriation as fixes the liability of his surety for the new term. The business of this association was not conducted in such a way that the obligation of the order was discharged when an assessment was made sufficient to meet it. Assessments were made, from time to time, of amounts deemed sufficient to meet death losses accrued, pay expenses, and provide a sinking fund. The liability of the order was not extinguished by the misappropriation of the fund thus assessed to meet accrued and fixed obligations. The funds coming to O'Brien's hands were not so earmarked as to amount to an appropriation of a particular dollar to the payment of a particular claim. If assessments were made sufficient to meet certain death claims, and the fund came to the hands of O'Brien, these claims were not thereby extinguished. If O'Brien embezzled the fund so appropriated, the association was not thereby relieved of liability. The claims were ob-

ligations of the order, and continued to be obligations until paid. When these obligations were paid out of subsequent funds of the order, it was only a case where the debt of the association was paid out of its own funds. No species of reasoning can make the application of the plaintiff's own money to the payment of its own obligations either embezzlement or larceny. The fund which had been provided for the payment of these claims had been already embezzled. The loss thus sustained should be borne by the bond in force when the default occurred. For that loss the new bond is not responsible.

It is assigned as error that the circuit judge, in his charge, referred to certain deposit tickets as having been "put in bank by O'Brien." The error assigned is that there was no evidence "that he did see or ever saw these slips, or that they are in his handwriting, or that he ever authorized it to be done." Neither plaintiff's assignment nor brief points out the evidence relating to these slips. The reply brief of the defendant is equally barren in citation of the record on this point. The result is that a needless labor has been imposed upon the court, only to find that the assignment is bad. The testimony of the accountant, Goodwin, and of the bank cashier, Davies, makes it circumstantially clear that the slips in question were the usual memoranda made by depositors, accompanying a deposit. They were produced as deposit slips, which came to the bank in the usual way, with evidence that they corresponded with O'Brien's account on the books of the bank. No objection was made below that they were not slips made by O'Brien, or authorized by him, and the court was entirely justified in referring to them as it did. We find no errors of which the plaintiff can complain.

The defendant's first assignment of error is too general, and violates the eleventh rule, which requires that each error intended to be asserted and relied upon shall be set out separately and particularly. The assignment is in these words:

"The court erred in striking out the pleas to plaintiff's declaration. They were competent and proper, and available under the statute as notices of defense, at least."

Any evidence which would have been competent under the first and fifth pleas stricken out would have been equally competent under the second and third pleas, and in point of fact all the evidence offered on the part of the defendant which was competent under either of these pleas was admitted under defendant's second and third pleas.

By the fourth, sixth, and seventh pleas, matters were presented presumably for the purpose of avoiding the bond, as having been procured through fraud and misrepresentation. The sixth plea was clearly bad, in that it did not connect the defendant by any averment with the alleged fraud or concealment or misrepresentation. The seventh plea, in addition to other objections, was bad as a double plea, presenting two defenses: First, that plaintiff knew O'Brien to be a defaulter; second, that if it did not so know, it ought to have known. The fourth and seventh pleas, stricken out, were as follows:

"(4) The defendant for further plea says that, at and before the execution and acceptance of the bond sued on, said O'Brien was a defaulter to plaintiff, which fact was known to them and concealed from the defendant, wherefore said bond is void, and of this it puts itself upon the country." "(7) For further plea, defendant says that plaintiff represented to defendant that it had examined O'Brien's accounts as supreme treasurer at the time the bond sued on was executed, and found them correct, when in truth he was a defaulter then, and plaintiff knew it, or could have done so by the exercise of diligence, wherefore the bond is void, and of this it puts itself upon the country."

The bond refers to certain "statements and declarations" relative to the "duties and accounts" of O'Brien, which it recites had been "heretofore delivered to the company," and constitutes and "forms the basis of the contract hereinafter expressed." This statement so referred to and made a part of the contract was in writing. It consisted of a series of questions and answers propounded to Mr. Coleman, as president of the plaintiff association, and answered by him. Thus the parties put in writing the statements and declarations of the plaintiff, which were to be treated as the basis of the contract. Neither of the pleas above set out undertakes to make any issue upon the representations so elicited, and made a part of the agreement. If that statement involved no misrepresentation or fraudulent concealment, then the contract would not be affected by loose parol statements, or by concealment of facts about which no inquiry was made, or by conduct upon which no reliance was placed. Neither plea presented in proper form any material defense, and there was no error in striking them out.

The second assignment is bad. When the bond in suit was offered to be read, the following colloquy occurred:

"Mr. Wheeler: I desire to read the bond. Mr. Bates: We object until it is proven, and because the bond offered varies from one declared on. Court: Any plea of non est factum? Mr. Wheeler: No, sir. Court: Read it."

No exception was taken, and the variance was not pointed out. The assignment now undertakes to point out that which should have been definitely stated when the objection was made. The alleged variance is as to the termination of the bond, the declaration stating July 1, 1893, and the bond showing that it ran until July 1, 1892; a clerical error in drafting a declaration, which could have been easily corrected if counsel had conformed to the well-understood rule, which requires that when an objection is made to evidence the ground of the objection must be specifically stated. This ruling carries with it the twentieth assignment of error. *Mitchell v. Marker* (decided May 8, 1894) 62 Fed. 139.

The third assignment is bad for the same reason. When the plaintiff offered its charter in evidence the counsel for defendant said, "I suppose we might treat it as read, subject to exception." No exception was afterwards made, and it must be regarded as read by consent. It is too late to present an objection now, or assign a ground for objection not pointed out in the first instance.

Defendant's fifth assignment of error is in these words: "The court erred in excluding the evidence offered by defendant that the

bond sued on was presented and accepted by plaintiff, in Cincinnati, on the 20th of July, 1891." The court construed this bond as in effect from the 1st day of July, 1891. The recital in the bond is that it was "made July 1st, 1891." The back of the bond is indorsed as follows: "Amount insured, fifty thousand dollars; annual premium, \$375.00; date of bond, July 1, 1891; expires July 1, 1892." The bond is dated July 10, 1891. The clear presumption is that the defendant company undertook to indemnify the plaintiff against loss from embezzlement from the time the bond purports to have been made, July 1, 1891, for the term of one year. It received a premium from the plaintiff covering one year expiring July 1, 1892. With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity which the assured had reasonable ground to expect. The rule applicable to contracts of fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case. We think the learned circuit judge was not in error in holding this bond as relating to the date when it purported to have been made, July 1, 1891, and that evidence as to when it was accepted was immaterial.

The twenty-second assignment of error is as to the instruction of the court as to when this bond went into effect, and is likewise overruled.

The twelfth and thirteenth assignments of error may be considered together. They are as follows:

"(12) The court erred in refusing to allow Mr. Hall, superintendent of defendant company, to detail the conversation had with T. J. Larkin, vice president of the defendant at the time of making application for the bond in question, as to the laws of the order, recently amended, mentioned by President Coleman in his letter, and to which defendant's attention was called by plaintiff. (13) The court erred in excluding from the jury the testimony of Hall, superintendent of the company, that the company refused to execute the bond for O'Brien unless the certificate should be required from the cashier of the bank where the order's accounts were kept, to be furnished to the supreme secretary of the order every Monday morning, showing the amount on hand at the close of business on the preceding Saturday night."

The contract in question must speak for itself. The only declarations and representations which the parties chose to make a part of or the basis of contract were the representations and declarations contained in the written questions propounded to Mr. Coleman, as president of the Catholic Knights, and his written answers thereto. Besides, it nowhere appears that Mr. Larkin, the vice president of the Catholic Knights, had any authority whatever to make any contract or make any representations with regard to the methods of business in the treasurer's office, nor in regard to the legislation of the order concerning assessments and disbursements. We think the court was not in error in ruling that conversations with Mr. Larkin were not admissible to change or modify the contract in any way.

The fourteenth and fifteenth assignments of error are dependent upon a like question. The defendant company offered to show that O'Brien was short on the 25th of April, 1891, about \$40,000. It also offered to show that O'Brien was short in the funds of the order \$61,000 at the time of the application for this bond. Upon objection the evidence was excluded. If this condition of O'Brien's affairs was unknown to the plaintiff order at the time this bond was applied for and accepted, such evidence would have been wholly immaterial. The only representation made by Mr. Coleman, and referred to in the contract as being the basis of contract, was in answer to question 13 of the statement delivered to the defendant company. That question was this: "When were the accounts last examined, and were they in every respect correct?" To this question Mr. Coleman answered: "May, 1891, and reported correct by examiners,—three supreme trustees." This evidence tended in no way to show that Mr. Coleman's answer was untrue. His representation was that three examiners had examined O'Brien's accounts, and reported his accounts correct. Now, if such an examination was made, and such a report was made to the council of the order, Mr. Coleman's representation was in no respect untrue. The particular offer covered by this exception embraces no offer to show that Mr. Coleman, or any other officer of the order, at the time this bond was applied for, knew that Mr. O'Brien was a defaulter.

The nineteenth assignment must be overruled for the reasons above stated, as well as for the additional reason that the testimony sought to be elicited from Albright was hearsay. It was not shown that Mr. O'Brien was present, and the members of the committee making the examination, which it is alleged showed a defalcation, was the best evidence of the fact. It was incompetent for Albright to say what he heard a member of that committee say, especially in the absence of Mr. O'Brien.

The three assignments last mentioned are likewise bad, because there was no issue presented by the pleas for the purpose of avoiding the contract as procured through fraud. In ruling upon the assignment alleging error in striking out certain pleas, we have shown that in our judgment none of the pleas stricken out tendered any issue of fraud going to the validity of the contract. Neither of the pleas upon which the case was tried made any such issue, and the evidence excluded, and made the subject of assignments 14, 15, and 19, was immaterial.

The twenty-third assignment of error is in these words:

"The court erred in charging the jury: 'But did the officers know—did the representatives of this plaintiff know—that O'Brien was committing these defaults? And, if so, were they known during the currency of this bond, that is, during the time this bond was in force? I may say to you that I think the proof fails to show any such thing. Some complaints were made, but, upon investigation, complaints were found to be without foundation. There were not a great many complaints during the term of this bond, which is from the 1st of July to the 10th of September; and there is no evidence, as I can conceive, indicating that these plaintiffs knew that there was any defalcation during that period,—during the currency of the bond,—so far as O'Brien was concerned.' Defendant's counsel insist this was the point proof was excluded upon; that it was for the jury to determine whether

plaintiff knew of O'Brien's defaults; and that, as presented, the charge was misleading."

There was no error in this. No competent evidence, upon which a verdict could have been based, was submitted to the jury, which would have justified a verdict based upon the failure of the officers of the Knights to make prompt communication to the defendant of acts of fraud or dishonesty in O'Brien, discovered during the life of defendant's bond. Neither was any material or competent evidence excluded, so far as is pointed out by valid exception and proper assignment of error, which should have been admitted as bearing upon such a defense. It was not improper for the court to withdraw that defense from the consideration of the jury.

The defendant's fourth, ninth, eleventh, seventeenth, and eighteenth assignments of error are insufficient, in that they are not in compliance with rule 11 of this court, which requires that, "when an error alleged is to the admission or rejection of evidence, the assignment of error should quote the full substance of the evidence admitted or rejected."

The remaining assignments have been examined and are overruled. They are either immaterial, or not well taken. To rule upon them in detail would extend this opinion to an unpardonable length, and prove of no particular interest.

The judgment must be affirmed. Each party will pay one-half the costs of this court.

MCDONALD v. CITY OF TOLEDO.

(Circuit Court, N. D. Ohio. June 23, 1894.)

1. MUNICIPAL CORPORATIONS—OBSTRUCTED STREETS—SNOW AND ICE.

A city situated in the latitude of northern Ohio is not bound, as a matter of law, to remove, even from its principal streets, snow which fell, during an unusual storm, to the depth of four feet; and the fact that the snow has remained a week, and has been piled up by the street-car companies, in clearing their tracks, and become frozen and hard, is notice to the public, as well as to the city authorities, of its dangerous condition, and therefore the public is bound to exercise care in driving. *Chase v. City of Cleveland*, 9 N. E. 225, 44 Ohio St. 505, applied.

2. SAME—PERSONAL INJURIES—PLEADING.

In an action for injuries sustained in driving upon a street obstructed with snow and ice, plaintiff averred that the accident was caused because, in turning from one street into another, it was necessary to pass round a street car standing upon its track in the latter street, and that in so doing his horses were frightened by the sudden starting of the car, and drew his buggy over the ice, and overturned it. *Held* that, in the absence of any further averment on the subject, it should be assumed that the car had merely stopped to take on or discharge a passenger, and that, therefore, it was not necessary for plaintiff to drive around it.

This was an action at law by McDonald against the city of Toledo and others to recover damages for personal injuries sustained in driving upon the streets. The city demurred to the petition for want of facts sufficient to constitute a cause of action.

Hurd, Brumback & Thatcher, for plaintiff.

C. F. Watts, City Sol., for defendant.

RICKS, District Judge. The averments of the petition are that on the 12th day of February a severe and violent snowstorm prevailed in the city of Toledo, which left the snow, on or about where Cherry street and Collingwood avenue intersect, drifted to a depth of between 4 and 5 feet; that Cherry street is one of the principal streets and thoroughfares of the city; that the street-car tracks on the street are double, and occupy about 14 feet, and that the street is paved 44 feet between curbs; that said snow had been carelessly cleared from the railroad tracks by the defendant street-railway company, and piled up in a conical mass on the remaining parts of the street to the depth of 4 to 6 feet, until it packed and froze so as to become a hard mass, rendering said street dangerous; that plaintiff was driving with two horses in a carriage on Collingwood avenue from a northerly direction, and turned onto Cherry street, and at said crossing of Collingwood avenue it became necessary to pass around a car of the Toledo Consolidated Street Railway, which was standing on its track on Cherry street; that while so driving around said car the servants of said street railway carelessly started said car, and the noise frightened plaintiff's team so that they jumped towards the side of said street, and drew plaintiff's buggy upon and over said hardened mass of snow on the westerly side of said street, in such manner as to overturn said buggy; that plaintiff exercised due care in the driving, and was without fault, and, but for the existence of said mass of snow piled in said street as aforesaid, he could have controlled and stopped his team before said buggy was overturned; that each of said defendants had notice of said piling of snow on said street.

The case of *Chase v. City of Cleveland*, 44 Ohio St. 505, 9 N. E. 225, is relied upon in support of the demurrer. In that case the plaintiff fell on a slippery sidewalk, made so by the natural fall of snow, which froze, and had been smooth and slippery. The street was averred to be a public highway within the corporate limits, and it was charged that the city had, or might have had, notice of the dangerous condition of said walk. The walk was otherwise in good repair. The supreme court held the petition insufficient to show negligence. The reasoning of the court is that a fall of snow is a temporary impediment, and perhaps a danger, which is frequent in northern cities, and to impose upon a municipality the duty of removing snow or removing ice from sidewalks would be an onerous burden, involving great expense, and that, unless very exceptional conditions are shown, it would not be negligence to fail to remove such impediment or danger from the sidewalks. It is sought to distinguish the case at bar from the *Chase Case*, first, because this obstruction was in a principal thoroughfare, and because it was the result of an unnatural and violent storm, and therefore the city had notice of unusual obstruction to travel that would be caused thereby. It is further insisted that the city had notice that this obstruction was made greater and more dangerous because the street-railway company was permitted to scrape the snow from its tracks, and pile it upon the streets, and that said pile of snow was permitted to remain in the street for seven days, and so froze as to become

hardened. But it is to be observed that all these unusual and exceptional conditions which are relied upon to carry notice to the city of the dangerous character of the obstructions in the street, may likewise be relied upon to carry notice to plaintiff of the dangers he might naturally expect. For, as the supreme court said in the Chase Case, the city "is bound to exercise only ordinary care, to take such measures as are reasonably to be required and adequate in view of the ordinary exigencies." The conditions set forth in the petition are exceptional and rare. A fall of four feet of snow in one storm is rare, even in this section. Is the city bound to remove four feet of snow from even its principal thoroughfares? There are many such in Toledo, and they are of great length. The court may take judicial notice of such facts. It would be a hardship to impose upon the taxpayers, through their city authorities, the burden of removing snow and ice resulting from such a storm within so short a period.

The averment in the petition is that the accident was caused because it was necessary (for plaintiff) to pass around a car of the Toledo Consolidated Street-Railway Company, standing on its track on Cherry street. It is not averred that this car had stood there for a long time, or would be compelled to stand there for a long time, so as to show the necessity to drive around it. I think, in the absence of such an averment, the court is warranted in assuming that it was a stop to take on or discharge a passenger. I think this assumption ought to be rebutted by an affirmative allegation which would show some negligence or act tending to establish negligence on the part of such defendant, because the exceptional storm which left four to five feet of snow on the street would impose upon plaintiff more care and caution in driving about the streets. In such a condition of the street, travel might be substantially suspended, and persons who persisted trying to drive over such snow banks would be charged with notice, and to observe more than ordinary care. In such conditions the driving out of the way to avoid a street car only stopping for a moment would not be "necessary."

For these reasons, I do not think the petition states facts necessary to make out a case, and the demurrer will therefore be sustained.

LAWRENCE et al. v. PORTER et al.

(Circuit Court of Appeals, Sixth Circuit. May 28, 1894.)

No. 122.

DAMAGES—CONTRACT FOR SALE OF GOODS—REFUSAL TO DELIVER.

On a contract for sale of goods on credit, where the seller refuses to deliver them, but offers to deliver for cash at a reduced price, the reduction more than equalizing the interest for the term of credit, the buyer, not alleging inability to pay cash, but that he was unable to obtain the goods from others than the seller at the place of delivery or other available market, cannot recover damages on the ground that he had bought for resale at another place at an advance over the contract price and cost of transportation, and the seller was informed of that purpose.

In Error to the Circuit Court of the United States for the Western District of Michigan.

This was an action by Ida A. Lawrence and Frank Lawrence, administrators of the estate of Lorenzo J. Bovee, deceased, against William T. Porter, Charles L. Ames, and Abel H. Frost. At the trial the court directed the jury to find for defendants. Judgment for defendants was entered on the verdict. Plaintiffs brought error.

Bundy & Travis, for plaintiffs in error.

Walpole Wood and Taggart, Knappen & Denison, for defendants in error.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge. This is an action for breach of a contract of sale brought by the buyers against the sellers for failure to deliver a large quantity of lumber according to the terms of the agreement. The lumber was to be delivered by the defendants at their mill, on vessels to be furnished by the plaintiffs, during the shipping season of 1890. As each cargo was received, the buyer was to give acceptances, payable in 90 days. After the delivery of one cargo, the defendants refused, for no sufficient reason, to deliver the remainder upon the terms of the bargain, but offered to supply the lumber needed to complete the bill at a reduction of 50 cents on each 1,000 feet, for cash on delivery over the rail of plaintiffs' vessels and at the time when delivery was required by the broken agreement. The buyers stood upon their contract, and demanded delivery upon the credit therein stipulated, and refused to take the lumber offered by the delinquent sellers on any other terms than those contained in the agreement. There was evidence tending to show that the quantity and quality of lumber contracted for, and of the dimensions designated, could not be procured at the place of delivery from others than the defendants, or at any other available market in time for shipment according to the terms of the contract; that the lumber was intended for resale at Tonawanda, N. Y.; that defendants were so informed; and that the market value of such lumber at Tonawanda, after deducting freight and hauling, was considerably above the contract price.

The evidence of the plaintiffs established that the defendants were able to comply with their proposal to deliver the lumber required by the agreement during the period fixed for delivery in the agreement. This makes it unnecessary to consider the plaintiffs' assignment of error to the ruling of the court that the burden of proof was on the plaintiffs to show that defendants could not have complied with their offer to fill out the bill for cash at a reduced price.

There was a jury and verdict for the defendants in compliance with a charge to that effect.

The case must turn upon the error assigned upon the charge of the court, the other errors assigned being immaterial.

The view of the circuit court upon the question of law upon which this case in its present attitude must turn, as expressed in the rul-

ings and charge, is well summarized in the concluding paragraph taken from the charge:

"In this case the court is of the opinion that upon the case made by the plaintiff, although he has established a breach of contract, yet the evidence shows that the defendants offered to furnish the identical articles contracted for at a price not greater than the contract price, and so no legal damage has resulted to the plaintiff in consequence of the breach of the contract, and for that reason the plaintiff is not entitled to recover. This being the judgment of the court, as a matter of law upon the facts, as the plaintiff claims them to be, there remains only the duty of rendering a verdict for the defendants."

The general rule is that, for a breach of contract to deliver goods under an executory contract of sale, the measure of recovery is the difference between the contract price and the market value at the place of delivery at the time the contract was broken. If the goods cannot be procured at the place of delivery, then resort must be had to the nearest available market. *Tower Co. v. Phillips*, 23 Wall. 471. The damage thus measured is the ordinary and usual damage incident to such a breach, and is recoverable under a declaration which simply sets out the contract and the breach. Plaintiffs' declaration contains the usual common-law counts. Under the practice in Michigan, the defendants demanded from the plaintiffs a bill of particulars, setting out the particular damages they had sustained. The bill was delivered, but it did not show any damages other than the general damages recoverable under a general count.

It is true that a plaintiff is not always limited to the recovery of general damages. There may be such special circumstances as will entitle him to recover special damages, "which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effects." But, if the plaintiff has sustained other damages than those which usually flow from an ordinary breach of such a contract, he must in his pleading particularize his special loss, so that the defendant may prepare himself with evidence to meet such unusual claim. *Benj. Sales*, § 870; *Parsons v. Sutton*, 66 N. Y. 96; *Barrow v. Arnaud*, 8 Q. B. 604. Neither the declaration nor the bill of particulars sets out or particularizes any special damages sustained by plaintiffs. They are therefore limited to "general damages," which, for such a breach as the one declared on, are measured by the difference between what they had agreed to pay and the sum for which they could have supplied themselves with lumber of the same character at the place of delivery, or, if not obtainable there, then at the nearest available market, plus any additional freight resulting from the breach. In case of such breach, the plaintiffs are entitled only to indemnity in a sum equal to the loss they have sustained as a consequence. Hence it results that if the plaintiffs are able to replace the goods by others, bought at a less or equal price at the place of delivery, or other near and available market, they have sustained no loss, and are entitled at best to nothing more than nominal damages. Neither the declaration nor bill of particulars alleges any inability to pay cash, as demanded by the defendants. We do not, therefore, consider whether special damages might not, under some circum-

stances, be recovered, which were sustained by reason of the inability of plaintiffs to pay cash for lumber to replace that which defendants had contracted to sell them on credit. It follows that if plaintiffs were able to buy, and did not, they cannot throw upon the defendants any special losses incident to their own failure to mitigate the injury as far as they reasonably could. Sedg. Dam. (8th Ed.) § 741; Marsh v. McPherson, 105 U. S. 709; Warren v. Stoddart, Id. 224.

The ground upon which the defendants refused to carry out the sale was ostensibly their unwillingness to extend to the plaintiffs the credit of 90 days provided for in the agreement of sale. They have not endeavored to show that there were any circumstances which justified this breach of the agreement. Credit is often a material element in a contract of sale, whereby the buyer is enabled to operate upon the capital of the seller. Credit extended without interest is, in effect, a sale at the stipulated price less the interest for the period of credit. The damage for a breach of contract to pay money at a particular date is the lawful rate of interest for the period of default, unless some other penalty is imposed by the agreement. So it would seem that if the buyer, in order to supply himself with the articles which the seller was obligated to sell, is compelled to buy from another, and to pay cash, one element of recovery for the breach would be interest upon his purchase for the period of credit. It is the well-settled duty of the buyer, when the seller refuses to deliver the goods contracted for, to do nothing to aggravate his injury. Indeed, he must do all that he reasonably can to mitigate the loss. If the buyer could have supplied himself with goods of like kind, at the place of delivery or other available market, at the time the contract was broken, and neglected to do so, whereby he suffered special damages by reason of the breach, he will not be suffered to recompense himself for such special damage, for the reason that to that extent he has needlessly aggravated the loss. The contention of the plaintiffs is that they could not supply themselves at the time the contract was broken with lumber of the qualities and sizes mentioned in their contract, either at the place of delivery or at any other available market; that they were not required to buy from the defendants, who were already in default; that to have bought from them would operate both to encourage breaches of contracts, and would have been a waiver of all other right of recovery for the breach of their agreement; that to have accepted the proposal of the defendants to supply them for cash at the reduced price would simply have been to substitute one contract for another, thereby enabling defendants to escape all liability for a deliberate and indefensible violation of the bargain. They therefore insist that the measure of damage was the difference between the contract price and the market value at Tonawanda, N. Y., less freights to that point; the evidence showing that the lumber was bought for resale at Tonawanda, and that defendants were informed of that purpose.

For a breach of contract of sale, the law imposes no damages by way of punishment. The innocent party is simply entitled to re-

cover his real loss. If the market value is less than the contract price, the buyer has sustained no loss. This is axiomatic, and needs no citation of authority. If the plaintiffs could have bought at East Jordan, or at any other convenient and available market, at the time of the breach, lumber of like kinds, at the same price or a less price, it would be clear that they would have sustained no general damages. If they refused to avail themselves of such opportunity, and thereby sustained special and unusual loss, by reason of not having lumber of the kinds called for by the contract, or by being deprived of a profit resulting from a resale at Tona-wanda, they could not recover such special damage, for such damage might have been avoided by replacing the undelivered lumber by other of like kinds. The fact that they could only buy from the defendants does not affect the duty of plaintiffs to minimize their loss as far as they reasonably could. The offer to sell for cash at a reduced price more than equalized the interest for 90 days, which was the value of credit. There seems to be no insurmountable objection in thus permitting a delinquent contractor to minimize his loss. The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. *Warren v. Stoddart*, 105 U. S. 224; *Deere v. Lewis*, 51 Ill. 254.

In *Warren v. Stoddart*, above cited, the essential facts were these: *Stoddart & Co.* were publishers of an edition of the *Encyclopaedia Britannica*. It was a book sold only by subscription. Certain territory was assigned to the plaintiff, in which he was to have the exclusive right to sell the book on subscription. He was to have the book on a credit of 30 days, thus enabling him to deliver it to his subscribers, and obtain the means to make his own payments. Warren obtained a large number of subscriptions to *Stoddart's* publication. After delivering a few numbers, he ceased to canvass for the *Stoddart* publication, and became a canvasser for a rival edition. Thereupon *Stoddart* refused to extend further credit to Warren, and demanded cash on all his orders to supply his subscribers for the *Stoddart* edition. Warren demanded credit, and refused to pay cash. Being unable to get the *Stoddart* edition from any other source, he, at great expense to himself, substituted the Scotch, or rival edition, with which he furnished his subscribers for *Stoddart's* edition. For the loss thus sustained he sued. After discussing the effect upon Warren's contract, because of his ceasing to canvass for *Stoddart* and taking up a rival work, the court proceeded to decide the case upon the second ground of defense presented, saying:

"But, even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that, upon the refusal of *Stoddart* to give Warren a credit of thirty days upon the books, the latter could obtain a cancellation of the orders he had taken for *Stoddart's* reprint, and substitute orders for the Scotch edition, and charge the expense of so doing to *Stoddart*. The claim that, upon a simple refusal of *Stoddart* to allow him a thirty-days credit upon the books as he ordered them, he could go on and substitute other orders for another book, and

charge Stoddart with the expense of substitution, amounting to \$30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty-days credit which he thinks he was entitled to is not to be measured in that way. The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. *Wicker v. Hoppock*, 6 Wall. 94; *Miller v. Mariner's Church*, 7 Me. 51; *Russell v. Butterfield*, 21 Wend. 300; *U. S. v. Burnham*, 1 Mason, 57, Fed. Cas. No. 14,690; *Taylor v. Read*, 4 Paige, 561. The course pursued by Warren was not necessary to his own protection. He might have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them, on equitable terms. The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this, he unnecessarily destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing. If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages."

The opinion in *Warren v. Stoddart* rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller; if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages.

The case of *Deere v. Lewis*, cited above, was a case much like the one under consideration. The goods could be procured only from the defendant, who offered the goods for cash at 5 per cent. less than the contract price. It was held that plaintiff could recover only nominal damages, inasmuch as he could have bought the goods for less than the contract price from the delinquent seller.

The cases of *Havemyer v. Cunningham*, 35 Barb. 515, and *Manufacturing Co. v. Randall* (Iowa) 17 N. W. 507, have been cited as sustaining a different result. The first case rested upon a state of facts very unlike those here involved. The other seems to have gone off upon the apprehension that, if the buyer supplied himself by a purchase from the delinquent seller, he thereby abandoned his contract, and substituted a new agreement in place of the

broken bargain. That apprehension seems unjustified. But, however that may be, the case of *Warren v. Stoddart* is controlling. The offer after the breach by the defendants to sell the lumber necessary to complete the contract was not coupled with any condition operating as an abandonment of the contract, nor as a waiver of any right of action for damages for the breach.

The question as to whether there was error in not directing a verdict for nominal damages was not presented by any exception in the circuit court, nor raised by any assignment of error here. We do not, therefore, consider it.

Judgment affirmed.

CITY OF ST. LOUIS v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Missouri, E. D. July 9, 1894.)

1. MUNICIPAL CORPORATIONS—OPERATION OF ORDINANCE AS CONTRACT—ERECTION OF TELEGRAPH POLES IN STREET.

A city ordinance, authorizing the erection of telegraph poles in the streets, required any company erecting poles under its provision to file an agreement permitting the city to use "the top cross arm of any pole erected, or which is now erected," for telegraph purposes, free of charge. A company which had previously erected its poles in the streets filed the agreement required, and thereafter acquired and erected additional poles, and the city used many of the old and new poles. *Held*, that the ordinance, so accepted by the company, constituted a contract between the city and the company, which became executed when the city took the benefit thereof by using the poles; and the subsequent imposition by the city of a certain charge per pole for the use of the streets was a violation of the contract.

2. SAME—MUTUALITY OF CONTRACT.

Such ordinance reserved to the city the right to prescribe any other mode of conducting the wires over or under its thoroughfares. *Held*, that this did not destroy the mutuality of the contract.

3. SAME—RENTAL VALUE OF USE OF STREETS FOR POLES.

A city ordinance required a payment, in the nature of a rental, for the use of its streets by a telegraph company's poles, of five dollars per pole. *Held* that, although such ordinance was *prima facie* reasonable, that was no presumption that the amount of the charge was reasonable; and such sum, being enormously greater than the value of the average adjoining property, was unreasonable to exorbitancy.

This was an action of assumpsit by the city of St. Louis against the Western Union Telegraph Company. A trial by jury was waived, and the case was submitted on an agreed statement of facts, on which the circuit court rendered judgment for defendant. 39 Fed. 59. On writ of error, the judgment was reversed by the supreme court, and a new trial was ordered. 13 Sup. Ct. 485, 148 U. S. 92; 13 Sup. Ct. 990, 149 U. S. 465. The case was heard on the agreed statement of facts and additional evidence.

William C. Marshall, for plaintiff.
Dickson & Smith, for defendant.

PHILIPS, District Judge. This is an action of assumpsit, instituted April 7, 1888, to recover the sum of \$22,635, under Ordinance

No. 12,733, passed March 22, 1884, by the plaintiff city, providing for the payment of \$5 per telegraph pole "for the privilege of using the streets, alleys, and public places thereof." The case was tried in this court, without the intervention of a jury before Judge Thayer, resulting in a judgment for defendant. See 39 Fed. 59. On writ of error to the supreme court, this judgment was reversed, and the cause remanded for a new trial. See 148 U. S. 92, 13 Sup. Ct. 485; 149 U. S. 465, 13 Sup. Ct. 990. On remand, the cause has been heard before me, a jury again being waived, on the original agreed statement of facts and additional evidence.

Under the decision of the supreme court, two principal questions are involved on this retrial, left open for the development of additional proof: First, did section 8 of Ordinance No. 11,604, adopted February 11, 1881, on its acceptance by the defendant, and its erection and acquisition thereafter of additional poles, and the use by the city of both the old and new poles, which use yet continues, constitute a contract between the city and the company, which would be violated by the enforcement of said Ordinance No. 12,733? and, second, is the exaction of five dollars per pole, imposed under the last ordinance, so unreasonable that the court ought to interpose and set it aside?

Said section 8 is as follows:

"Any company erecting poles under the provision of this ordinance shall, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register, permitting the city of St. Louis to occupy and use the top cross arm of any pole erected, or which is now erected, for the use of said city for telegraph purposes, free of charge."

I am unable to agree with the contention of the learned counsel for the city that the first inquiry is precluded by the decision of the supreme court. It is as much open for admission of additional evidence, and for verdict on the facts, as the second proposition. All that can reasonably be inferred from the discussion by Mr. Justice Brewer is that, from anything appearing in the evidence then in the record, he was unable to find that the company, since the adoption of the Ordinance No. 11,604, had done any act under section 8, nor, of consequence, it must be assumed, had the city enjoyed the benefits thereof, so as to make a predicate for an executed contract containing the elements of an estoppel. After commenting on the absence of proof on this issue, he said: "It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed."

The evidence now shows that, of the 1,509 poles, the city, since 1881, has been using 834 for its wires, and fire "hoodlum" signal boxes, and in some instances has as many as 8 wires on one pole; and, since the adoption of Ordinance No. 11,604, the company has purchased 280 poles of another company, and erected 104 new poles, the top cross arms of which the city has, presumably, since occupied. Certainly, as to the 384 poles acquired and erected thus by the company, there ought to be no question but that this was an act in execution of the provisions of said section 8, and would clearly come

within the thought of Mr. Justice Brewer as constituting an estoppel. If so, I am unable to perceive how there can be any logical escape, on principle, from the application of the rule to the entire user by the plaintiff.

I understand the law to be that the grant of an easement or a use by the state or municipality like the plaintiff city, by ordinance, with a condition attached to be performed by the grantee beneficial to the grantor, when accepted by the grantee and acted on by both parties, constitutes a contract between them, from which neither party can recede, except upon the terms provided for or contemplated by the contract. *Dill. Mun. Corp.* (3d Ed.) par. 472; *City of New Orleans v. Great Southern, etc., Co.*, 40 La. Ann. 41, 3 South. 533; *Kansas City v. Corrigan*, 86 Mo. 67; *State v. Corrigan St. Ry. Co.*, 85 Mo. 264; *City of Quincy v. Bull*, 106 Ill. 342; *Com. v. New Bedford Bridge*, 2 Gray, 339; *Chicago v. Sheldon*, 9 Wall. 50; *Coast-Line R. Co. v. Mayor, etc.*, 30 Fed. 646.

A grant is a contract. Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 136, said:

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its very nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant."

In *City of New Orleans v. Great Southern, etc., Co.*, supra, where the city, after granting the right to the telegraph company on condition of furnishing to the city certain free telephonic facilities, sought to impose a charge of five dollars per pole, the court, *inter alia*, said:

"Either she is bound according to the terms of her proposition accepted and acted upon by defendant, or she is not bound at all. Obviously, upon the clearest consideration of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract; and the city is powerless to set it aside, or to interpolate new or more onerous considerations therein."

So in *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 26 Atl. 635, the supreme court of Vermont say:

"An ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when adopted and acted upon by the grantee by a compliance with its conditions, becomes a contract which the city cannot abolish or alter without the consent of the grantees."

See, also, *Western Paving, etc., Co. v. Citizens' St. Ry. Co.*, 128 Ind. 525, 26 N. E. 188, and 28 N. E. 88; *Gregsten v. City of Chicago* (Ill. Sup.) 34 N. E. 426; *Hudson Tel. Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123.

What difference can it make, in the application of this principle to this case, that prior to 1881 the defendant had erected most of its poles, and had suffered the city to use a few of them? That

was, at most, but a parol license, revocable at will. Prior to 1881, the city does not appear to have taken any account of the presence of the defendant's poles on its streets; but in February, 1881, the city, by ordinance, recognized the right of and authorized the company to be and continue on its streets and alleys. By Ordinance 11,604 it imposed upon the company the duty and obligation of keeping on deposit with the city treasurer the sum of \$50, subject to the order of the street commissioner, to be used by him in restoring any sidewalk, gutter, street, or alley pavement displaced or injured in the erection, alteration, or removal of any pole of such company; and further requiring, in consideration of the grant of occupancy of the streets, that the company, before obtaining a permit therefor from the board of public improvements, should file an agreement with the city permitting the city to occupy and use the top cross arms of any poles to be erected, "or which is now erected, for the use of said city for telegraph purposes, free of charge." The company filed its agreement accordingly. This ordinance then became a binding contract, from which the company could not recede so long as its poles stood in the plaintiff's streets; and, when the city took the benefit thereof by using the defendant's poles, it became an executed contract. How, then, could the city, after thus binding the company to furnish it free of charge the use of its poles, in consideration of the grant made to the company and using the privilege for three years, subject the company to an additional charge of five dollars per pole, while still holding onto the top arms?

It is no answer to this to say that the number of wires placed on the poles by the city are greatly less than those employed by the company. If it is a contract, and that contract has been kept by the defendant, and the plaintiff has enjoyed the fruit thereof to the full measure of the requirements of the contract, it is enough. Furthermore, the uncontradicted evidence shows that it costs \$23 to erect a pole and top cross arm, to say nothing of the expense of keeping them in repair and removing and replacing them to suit the city. This sum the city saved by using over 800 of the defendant's poles.

Nor does the evidence, by its weight and credibility, support the contention of counsel for the city that there has been but little change in the use of the defendant's poles by the city prior and subsequent to the adoption of the ordinance of 1881. On the contrary, it clearly enough shows that prior to 1881 the wires of the city were strung on the tops of houses, rendering their accessibility for repairs more inconvenient and expensive, and that they were afterwards mainly placed upon defendant's poles.

Nor can I accede to the proposition of counsel that no contract is predicable of Ordinance 11,604 and the acts done thereunder, for the reason that they are wanting in the quality of mutuality. The basis for this contention is section 9 of said ordinance:

"Nothing contained in this ordinance shall be so construed as to in any manner affect the right of the city in the future to prescribe any other mode of conducting such wires over or under its thoroughfares."

The effect of this was simply to reserve to the city the right to compel the company, if the city saw fit, to resort to a subterranean construction of its wires. If that ever should be done, the city's wires, of course, would have to come down when the company had to abandon them. But this action, if taken, is of the city's election. If it never so elects, so long as the defendant's poles stand, the right remains to the city, irrevocable by the company, to compel the company to maintain the top arm for the benefit of the city. In other words, the contract is a binding one of mutual rights and obligations, subject to the contingency, at the election of the city; and, if such contingency never arises, the mutual rights of the parties continue. How, then, does section 9 destroy the mutuality of the contract?

My conclusion is on this branch of the case that Ordinance 11,604, having been accepted by the defendant, subject to the condition imposed by section 8, and said condition having been performed by the defendant, and the plaintiff having received the benefit thereof, constitutes a contract between the parties, and that the imposition of the additional burdens sought to be enforced by Ordinance 12,733 is violative of the first contract, and for that reason the latter ordinance ought not to be enforced.

But, as it is altogether probable that this case will go further for final determination, I will proceed to consider and pass upon the second issue involved in this new trial, under my understanding of the decision of the supreme court.

It is held by the supreme court in this case that the five dollars per pole, imposed by Ordinance 12,733, is not a privilege or license tax, but is of the nature of a rental, for the use of so much of the streets and alleys of the city as is occupied by the company permanently with its telegraph poles. As the case had been tried below mainly on the question as to whether or not the imposition of this five dollars was a license tax, and therefore void, as being in contravention of the interstate commerce provision of the federal constitution, there was not, in the opinion of the majority of the court, sufficient evidence in the record to enable them to determine safely the question ultimately raised by defendant, whether the rental exacted was unreasonable, and further evidence was invited on this issue at the retrial.

Both at the trial and in his brief, counsel for the city plants himself upon the proposition that the sum fixed in the ordinance is *prima facie* reasonable and just, and the burden rests upon the company not only to overcome this presumption by a preponderance of evidence, but it should go further, to some indefinable extent, to warrant the court in declaring the ordinance void. If this charge of five dollars is warranted as a mere rental, there would be no escape, as a matter of common justice and practice, from the proposition that in the absence of an agreement with the occupant, or even an opportunity accorded by the city to negotiate with it, for a rental sum, the very utmost the city could claim, in common decency, is that the sum demanded by its ordinance should be reasonable. Why should the city in such strife be permitted by its own ordinance to make for itself a *prima facie* case?

No question is made of the well-established rule that, in all matters pertaining to the police regulation of municipalities, their ordinances, being of the nature of legislative discretion, are *prima facie* reasonable. In the matter of licensing trades and avocations, and fixing the amount of permissible taxes therefor, in the very nature of things, the action of the governing board or legislative department, as to the amount thereof, is presumptively honest and just. So, under section 888 of the Revised Statutes of the state, the city, in a case like this, under the power to regulate the presence of telegraph lines on its streets, is authorized to do three things: (1) To fix the place where the posts, piers, or abutments shall be located; (2) the kind of posts that shall be used; (3) the height at which the wires shall be run. *Hannibal v. Telephone Co.*, 31 Mo. App. 30, 31. And under the decision of the supreme court in this case, under the power to regulate, the city may by ordinance require the company to pay for the use of such streets. The city, in such case, is the sole judge of the necessity and wisdom of such an ordinance; and the ordinance making such requirement would be *prima facie* reasonable. But as to the amount of the rental, which is the reasonable value of the use, and no more, the case is *sui generis*; and upon what principle of common right and justice the party demanding the rent should be permitted to establish for itself a *prima facie* value by adopting an ordinance, and throwing the whole burden of establishing its unreasonableness upon the defendant, is not apparent to my mind. The defendant company is in the city, with its poles and wires on the streets, under the paramount authority of an act of the federal congress. It comes as a governmental agency, in performing an important function in interstate commerce. It neither asks, nor can the city demand, any permit or license to be and remain on such public highway. It has the right to demand the use of the plaintiff's streets and alleys, and the plaintiff must submit to such use, with or without an ordinance. But, as the defendant occupies public property under the dominion of the city, the city has a right, by ordinance, to demand what? Not such rental therefor as to its legislative body may seem just and proper, but such rental as may represent what is reasonable for the use of the territory appropriated.

So while the court, in this case, said an ordinance like that is *prima facie* reasonable, we are to look at what the learned justice said later on as to what extent that reasonableness should go; for in the final summing up of this question he said:

"Indeed, it may be observed, in the line of the thought heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate company of the streets cannot be denied by the city; that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated. And it follows, in the nature of things, that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts."

According to what would be the logical sequence of the theory on which I think this question should be determined, where the parties are unable to come to an agreement and appeal to the court, the court, on hearing the evidence, if satisfied that the amount de-

manded by the city is unjust and unreasonable, should ascertain the reasonable rental value, and give judgment therefor.

But accepting as correct the contention of the plaintiff that its action must stand or fall on the proposition that if the court finds the ordinance, in respect of the assessment of five dollars per pole, to be unreasonable to exorbitancy, the plaintiff cannot recover at all, we proceed to consider the second proposition above indicated.

How is the court to arrive at this rental value? The usual ordinary method is to ascertain the customary annual rental of like property similarly situated, or its market value. In the latter case, 6 per cent. interest on the property capitalized would represent its rental value. But in this case the streets and alleys of a city have no market value predicable of like sales, as they, or any part thereof, are never sold. Nor is there any evidence that the streets and alleys, or any part thereof, were ever rented; for the reason, presumably, that such a thing as selling or renting a part of a street is unknown in commerce. Persons often obtain permission or license from municipalities to occupy for a time a portion of the streets or alleys, for which they pay a license tax. The question of fact under inquiry must therefore, necessarily, like any other similar circumstanced case at issue, be ascertained as nearly as may be by resort to the next best evidence. To this end, the court necessarily, in search of light, permitted the parties to indulge in a wide latitude in bringing to bear evidence upon this issue. Evidence was heard showing the valuation placed upon defendant's plant by the state; the cost of its maintenance, and the market value and the like of property on different streets of the city abutting on the lines of defendant's telegraph wires. The evidence shows that the average space occupied by each pole is approximately 15 inches in diameter. After hearing all the evidence, including sales of property actually made on the different streets, and the opinion of so-called "experts," I feel compelled to say that the rental charge for the spaces occupied by the defendant company is so enormously greater than that of the abutting property as to render this exaction absolutely unconscionable. Making every reasonable concession to the city on account of any conceivable inconvenience consequent upon the limited space occupied by 1,500 poles, distributed, as these are, over a wide extent of territory, and also taking into account the space occupied by the cross arms, and, if you please, for the wires in mid air between the poles, the charge by the city under this ordinance exceeds manifold the value of the average adjoining property.

The plaintiff, to mitigate this exaction, introduced some of its firemen, who testified that the presence of the wires, particularly in the business centers of the city, renders access by ladders to houses in cases of fire at times inconvenient and troublesome. But why this should enter into the estimation of the rental value to the city for the space occupied by the defendant is not apparent. Any injury or loss attendant thereon would result to the owner of the buildings, and the regulation of this matter would pertain to the police power of the city, to say nothing of the impracticability of approximately estimating a valuation by taking into account such casual or occasional incidents.

Again, plaintiff contends that the five dollars per pole would yield to the city less revenue than it obtains by assessment upon the gross earnings of the Bell Telephone Company in the city. That ordinance is not in evidence, but I infer from what is said in section 11 of Ordinance 12,733 that the ordinance is simply a tax "on the gross income for city purposes." In other words, it is simply an occupation tax. But the conditions of the two companies, in respect of their business, are so dissimilar as to render the comparison quite inadmissible. The business of the Bell Telephone Company is approximately intramural; so that the sum of its business is easily ascertainable, and its expenditures are confined to that locality. Not so with the defendant company. Its intramural business bears but an infinitesimal relation to that which begins from within, and vice versa. Hence the practical impossibility of arriving at the gross income of the company in the city was admitted by the city's able counsel at the trial to be the reason why the ordinance did not impose a tax on its gross income; and, inferentially, I presume that is the reason they call this a rental to accomplish the same results in raising a city revenue. Furthermore, the defendant's state and interstate business compels it to maintain its wires and offices over long stretches of territory where there is little income from the business; so that what comes to and goes from the city is depleted in supporting the outlying regions, which it must keep up in order to accomplish the ends of interstate commerce, and to assist the government in communicating with the national army.

At the trial, plaintiff introduced witnesses engaged in the business of advertising by posters,—in the picturesque business of placarding fences, walls, and posts, wherever permitted,—who testified that they would cheerfully give five dollars per pole for such advertising purposes. To say nothing of the nuisance of the spectacle of the streets of a city with poles plastered over with flaming, vari-colored handbills, as eye catchers, presenting pictures from a prize fight to a circus woman in the folds of a South American reptile, this is hardly a legitimate test of the rental value of such property. The very singularity and attractiveness of such displays give a factitious value to such use. The average billposter would pay five dollars a month for each tombstone in a graveyard; if he could use them as a fakir for advertising.

If recourse were permissible to the value of defendant's property on the streets, the disproportion between its value and this assessment is equally glaring. Under the laws of the state, the fixing of the valuation of property for assessment is imposed upon the state board of equalization, composed of the highest state officials. This board assessed defendant's property in St. Louis, in 1884, at \$17,064.53; in 1885, at \$19,623.60; in 1886, at \$20,678.10; and in 1887, at \$20,678.10. After collecting from the defendant the customary taxes, the city seeks to collect by this ordinance \$7,545 per annum more on this plant. Allowing for the customary undervaluation, \$7,500 would be 30 per cent. of its actual value; and this the city demands in addition to the privilege secured to it by the ordinance of 1881 of using defendant's poles for city purposes.

In *Telegraph Co. v. Katkamp*, 103 Ill. 420, which was a proceeding to condemn the right of way for telegraph poles, it was sought by the owner of the land to augment the value of the small spaces to be occupied by the poles by showing the probable inconvenience in plowing out at the point of the poles; but the court, after ascertaining the value per acre of the land, based its estimation upon the quantity of ground which would be occupied by the poles had the sum of it been placed in one continuous strip, and after ascertaining by this means that the value of this strip would, as compared to the acre value of the tract, amount to not more than \$36, set aside a verdict for \$38.50. The space occupied by 1,500 poles aggregates 18,000 square feet,—a space equal only to a lot 18x100 feet. The sum of \$7,500, charged in this ordinance, represents a capital of \$125,000. Perhaps there are pieces of ground at the business centers of St. Louis which might approximate these figures; yet the evidence of sales actually made during the period in question on streets where defendant's wires run does not present any such figures by from one hundred to many hundred per cent.

Willing, as the court is, to accord to the city the full measure, even "heaped up and running over," of the rental value of its highways used by the defendant, it ought not to permit it to take the pound of flesh, and a half pound more. For this reason, this issue is found for the defendant. Verdict and judgment accordingly for the defendant.

ATLANTIC TRUST CO. OF NEW YORK v. TOWN OF DARLINGTON.

(Circuit Court, D. South Carolina. September 4, 1894.)

1. TOWNS—AIDING RAILROAD CONSTRUCTION—CORPORATE PURPOSES.

Act S. C. 1889 (20 St. 503), authorizing a town to issue bonds in aid of the construction of a railroad, is not in conflict with Const. S. C. art. 9, § 8, permitting the legislature to authorize municipal corporations to collect taxes for corporate purposes only.

2. SAME—CONSTRUCTION OF STATUTE.

Act S. C. 1889 (20 St. 503), authorizing a town to issue bonds "in any amount" in aid of the construction of a railroad, will be construed to mean any amount within the constitutional limit of 8 per cent. of the assessed value of its taxable property (Const. S. C. art. 9, § 17), and therefore not in conflict with it.

3. SAME—VALIDITY OF ASSESSMENT.

In determining whether an issue of bonds by a town was in violation of Const. S. C. art. 9, § 17, providing that it shall not exceed 8 per cent. of the assessed value of its taxable property, the assessment prior thereto will be considered valid, though the assessors did not file a report thereof within 10 days, as directed by the town charter, where it was filed soon after, accepted, and acted on, the taxes being collected thereunder.

4. SAME—ASSESSED VALUE OF PROPERTY.

Property of a manufacturing company, not being within the classes of property which may be exempted from taxation under Const. S. C. art. 9, § 8, is to be considered in determining the assessed value of the property of a town, within article 9, § 17, prohibiting any issue of bonds by a town in excess of 8 per cent. of the assessed value of its taxable property.

5. SAME—ISSUE OF BONDS AT PAR.

Where a town agrees to give a certain amount to aid in the construction of a railroad, and such amount is expended in the construction of the road, and the town pays its subscription in its bonds, of the face value

of the amount of its subscription, it does not violate the provision of Act S. C. 1889 (20 St. 503), permitting it to issue bonds in aid of railroad construction,—that no bond shall be sold for less than its par value,—though in return it is given stock in the road, of no marketable value.

Action by the Atlantic Trust Company of New York against the Town of Darlington on interest coupons. Judgment for plaintiff.

Curtis, Smythe & Lee and Knox Livingston, for plaintiff.

Woods & Spain, Mitchell & Smith, and Lord & Burke, for defendant.

SIMONTON, Circuit Judge. This case, by stipulation of counsel in writing, was tried by the court without the aid of a jury.

Findings of Fact.

The plaintiff is a corporation under the laws of New York. The defendant is a municipal corporation of the state of South Carolina. The railroad now known as the Charleston, Sumter & Northern Railroad had been constructed from a point on the South Carolina Railroad to the town of Sumter, S. C. The town of Darlington made an agreement with the Charleston, Sumter & Northern Railroad Company, looking to the proposed extension of the Charleston, Sumter & Northern Railroad from Sumter, S. C., via Darlington, to Bennettsville, S. C., in which agreement it was provided that the railroad company would build and equip a railroad from Sumter, S. C., via Darlington, to Bennettsville, S. C., and that on completion of the said railroad the town of Darlington would contribute certain aid thereto, in bonds, money, material, etc. The general assembly of South Carolina passed an act to amend an act to alter and amend the charter of the town of Darlington (20 St. at Large, 503), in which, among other things, is the following section:

"Sec. 29. That the said mayor and aldermen may for the purpose of internal improvements, borrow money, issue bonds or scrip therefor, bearing not a greater interest than 7 per cent. payable at such times as they may think advisable, and payable out of the taxes and incomes of said town; provided, said principal of bonds and scrip shall at no time exceed \$5,000, except for the purpose of aiding in the construction of railroads, and for that purpose the said mayor and aldermen may issue bonds or scrip in any amount; provided, further, that the right to issue said bonds or scrip shall exist only in a majority vote of the town, as hereafter provided. That no one shall be entitled to vote on said question unless he or she is the owner of property within the corporate limits of said town, and has returned and paid taxes on \$100 dollars worth of property the year immediately previous to said voting; and on each \$100 worth of property so returned and paid for, the person or persons shall be entitled to one vote. The manner of holding said election shall be provided for by the town council of said town; it is also provided, further, that the time, manner and form and payment of said bonds or scrip shall be provided for by the town council of said town, and that no bond shall be sold for less than its par value."

On the 22d April, 1890, formal articles of agreement were made between the town of Darlington,—the resolution of the town council being set forth at large in the agreement,—and the Central Carolina Land & Improvement Company, a corporation. By this

agreement the land and improvement company bound itself to construct and equip a railroad that should be acceptable to the railroad commissioners of the state of South Carolina, from Sumter, S. C., via Darlington, to Bennettsville, in said state, where a connection with some railroad giving northern outlet could be effected; and in consideration thereof the town of Darlington agreed to turn over to the Central Carolina Land & Improvement Company, upon the completion of said railroad, bonds to run for 30 years, at 5 per cent. per annum, at the rate of \$2,000 per mile, not to include sidings and side tracks, from Lynch's Creek to Bennettsville, and to give the Central Carolina Land & Improvement Company a certain tract of land in the town of Darlington, containing 24 acres, and to exempt said railroad from town taxes for a period of five years, and to bear equally with the Central Carolina Land & Improvement Company one-half of all expenses of money expended in obtaining the necessary right of way to Bennettsville. In furtherance of this agreement, another was entered into between these same parties, under which 80 of the bonds described in that agreement, at \$1,000 each, with certain securities and obligations mentioned in the schedule annexed to the agreement, amounting to \$5,000, were deposited in escrow with the American Loan & Trust Company of New York, which bonds and securities, or such part thereof as was proper, were to be delivered to the Central Carolina Land & Improvement Company upon the performance by them in full of their agreement, to be evidenced by the certificate of the railroad commissioners. The vote of the town was taken, according to the act of assembly. The bonds were prepared, and deposited in escrow with the American Loan & Trust Company, and afterwards with the Atlantic Trust Company, duly substituted as trustee, in escrow, instead of the American Loan & Trust Company; and, upon the certificate of the railroad commissioners that the railroad was in all respects completed, the bonds to the amount of \$73,000 were turned over to the order of the Central Carolina Land & Improvement Company, due notice of which was given to the mayor of Darlington by the Atlantic Trust Company, with further notice that the remaining \$7,000 of bonds were held to the order of the town. These were subsequently delivered to the town. The Central Carolina Land & Improvement Company assigned these bonds to the Atlantic Trust Company to secure a loan to be procured by the Central Carolina Land & Improvement Company, which loan, to an amount of \$75,000, was procured, and this amount was all used by the Central Carolina Land & Improvement Company in the construction of the railway. The Atlantic Trust Company is the holder of 70 of these bonds, and two coupons of interest, in the amount of \$6,085.66, being past due and unpaid, payment of which was demanded from and refused by the town, and are now the subject-matter of this suit. These coupons are those due on the 1st day of April, 1892, but calculated as bearing interest on the bonds only from the 1st day of August, A. D. 1892, the date of the completion of the road and the delivery of the bonds, and those due on the 1st day of April, A. D. 1893. The form of the bond was as follows:

"The town of Darlington promises to pay to bearer one thousand dollars on the first day of April, Anno Domini one thousand nine hundred and twenty, with interest thereon at the rate of five per centum per annum, payable annually on the 1st day of April of each year, until maturity, on the presentation of the proper coupons at the office of the treasurer of the town of Darlington, So. Ca., where the principal will be paid at maturity, on the surrender of this bond. This is one of a series of bonds not to exceed in the aggregate eighty thousand dollars, to be issued to aid in the construction of the Charleston, Sumter and Northern Railroad from Sumter, through the town of Darlington, to the town of Bennettsville. And in consideration of the said town of Darlington receiving for the said bonds an amount of stock in said railroad equal to the aggregate amount of bonds so received for said purpose by the majority vote of the owners of property within the corporate limits of the said town of Darlington, at an election held on the 7th day of March, A. D. 1890, and in pursuance of an ordinance of the town council of the said town of Darlington dated the 25th day of February, A. D. 1890, passed under authority of an act of the general assembly of South Carolina entitled 'An act to amend an act entitled "An act to alter and amend the charter of the town of Darlington, S. C.," approved 24th December, A. D. 1889,' and is payable out of the taxes and income of the said town of Darlington."

The constitution of the state of South Carolina provides as follows:

"Sec. 17. Any bonded debt hereafter incurred by any county, municipal corporation or political division of this state, shall never exceed eight per centum of the assessed value of all the taxable property therein." 18 St. at Large, p. 687.

Under the charter of the town of Darlington the real property is assessed as follows, under section 17 of the charter: The mayor and aldermen appoint annually three citizens to make such assessment, who are required to make a report in writing of the assessment made by them, and file the same in the office of the clerk of said town, within the period of 10 days next ensuing upon the date of their appointment as such assessors. The personal property is returned for taxation by the property owners. On the 31st January, 1890, the board of assessors was appointed,—no evidence appears as to the day of their notification or qualification,—and made and filed their assessment; not, however, until the 28th day of February after their appointment. The assessment was accepted, and was finally approved. The tax levy was made under it, and taxes paid. The lists of real and personal property included the Darlington Manufacturing Company, both its realty and personalty,—its realty assessed at \$70,000, and its personalty at \$125,000; in all, \$195,000. The aggregate of the list of both real and personal property, including the Darlington Manufacturing Company, was \$1,019,685. If that company was excluded the aggregate would be but \$824,685. The aggregate of assessment of the real and personal property for the year preceding the issue of these bonds was \$607,757, which did not include the Darlington Manufacturing Company. The assessments for the succeeding years all run above \$1,000,000. By the sixteenth section of the act of incorporation of the town (18 St. 927), the town council have power to impose taxes for the use of the town each year, not exceeding 50 cents on every \$100 worth of real and personal property in the town, except that of churches, charitable associations, and institutions of learning. By the amended

charter (20 St. at Large, 504), the town council, if bonds are issued in aid of railroads, may impose an additional tax to pay the interest on its bonds, which additional tax, however, shall not exceed 50 cents on every \$100 of property. The constitution of South Carolina provides for exemption from taxation property used for municipal, literary, scientific, or charitable purposes. Article 9, § 1. The General Statutes of South Carolina (section 169, subd. 23), in force when the Darlington Manufacturing Company was incorporated, provides:

"Any person who since the 1st January, 1872, has invested capital in the manufacture of cotton, woollen or paper fabrics, from iron ores and agricultural implements, within this state, shall for the period of ten years from the date of his investment, be entitled to receive from the treasurer of the state a sum equal to the aggregate amount of state, and from the county treasurer the aggregate amount of county taxes, less the two mills for school purposes, and from the treasurers of all municipal corporations a sum equal to the aggregate amount of municipal taxes, which shall be levied or collected upon the property or capital employed or invested directly in such manufactures or enterprises, not including herein the tax levied upon the land upon which the factories may be erected, the sum of money so to be repaid to be fixed and determined by the comptroller general in accordance with the tax returns, the state tax to be paid by the state treasurer on his warrant, and the county tax by the county treasurer under the order of the comptroller general."

The section was repealed in 1885 (19 St. at Large, 333), but rights acquired under this section thus repealed are not affected by the repeal. The Darlington Manufacturing Company began business some time before 1884. The town of Darlington collected no taxes from it, but the assessments on the property were made. When the bonds of the town of Darlington were delivered under the agreements above referred to, a certificate of stock in the Charleston, Sumter & Northern Railroad Company was made out, in the name of said town, for 730 shares, for the par value of \$100 each, and delivered to the town. Afterwards, the town surrendered this certificate, and obtained in its stead other certificates,—one in its own name, for 680 shares, and several in the names of individuals who had agreed to subscribe to the stock of the Charleston, Sumter & Northern Railroad Company. The plaintiff introduced testimony showing that in five cases, at least, the town collected the amount of their subscription from each of these five at par, delivering to them, upon payment therefor, the scrip in the Charleston, Sumter & Northern Railroad, which they had received in part exchange for their original scrip for 730 shares, above referred to. The town acquired the tract of 24 acres by them agreed in the agreement of 22d April, 1890, to be conveyed to the Central Carolina Land & Improvement Company, and duly conveyed the same to the land and improvement company, having paid for the same, acquiring it, the sum of \$4,200.

Conclusions of Law.

The bonds to which the coupons sued on in this case belong were executed for the purpose of completing and equipping a railroad from Sumter, S. C., via Darlington, to Bennettsville, S. C.,

there to meet a northern connection. This railroad has been built, equipped, and is in operation. The northern connection has been effected. The road has been approved and accepted by the railroad commissioners. The entire face value of the bonds—their par value—has been expended in the construction and equipment of this road. This construction and equipment were completed in consideration of the execution and receipt of these bonds. The bonds were delivered in consideration of these results. We are therefore free to discuss the legal question in the case, not embarrassed by considerations which frequently attend cases of this character,—the expenditure of money or the incurring of obligations which failed to secure the end for which the money was expended and the obligations incurred.

The single question of law in the case is, are these bonds valid obligations of the town of Darlington? The validity of the bonds is denied because their issue is in conflict with the constitution of the state of South Carolina. We must meet this question, notwithstanding the fact that these may be negotiable instruments, and in the hands of bona fide holders for value. The principal of estoppel or ratification cannot be applied to a municipal bond issued ultra vires. *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Brenham v. Bank*, 144 U. S. 188, 12 Sup. Ct. 559.

The first ground of constitutional invalidity is that the act under which they were issued (A. D. 1889; 20 St. 503) is unconstitutional, in that it authorizes the issue of municipal bonds in aid of the construction of a railroad, and this is not a corporate purpose. The constitution permits the legislature to authorize municipal corporations to assess and collect taxes for corporate purposes (section 8, art. 9), and none other. A municipal corporation is not only a representative of the state, but a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. *U. S. v. Railroad Co.*, 17 Wall. 322. The powers of a municipal corporation, dependent wholly upon the source whence they are derived, may be enlarged at any time by the legislature. *Rogers v. Burlington*, 3 Wall. 654. The legislature then determines the purposes for which they have been created, and clothes them with the means of attaining them. These purposes are their corporate purposes. The legislature may declare that corporate purposes may be promoted by affording aid to a railroad. The unchanging course of legislation shows that this is a public purpose as well as a corporate purpose; and, without question, cities, towns, villages, and counties have again and again been clothed with this power. It is true that in *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, arguendo, the court says that counties have the right to aid in such construction because they have jurisdiction over highways, and a railroad is a highway. But streets in cities. Towns, and villages are also highways; and, although the authority of the county over its highways ends at its boundaries, a county has the right to aid a railroad whose termini are in other counties,—perhaps in other states. *Floyd v. Perrin*, relied on in argument, does not decide that aid to a railroad cannot

be a corporate purpose. That case only decides this: Townships in South Carolina, being mere territorial subdivisions of land, with no public duty or function whatever, no corporate or public purpose, an act declaring them corporations, and permitting them to subscribe to a railroad, is not constitutional. Why? Because, having no corporate purpose, the investment in railroad stock could be used for no purpose whatever. Making them corporations, authorizing them to invest in railroad stock, were but steps,—incomplete steps. To secure the constitutionality of the action, the legislature should have given them a corporate purpose. This it did not do, and the whole thing was void. But cities, towns, villages, and counties have well-defined corporate purposes, which can be promoted by such investments. The existence of these corporate purposes, and their promotion by aiding railroad enterprises, give them their constitutional character. As a conclusion of law this act is not in conflict with section 8, art. 9, of the constitution.

Is it in conflict with section 17, art. 9, because no limit is fixed as to the amount of aid to be given to railroads? The constitution and the act must be read in *pari materia*. The legislature must be presumed to have enacted the act in view of the constitution. It cannot be assumed that the legislature went in the teeth of the constitution. Such a construction must be put on this act as will reconcile it with the constitution. "*Ut res magis valeat quam pereat.*" We must hold it to mean, "May issue bonds in any amount within the constitutional limitation." As a conclusion of law, the act is not in conflict with section 17, art. 9, in this respect.

It is said, however, that as a matter of fact the issue of \$73,000 of bonds exceeded 8 per cent. of the assessed value of all taxable property in the town of Darlington, and so the issue is void under this seventeenth section of the eighth article of the constitution. The argument is on two lines: First, because the report of the assessors was not filed within 10 days, and so there was no lawful assessment for the year 1890, when the issue was made, and the issue must be tested by the assessment of the previous year; second, because the assessment of 1890 includes the real and personal property of the Darlington Manufacturing Company, which is exempt from taxation, and if this be excluded \$73,000 will exceed 8 per cent. of the true aggregate. No complaint is made as to the legality of the appointment of the assessors. The act required them to make their return within 10 days. It imposes no penalty and declares no result if this period be exceeded. The return, however, was made not long after the expiration of the 10 days; was accepted by the town counsel; was left open for inspection and protest; was finally confirmed and acted upon. All taxes were collected or enforced under it, and were received and spent by the town council. It has been acquiesced in up to this time. Surely, it does not lie in the mouth of this defendant, the town of Darlington, to say that this assessment, good for every other purpose, is invalid for this single purpose,—the validation of its bonds. "Corporations are as strongly bound as individuals are to a careful adherence to truth in all their dealings, and they cannot, by their representations or by silence,

involve others in onerous engagements, and then defeat the calculations and claims which their own conduct has superinduced." *Zabriskie v. Railroad Co.*, 23 How. 381; *Moran v. Miami Co.*, 2 Black, 722. As a conclusion of law, notwithstanding the delay in filing the return of the assessors, the assessment reported by them, for the purpose of this case, is a lawful assessment, and fixes the value of property assessable for taxation.

Was the property of the Darlington Manufacturing Company properly included in the assessed value of all taxable property in the town? It was, unless it was legally exempt from assessment and taxation. The eighth section, ninth article, of the constitution of South Carolina, directs the general assembly to require all the property within the limits of municipal corporations to be taxed for the payment of debts contracted under authority of law, except such property as has heretofore been exempt in said constitution. The only exemptions are of property used for municipal, educational, literary, scientific, religious, or charitable purposes. So, even if the town of Darlington fails to collect the taxes from this manufacturing company, or exempts it by ordinance from taxation, these would be in contravention of the constitution. But the law does not attempt to exempt corporations like this of the Darlington Manufacturing Company from assessment and taxation. Section 169, subd. 23, of the general statutes, requires the property of such companies to be assessed and taxed, and the tax to be paid, and then authorizes its return in whole or part. The constitution, in its terms, confines itself to the assessed value of all the taxable property, not that from which taxes are collected or levied. As a conclusion of law, the property of the Darlington Manufacturing Company was properly included in the assessed value of all the taxable property in the town of Darlington. And, as a conclusion of law dependent on this, the aggregate amount of these bonds being less than 8 per cent. of the assessed value of all the taxable property in the town of Darlington, their issue is not in conflict with section 17, art. 9, of the constitution.

It is further objected that these bonds were delivered in exchange for stock, and that, the stock having no real or marketable value, the condition that the bond should not be issued for less than par has not been fulfilled. The act of assembly authorizes the issue of bonds in aid of railroads. This aid can only be given in the shape of a subscription to the stock of the road, or as a gratuity. If it be in the shape of a subscription, the subscriber binds himself to pay the full amount of his subscription, and usually it is payable in cash. If he pay his subscription in bonds, dollar for dollar, with the amount of money of his subscription, his bonds are taken at par. Several persons had agreed to aid the town by subscribing for stock in the road. The town of Darlington required each subscriber to pay in cash the full value of the stock at par. If it be a gratuity, then the only question is, was the amount expended in the construction and equipment of the road equal to the par value of the bonds, whose proceeds paid it? It has been found as a fact that this was the case. So, in any view of this matter, the bonds were

disposed of at par. The certificate of stock practically operated as a receipt.

Applying these conclusions of law to the findings of fact, a verdict is found for the plaintiff in the sum of \$6,873.60 and costs of this suit. Let judgment be entered accordingly.

CRESSWELL RANCH & CATTLE CO., Limited, v. MARTINDALE et al.
(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 421.

1. CONTRACT OF SALE—BREACH BY VENDEE—EFFECT.

Where the vendee of cattle to be delivered and paid for in installments refuses, upon demand of the vendor, to accept and pay for a substantial part of an installment according to contract, he cannot thereafter recover against the vendor for a refusal to deliver further installments.

2. SAME—GOOD FAITH OF VENDEE—MATERIALITY.

Where a contract for the sale of cattle provides that the vendees may reject "any objectionable steer that may not weigh 900 pounds," and, without actually weighing the cattle, the vendees reject, as weighing less than 900 pounds, a large number which weigh more than that amount, the fact that such erroneous rejection is made in good faith is immaterial on the question of the vendor's right to refuse further performance of the contract.

3. REVIEW ON APPEAL—ERRONEOUS INSTRUCTION.

A general verdict cannot be upheld where there are several issues tried, and error is committed in charging the jury upon any one of them.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by William Martindale and Thomas J. Price against the Cresswell Ranch & Cattle Company, Limited, for a breach of contract to deliver cattle. The district court rendered a decree for the plaintiffs. Defendant appeals.

O. H. Dean and L. C. Krauthoff (William Warner, James Gibson, W. D. McLeod, J. V. C. Karnes, Daniel B. Holmes, and Edwin A. Krauthoff, on the brief), for plaintiff in error.

S. W. Moore (Gardiner Lathrop, Thomas R. Morrow, and John M. Fox, on the brief), for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. If the vendee of personal property, to be delivered and paid for in installments, refuses, upon the demand of the vendor, to accept and pay for a substantial part of an installment according to the contract, will the fact that he does so in good faith, and in the belief that he is not required by the contract to receive any of the property so rejected, deprive the vendor of his right to refuse to further perform the contract on his part? This is the principal question presented by this case.

September 19, 1892, the Cresswell Ranch & Cattle Company, Limited, a corporation, the plaintiff in error, sold to William Martin-

dale and Thomas J. Price, the defendants in error, 5,021 steers, 1,321 of which were to be delivered not later than October 20, 1892, and the remaining 3,700 at the rate of 1,000 each week, commencing October 24, 1892. The vendees agreed to pay \$28 per head for the cattle, and at the date of the contract paid \$5,000, which was to be applied to the payment for the cattle as they were delivered at the rate of \$1 per head. The 3,700 cattle were part of a herd of cattle owned by the vendor that was on a range in Texas, 40 miles square, and the contract provided that when any installment of these cattle was ready to load upon the cars the vendees should be notified, and might cut out any of the steers gathered that did not weigh 900 pounds. After the 1,321 cattle and two installments of the 3,700 had been delivered and paid for, making in all 2,289 steers, the parties met on November 14, 1892, for the fourth delivery, and the vendor tendered, and demanded that the vendees should receive, 980 steers that weighed over 900 pounds each, and that complied with the other requirements of the contract. The vendees cut out and refused to accept or pay for 282 of these cattle, on the ground that they did not weigh 900 pounds each, but accepted and paid for the remaining 698. Before the time for another delivery arrived, the vendor notified the vendees that they had violated the contract on their part by rejecting the 282 steers, and that the cattle company would deliver no more cattle to them thereunder. The vendees then brought this suit for damages for the failure of the vendor to deliver the remainder of the cattle specified in the contract, and for the balance of the \$5,000 not yet applied to the payment for the cattle already delivered. The vendor answered that the vendees had committed the first breach by failing to receive and pay for the 282 cattle tendered November 14, 1892. At the close of the trial the court instructed the jury, in effect, that the mere fact that the vendees refused to accept the steers that complied with the contract on November 14, 1892, did not relieve the vendor of its obligation to make tender of the remainder of the 5,021 steers due under the contract, if the jury further found that the vendees made the rejection in good faith, in the belief that the rejected steers did not come up to the requirements of the contract. The court also refused to charge, as requested by the vendor, that the rejection of these steers entitled it to treat this action as a breach of the contract, and that, if the vendor notified the vendees that it so elected in a reasonable time after the rejection, the latter could not recover. The court also instructed the jury that, although they found that the vendor tendered and the vendees refused to accept cattle that fulfilled the requirements of the contract, yet, if the vendor had subsequently waived that breach of the contract, the vendees could recover damages for the failure of the vendor to make the subsequent deliveries. There was a verdict and judgment for the vendees for damages for the failure of the vendor to deliver the steers due subsequent to November 14, 1892. But the jury found that the 282 steers tendered and rejected on that day fulfilled the requirements of the contract, and gave the vendees no damages on account of those steers. The verdict does not disclose whether the jury found

that the vendees' breach of the contract on November 14, 1892, was excused because they made it in good faith or because the vendor had waived it.

The contract on which this action was based was an entire contract. It was a contract for the sale of 5,021 cattle for \$140,588, and the \$5,000 earnest money paid at the time the contract was made was paid on account of the entire purchase. The subsidiary provisions of the contract, that the price was \$28 for each steer, and that there were to be five deliveries of the cattle, no more made as many contracts of this one as there were to be installments of cattle delivered than it made as many as there were cattle to be delivered. *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12; *Iron Co. v. Naylor*, 9 App. Cas. 434, 439. Nor was the vendees' breach of this contract slight or in an immaterial part. It was substantial, and went to the very root of the contract. It consisted in their refusal to accept 282 cattle, and to pay \$7,896 for them, at the time and place they agreed to accept and pay for them under the contract. These cattle had been gathered by the vendor from a range 40 miles square by the labor of many men for many days and driven near to the railroad station to be delivered to the vendees. Their refusal to take them imposed upon the vendor the necessity of gathering other cattle from this extended range in the same manner to carry out its contract in the face of the fact that the vendees had refused to accept nearly three hundred cattle that complied with its provisions. A plaintiff cannot maintain his action for the breach of a contract made with him by a defendant unless he can establish such performance on his part as will entitle him to demand performance of the defendant. A prior substantial breach of the contract on the plaintiff's part is ordinarily a conclusive answer to an action for a subsequent breach on the defendant's part. In their complaint the vendees recognized this principle, and alleged that they "have in all things kept and performed the said contract upon their part," but that the cattle company, on November 19, 1892, refused to perform on its part. The verdict does not rest, however, upon proof of this prior performance on the part of the vendees, but upon the facts that, before they charge any breach upon the cattle company, they had themselves failed to perform a substantial part of the contract, but that they then in good faith believed that they were not so failing. Nor was this exercise of good faith and belief by mistake, or without notice of the fact. It was a willful and determined exercise of faith. The vendor insisted, at the time, that these cattle weighed over 900 pounds each; weighed some of them in the presence of one of the vendees on some defective scales that indicated that its claim was well founded, and demanded that the vendees should accept them. All this may not have demonstrated the weight of the cattle, though it seems to have proved it to the satisfaction of the jury, but, although the judgment of the vendor's agent was liable to be at fault, and although the scales were defective, this was ample warning to the vendees to determine the weight of these cattle in some way correctly before they rejected them. They had, by the express terms of the contract, reserved to

themselves the exclusive privilege of rejecting cattle that did not in fact weigh 900 pounds, and by that very provision they had imposed upon themselves the duty of determining the fact, and of rejecting, at their peril, those whose weight exceeded that amount. The provision of the contract which presents this question is that the vendees may cut out "any objectionable steer that may not weigh 900 pounds." It was perfectly competent for these parties to this contract to have provided in it that the vendees might cut out and reject any steer that in their judgment weighed less than 900 pounds, or any steer that they in good faith believed weighed less than 900 pounds. This they did not do. They provided that the vendees might cut out those steers that in fact weighed less than 900 pounds each. There is a well-known and accurate standard and method for measuring the weight of cattle and most mercantile commodities, and contracting parties know when they make their contracts what the standard is, and what the method is, and that neither of them will probably change. But there is no accurate test, standard, or method by which the belief of vendees as to the weight of the articles they purchase can be measured, and no one can know in advance what such a belief may be. The belief of the defendants in error in this case was, according to the verdict of the jury, too far from the fact to authorize its substitution in this contract for the actual weight, for out of 980 cattle that weighed over 900 pounds each they believed that more than 28 per cent. of them weighed less. To substitute in this contract, for the actual weight, the judgment or belief in good faith of the vendees on that subject as the standard by which to determine what steers were heavy enough to comply with the terms of the contract, would be to make a new contract for these parties,—a contract they neither made nor intended to make, and one which the verdict shows would have been far more beneficial to the vendees than was the actual contract. It is not claimed that this can be done. But it is insisted that, although the good faith and belief of the vendees cannot be made the standard to determine the existence of the breach of this contract, yet they may be interposed to deprive that breach of some of its ordinary legal effects. But that as effectually makes a new contract for the parties as to substitute the vendees' belief as to the weight for the actual weight. The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the acts stipulated. One of the rights of the vendor under this contract was to refuse to perform subsequent acts stipulated after the vendees had refused to perform a substantial part of the contract on their part. This right is given by the law for his protection to the party to a contract against whom the first breach has been committed. No sound reason occurs to us why its existence should be made dependent on the good faith or belief of him who first breaks the contract. On the other hand, there are cogent reasons to the contrary.

First. It is the breach itself, and not the good faith or belief of the party who commits it, that causes and measures the damage of the injured party. The injury to the vendor in the case before us

was not less because the vendees broke the contract in good faith, in the belief that they were not breaking it. Nor did the fact that they broke it in good faith, in the belief that they were complying with it, raise any presumption that they would not continue to do so. On the other hand, this fact presented the guaranty of word and of act that they would continue to break it.

Second. The rights and remedies of parties for breaches of civil contracts ought not to depend on the good faith and belief of those who violate them, because these are so difficult to ascertain. The proof of the existence or absence of such good faith and belief is peculiarly within the knowledge and control of the violators themselves. Frequently they alone know what they believe, and whether or not they are acting in good faith. It would always be difficult, and often impossible, to establish their bad faith or their belief that they were violating their contracts, without their testimony, and generally impossible to do so with it. The rights and remedies of parties for the breach of civil contracts ought not to be so placed at the mercy of those who break them. It would be intolerable that parties to continuing contracts should be compelled to perform them on their part until they could prove that the other contracting parties, who were constantly breaking them, were doing so in bad faith, and in the belief that they had no right to do so.

Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform. *Norrington v. Wright*, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19; *Rolling-Mill v. Rhodes*, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882; *Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co.*, 3 C. C. A. 248, 52 Fed. 700, 703, 10 U. S. App. 465, 470; *Philip Mills v. Slater*, 12 R. I. 82; *Smith v. Lewis*, 40 Ind. 98; *Hoare v. Rennie*, 5 Hurl. & N. 19; *Pope v. Porter*, 102 N. Y. 366, 371, 7 N. E. 304; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333, 344, 7 N. W. 357; *Reybold v. Voorhees*, 30 Pa. St. 116, 121; *Stephenson v. Cady*, 117 Mass. 6, 9; *Branch v. Palmer*, 65 Ga. 210; *Fletcher v. Cole*, 23 Vt. 114, 119.

In *Norrington v. Wright*, *supra*, most of the authorities cited by counsel for the defendants in error in this case in support of their contention that the failure of the vendees to accept a part of one installment of the cattle would not authorize the vendor to refuse to make the subsequent deliveries, are carefully reviewed, and disapproved or distinguished from cases like that before us. It would be idle to review them here again. In that case 5,000 tons of iron rails were sold to be shipped at the rate of about 1,000 tons per month. The vendor shipped 400 tons the first month and 885 tons the second, when the defendant refused to accept the rails, because

the shipments had been less than 1,000 tons per month. The vendor shipped the remainder of the rails, and sued for damages for the failure of the vendee to accept them. The supreme court held that he could not recover, and stated the rule to be:

"A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

An attempt is made to distinguish this case from that at bar, because in the former the default occurred in the delivery of the first installment, and in the latter in the acceptance of the fourth installment. But it is a distinction without any substantial difference. The reason why the vendor could not recover in *Norrington v. Wright* was that he had committed the first breach of the contract, and that relieved the vendee from subsequent performance on his part. For the same reason the breach committed November 14, 1892, relieved the cattle company from any subsequent performance on its part. If a default on the first installment by one party relieves the other contracting party from the performance of all the stipulations of the contract, by so much the more will a default on a later installment relieve him from all subsequent performance. It is the first breach which he commits, and not the number of the particular installment to which it relates, that defeats the plaintiff, in these actions. Thus in *Robson v. Bohn*, *supra*, a contract was made May 19, 1873, for the sale of 425,000 feet of lumber, to be delivered at the rate of 20,000 feet per week from the date of the contract, and the defendant agreed to give his promissory note for \$3,000 at that time, to pay \$2,000 in cash August 1, 1873, and to pay the balance on the full delivery of the lumber. He gave his note for \$3,000. The vendor delivered the lumber weekly until August 1, 1873. The vendee then failed to pay the \$2,000 in cash, and the court held that the refusal of the vendee to pay the \$2,000 excused the vendor from the delivery of any lumber subsequent to August 1st. To the same effect are *Dwinel v. Howard* and *Reybold v. Voorhees*, *supra*. The rule is general that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform, and it rules this case.

Finally, it is contended that the cattle company waived the breach committed by the vendees, and that, even if there was error in the instruction we have been considering, it was error without prejudice, and the judgment should be affirmed. The claim of a waiver rests upon the fact that the cattle company received payment November 14, 1892, for the 698 cattle that the vendees accepted, and the claim that its agent then told the vendees to come at some later date for more cattle, and arrange to gather and deliver them. It is difficult to see how the cattle company waived any of its rights by insisting upon its acknowledged right to deliver and receive payment for the 698 cattle the vendees accepted, especially in view of the fact that these cattle were, according to the verdict,

worth several hundred dollars more than the contract price which the vendees paid for them, and they could have lost nothing by taking them. If the company had received payment for the 282 cattle that were rejected, there might have been some ground for the claim of waiver here. Nor is it easy to see how the statement that the vendees might come at some future day for more cattle, or any action the vendor took to gather and ship them, could work a waiver, when the cattle company notified the vendees, before they started to come for these cattle, that they need not do so, and that it would deliver no more cattle to them under this contract. There seems to be nothing in all this that could have induced the vendees to act or omit to act to their prejudice. We have grave doubts whether the evidence in this case is sufficient to sustain a verdict of a waiver of this breach by the cattle company if it were rendered. But it is unnecessary to determine that question here. That question, and the question whether or not the vendees committed the breach in good faith, in the belief that the rejected steers did not comply with the requirements of the contract, were submitted to the jury under instructions to the effect that, if they answered either in the affirmative, the vendees could recover, although they did commit the first breach of the contract. The verdict shows that the jury found that the vendees committed the first breach, and that they must have answered one of these two questions in the affirmative. But it does not show which one. Such a verdict cannot be upheld where there is more than one issue tried, and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *Coal Co. v. Johnson*, 6 C. C. A. 148, 56 Fed. 810; *State of Maryland v. Baldwin*, 112 U. S. 490, 492, 5 Sup. Ct. 278.

There are other questions discussed in the briefs, but, as the case must be retried, and these questions may not arise upon a second trial, it is unnecessary now to notice them. The judgment is accordingly reversed, with costs, and the cause remanded, with directions to grant a new trial.

BELT et al. v. ROBINSON.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 411.

ASSIGNMENT FOR BENEFIT OF CREDITORS — RESERVATIONS — MISTAKE OF ASSIGNOR.

The reservation, by the assignor in a general assignment, to himself, as exempt, by mistake, of property which he does not own or control, does not make the assignment partial, if it in fact conveys, regardless of such reservation, all the property of the debtor not exempt from execution sale; and the assignee may plead and prove the ownership of the property described in the assignment, to establish this fact, and to maintain his right to the property assigned.

In Error to the United States Court in the Indian Territory.

This was an action by J. M. Robinson, doing business as J. M. Robinson & Co., against J. C. Belt, in which an attachment against defendant's property was issued. C. M. King filed an interplea claiming property on which the attachment had been levied. A demurrer to the interplea was sustained, and judgment for plaintiff, as against the intervener, was rendered thereon. The defendant and the intervener brought error.

For report of a former decision, dismissing a writ of error sued out to review the ruling on demurrer before judgment thereon, see 5 C. C. A. 521, 56 Fed. 328.

J. C. Hodges, A. J. Nichols, W. H. H. Clayton, James Brizzolara, J. B. Forrester, and J. H. Koogler, for plaintiffs in error.

W. T. Hutchings (N. B. Maxey and C. L. Jackson, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. December 30, 1891, the defendant in error, J. M. Robinson, commenced an action against his debtor, J. C. Belt, and attached, as his, a stock of general merchandise at Eufaula, in the Indian Territory. Thereupon, pursuant to the practice which prevails in that territory (Mansf. Dig. Ark. §§ 356, 358; 26 Stat. 81, 94, c. 182, § 31), the plaintiff in error, C. M. King, filed an interplea, in which he set out a general assignment to him by Mr. Belt for the benefit of his creditors, dated December 29, 1891, and claimed to be the owner of the attached property as such assignee. A demurrer to this interplea was sustained, and judgment rendered for the defendant in error on the issue between him and the interpleader.

The only substantial ground on which the counsel for the defendant in error claims that this judgment can be sustained is that the assignor reserved to himself, in the assignment, certain household furniture situated in Eufaula, in the Indian Territory, and a pair of mares, a buggy, and a harness, as exempt from forced sale under execution, when none of this property was in fact legally exempt.

This is a preferential assignment, which exacts releases from the creditors as a condition for participating in the preferences; and it is conceded that if it is partial—if it does not convey all the debtor's property not exempt from sale under execution—it is void, and the judgment is right. But the questions whether or not, under a correct construction of the assignment, the assignor did absolutely reserve this property to himself, and whether or not it was legally exempt if he did do it, are zealously contested and exhaustively discussed in the briefs. Upon an examination of the record, however, we find that the interplea does not necessarily present these questions. The assignee there avers that the furniture at Eufaula, and the mares, buggy, and harness, were not, when the assignment was made, and never had been, the property of the assignor, Belt, and that the description of them was written into the

reservation of exempt property in the assignment by mistake. The demurrer admits the truth of this averment, and it is a complete answer to the charge that the assignment was partial because the assignor reserved this property. An assignment that conveys all the debtor's property is not a partial assignment; and one that conveys all his property, and then by mistake reserves or exempts from the conveyance the property of another, that the assignor could not in any way convey, none the less conveys his entire property, and cannot be obnoxious to the objection that it is a partial assignment.

There is nothing in the proposition maintained by *Flower v. Cornish*, 25 Minn. 473; *Clapp v. Nordmeyer*, 25 Fed. 72; and *Rice v. Frayser*, 24 Fed. 464,—that an assignee is not vested with the rights of creditors to attack fraudulent conveyances, and that he is not a bona fide purchaser for value,—to estop this assignee from pleading and proving the fact to which we have referred, to sustain his right under this assignment. He is not thereby attacking, but is sustaining, the assignment. He is not thereby attempting to prove any act or conveyance of his assignor fraudulent, but that this assignment was valid and honest. He is not attempting to contradict or vary any of the terms of the assignment, but to prove by evidence aliunde that one portion of a clause was inoperative because the property it described was not owned by the assignor.

The result is that the reservation to himself, as exempt, of property which he does not own or control, by the mistake of an assignor in a general assignment, does not make the assignment partial, if it in fact conveys, regardless of such reservation, all the property of the debtor not exempt from execution sale; and the assignee may plead and prove the ownership of the property described in the assignment to establish this fact, and to maintain his right to the property assigned.

The suggestion that the allegations of the interplea are insufficient to show that the four lots in Ft. Smith, Ark., claimed as a homestead, were exempt, because there is no averment that Mr. Belt ever occupied or intended to occupy that property as a home residence, is unworthy of serious consideration. Some of the allegations of the interplea are that Mr. Belt, at the time he made the deed of assignment, was the head of a family, and a bona fide resident citizen of the state of Arkansas, and that he was holding and occupying these lots, comprising less than one acre of land, as a homestead for himself, wife, and minor child. These allegations were surely ample. Mansf. Dig. §§ 3006-3013, inclusive.

In our opinion the interplea stated a good cause of action for the recovery of the attached property, and the demurrer should have been overruled. The judgment is accordingly reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

KENTUCKY LIFE & ACC. INS. CO. v. HAMILTON.¹

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 134.

1. REVIEW—SPECIAL FINDINGS BY COURT—OPINION.

The recital in a judgment entry that the court delivered an opinion, and made a finding of all the issues in favor of plaintiff, does not make the opinion a part of the record and a special finding of facts, within Rev. St. § 700, providing that when an issue of fact is tried by the court, and its finding is special, the sufficiency of the facts found may be reviewed.

2. SAME.

An opinion which, so far as it deals with the facts, is a mere statement of part of the evidence, referred to and commented on for the purpose of supporting the judgment, and not the conclusion of court as to facts from the evidence, is not a special finding, within the statute.

3. SAME—BILL OF EXCEPTIONS.

A bill of exceptions embodying the evidence is not a special finding allowing review of the sufficiency of the facts.

On Rehearing.

4. SAME—AGREED STATEMENT.

An agreed statement of facts, on which judgment is rendered, consisting not of the ultimate facts, but of the evidence to be submitted to the court on the issues presented by the pleadings, is not the equivalent of a special finding of the facts, allowing review of their sufficiency.

5. SAME—STATE AND FEDERAL PRACTICE.

Rev. St. § 914, requiring the practice and pleadings in law cases in federal courts to conform to those of the state courts, does not apply to appellate proceedings, so as to require a determination on the merits on a record which would permit it in the appellate court of the state.

6. SAME—SUFFICIENCY OF PLEADING—QUESTION NOT RAISED BELOW.

The sufficiency of the pleadings to warrant a judgment may be passed on in the appellate court, though the question was not raised in the lower court.

7. LIFE INSURANCE—CONDITIONS OF POLICY.

A condition on the back of a life policy, under the title "Assignments," providing that it shall not be assigned without notice, "nor unless a claim hereunder made by assignee be subject to proof of interest, nor unless the amount recoverable hereunder by such assignee, an insurable interest, existing at the time of the assignment or transfer must be shown by all claimants at the time of claim hereunder; and claims by any creditors as beneficiary or assignee shall not exceed the amount of the actual bona fide indebtedness of the member to him existing at the time of said death," and the policy, as to amounts in excess thereof, shall be void, except the assignee be wife, child, parent, brother, or sister of the insured,—applies only to assignees, and, even if it did refer to original beneficiaries, would apply only to one made a beneficiary as a creditor, and not to one who subsequently became a creditor.

8. SAME—BENEFICIARY—INSURABLE INTEREST.

One not the wife, child, parent, brother, sister, or creditor of insured may have an insurable interest in his life.

9. SAME—PLEADINGS—SUFFICIENCY AFTER VERDICT.

An allegation by plaintiff that the policy in suit was not speculative, without affirmatively setting out an insurable interest, is sufficient, after verdict, on motion in arrest, and therefore on writ of error.

Appeal from the Circuit Court of the United States for the District of Kentucky.

¹ Rehearing denied.

Action by Charlotte A. Hamilton against the Kentucky Life & Accident Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Marc Mundy, for plaintiff in error.

Azro Dyer, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge. This was an action on a policy of insurance upon the life of Mrs. Sarah Ritter, the defendant in error being the beneficiary to whom the sum assured was to be paid on the death of Mrs. Ritter. A jury was waived by written stipulation entered of record, and the issue submitted to the court. The court found for the plaintiff, and rendered judgment for the full sum assessed, with interest. The errors assigned by the appellant are these:

"(1) The said court erred in construing that the charter of the defendant, the Kentucky Life & Accident Insurance Company, exhibited in the trial, authorized said company to issue wager policies of life insurance. (2) It nowhere appearing in this record that the claimant, Charlotte A. Hamilton, is the mother, sister, or daughter of the assured, Sarah E. Ritter, the court erred in adjudging to said claimant the maximum amount of the policy sued on, with interest. (3) The court erred in holding that the legislature of Kentucky did or could, by act chartering defendant, authorize it to make wager policies of insurance, and that said company could, under its charter, and did, by its policy, make a binding contract with Sarah E. Ritter, whereby it should pay to said Charlotte A. Hamilton, on the death of said Ritter, any sum exceeding the sum of indebtedness of said Ritter to said Hamilton. (4) The court erred in signing judgment for claimant, Hamilton, under the pleadings and evidence of the case."

Section 649 of the Revised Statutes provides that a jury may be waived, and issues of fact tried and determined by the court, upon a stipulation in writing. The finding of the court upon the facts may be general or special, and, by the statute, is given the same effect as the verdict of a jury. By section 700 the method of reviewing a judgment so rendered is provided. That section is in these words:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon an appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

There was no such special finding of facts by the court as required in order to enable this court to determine the sufficiency of the facts to support the judgment. The judgment entry was as follows:

"And on another day of said term of said court, to wit, on Tuesday, July 18, 1893, came said plaintiff, by Azro Dyer, her attorney, and said defendant, by Marc Mundy, its attorney, and it appearing that heretofore, to wit, on the 15th day of April, 1893, this cause was, by agreement of parties, submitted to the court for trial without the intervention of a jury; that afterwards, to wit, on the 31st day of May, 1893, the court delivered a written

opinion, and made a finding of all the issues in favor of the plaintiff, assessed her damages in the sum of five thousand dollars, with six per cent. interest from June 24, 1892; that afterwards, to wit, on the 1st day of June, 1893, the said defendant entered a motion for new trial upon written grounds filed,—the said motion for a new trial is now submitted to the court, and, the court being sufficiently advised, the said motion is overruled. It is therefore considered, ordered, and adjudged by the court that the plaintiff, Charlotte A. Hamilton, recover of and from the defendant, the Kentucky Life & Accident Insurance Company, the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum from the 24th day of June, 1892, until paid, also her costs herein expended, for which she may have executions. On motion of defendant, it is ordered that it do have fifteen days to file a bill of exceptions."

That entry recites that, "the court delivered a written opinion," "and made a finding of all the issues in favor of the plaintiff." This is nothing more than a general finding in favor of the plaintiff. The contention of the appellant is that the effect of the recital is to make the opinion a part of the record, and a special finding of facts, within the statute. We do not think the opinion thereby becomes a part of the record. It is a mere recital of the fact that an opinion had been read. The opinion did not become thereby a part of the judgment entry, and did not operate as a special finding of facts. The opinion is included in the transcript sent to us, but there is no minute entry making it a part of the record. It was properly included in the transcript under the 14th rule of this court, which requires the clerk of the circuit court "to transmit with the record a copy of the opinion or opinions filed in the case." This opinion does not purport to be a special finding of facts. Some parts of the evidence are referred to and commented on for the purpose of supporting the judgment. In so far as it deals with the facts, it is a mere statement of the evidence, and not the conclusion of the court as to the facts from the evidence. In *Insurance Co. v. Tweed* a like question arose. Mr. Justice Miller, on this subject, said:

"We are asked, in the present case, to accept the opinion of the court below, as a sufficient finding of the facts, within the statute, and within the general rule on this subject. But, with no aid outside the record, we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection, often referred to in this court, that it states the evidence, and not the facts as found from that evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment.'" 7 Wall. 51.

In that case, counsel stipulated in the supreme court that certain parts of the opinion should be accepted as showing the material facts of the case. Upon this agreement the court permitted the opinion to stand for a special finding of facts. Whether that practice would be again followed is more than questionable. Here there is no such agreement. Upon the contrary, counsel for appellee has strenuously insisted in brief and argument that no case is here presented for review by this court, and that the opinion is not a special finding of the ultimate facts. We have, therefore, "no aid outside of the record," and we cannot treat the opinion as a finding of facts. *Insurance Co. v. Tweed*, *supra*; *Dickinson v. Bank*, 16 Wall. 250; *Reed v. Stapp*, 3 C. C. A. 244, 52 Fed. 641. In the latter case the court said:

"The practice adopted by counsel in this case, of seeking to have the opinion of the court fulfill the office of a finding, is not to be commended. The special finding of the statute is a specific statement of the ultimate facts proven by the evidence, determining the issues, and essential to sustain the judgment. It corresponds to the special verdict of a jury, and should be equally specific and comprehensive. It should declare all the ultimate facts established by the evidence, so that if they do not, in law, warrant the judgment, an appellate tribunal may direct such judgment thereon as the law adjudges upon the facts determined, and without the need of a new trial, as was done in *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56."

It seems to us very clear that the opinion found in this transcript should not be regarded as a special finding of facts. The facts submitted to the circuit court have been made a part of the record by bill of exceptions. The supreme court of the United States have frequently ruled that a bill of exceptions embodying the evidence is not the special finding which will enable an appellate court to review the evidence, and determine the sufficiency of the facts to support the judgment. The statute contemplates two distinct kinds of findings, to wit, general and special. "This," as observed by Mr. Justice Miller in *Norris v. Jackson*, 9 Wall. 127, "is in perfect analogy to the findings by a jury, for which the court is, in such cases, substituted by consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict." This special finding, said the court in that case, "is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest." "Whether the finding be general or special," (the statute) "gives it the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it includes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law." "In the case of a special verdict the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and, this being matter of law, the ruling of the court on it can be reviewed in this court on that record. If there were such special verdict here we could examine its sufficiency to sustain the judgment. But there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts. The judgment of the court, then, must be affirmed, unless the bill of exceptions presents some erroneous ruling of the court in the progress of the trial." The conclusions of the court in that case were thus summarized:

"If the verdict be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in trial by jury." "That, if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them." "That objection to the admission or

exclusion of evidence, or to such rulings on the propositions of law as the party may ask, must appear by bill of exceptions."

That case has been repeatedly followed. See *Insurance Co. v. Folsom*, 18 Wall. 237; *Cooper v. Omohundro*, 19 Wall. 65; *Crews v. Brewer*, Id. 70; *Dickinson v. Bank*, 16 Wall. 250; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Bowden v. Burnham* (Jan. 29, 1894) 8 C. C. A. 248, 59 Fed. 752.

There was no demurrer to the case stated in the pleadings, and no motion in arrest of judgment after the general finding for the plaintiff. No exceptions were taken upon evidence admitted or excluded, and no rulings made during the trial upon questions of law. In *Cooper v. Omohundro*, cited above, the court said:

"Where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review * * * except the rulings of the circuit court in the progress of the trial; and the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding."

In the case of *Martinton v. Fairbanks*, also above cited, the court said:

"The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that by excepting to the general finding he excepts to such conclusions of law as the general finding implies. But section 649, Rev. St., provides that the finding of the court, whether general or special, shall have the same effect as the verdict of the jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. * * * The provision of the statute that the finding of the court shall have the same effect as the verdict of a jury cuts off the right to review in this case."

The issues presented were mixed questions of law and fact. The finding being a general one, the legal questions supposed to be involved in the general result are not, on this record, open to review. It is accordingly ordered that the judgment of the circuit court be affirmed.

On Rehearing.

(July 3, 1894.)

An earnest petition for a rehearing of this cause has been filed, to which the court has given careful consideration.

1. It is insisted that the cause was heard below upon an agreed statement of facts, which is a part of the record by bill of exceptions; that such an agreed statement is equivalent to a special finding of facts by the court; that, therefore, the question, as presented on the writ of error, is whether the facts thus agreed upon require a judgment for plaintiff or defendant; and that, this being a matter of law, the ruling of the court below can be reviewed. An agreed statement of facts, upon which a judgment is founded, will be taken, on appeal or writ of error, as the equivalent of a special finding of facts. *Bond v. Dustin*, 112 U. S. 607, 5 Sup. Ct. 296; *Supervisors v. 63F.no.1—7*

v. Kennicott, 103 U. S. 554; Lehn v. Dickson, 148 U. S. 73, 13 Sup. Ct. 481. But the so-called "agreed statement of facts" does not purport to be a statement of the ultimate facts, but a mere agreement as to the evidence to be submitted to the court as bearing upon the issues presented by the pleadings. To treat the evidence thus submitted as an agreed statement of facts, equivalent to a special finding of facts, would require this court, on a writ of error, to examine the evidence as it was submitted to the court below, and confound all the distinctions which distinguish an appeal from a writ of error. The bill of exceptions sets out the numerous applications, notices, letters, policies, charters, and by-laws therein referred to as having been read upon the hearing. What ultimate facts are proven by all this evidence is not stated in the agreement itself, nor is there any special finding of facts based upon all this evidence by the trial judge. An agreed statement of facts, which will be accepted as the equivalent of a special finding of facts, must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found is not within the rule stated in *Supervisors v. Kennicott*, supra. In *Raimond v. Terrebonne Parish*, 132 U. S. 192, 10 Sup. Ct. 57, a like question arose as to the sufficiency of a so-called agreed statement of facts, in regard to which the court said, "The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial."

Speaking as to the general subject, Mr. Justice Gray, for the court, said:

"By the settled construction of the acts of congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred." *Id.*, 132 U. S. 194, 10 Sup. Ct. 57.

See, also, *Minor v. Tillotson*, 2 How. 392; *Campbell v. Boyreau*, 21 How. 223; *Bond v. Dustin*, 112 U. S. 606, 5 Sup. Ct. 296.

2. The next contention of the petition is that the appellant is entitled to have this cause determined upon its merits in this court and upon this record, if he would be entitled to have it heard upon the merits on a like record in the court of appeals of Kentucky. This argument is predicated upon the assumption that section 914, Rev. St., requiring the practice and pleading in civil causes on the law side of the circuit and district courts of the United States to conform to the practice and pleadings in the state courts, is applicable to appellate proceedings. In *Re Chateaugay Ore & Iron Co.*, 128 U. S. 553, 9 Sup. Ct. 150, the court construed section 914 and held that it had no application whatever to proceedings under which it was sought to review a judgment of the circuit court. The manner or the time of taking proceedings intended to result in such review by this court is regulated either by the acts of congress or by the ancient common-law practice. The manner in which a judgment may be reviewed by this court when a jury has been waived

is the subject of express congressional enactment, as we have already shown.

3. The final contention of appellant is that the pleadings do not warrant any judgment, and that the determination of this question is a question of law arising solely upon the pleadings, and therefore open to review upon this record, under the assignment of errors. No demurrer was interposed by the defendant in the court below, and no motion in arrest of judgment was made after verdict, nor was this question pressed upon the argument of this case. The failure to demur or move in arrest of judgment is perhaps not important, for, if anything appears upon the record which would have been fatal upon a motion in arrest of judgment, that thing is equally fatal upon a writ of error. *Slacum v. Pomery*, 6 Cranch, 221; *Bond v. Dustin*, 112 U. S. 609, 5 Sup. Ct. 296; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481. In *Slacum v. Pomery*, cited above, Chief Justice Marshall, speaking for the court, said:

"It is not too late to allege as error in this court a fault in the declaration which ought to have prevented a rendition of the judgment in the court below."

The argument in support of the petition for a rehearing presents two questions of law as arising upon the pleadings. These questions are—First, that the pleadings do not show that the plaintiff bore to the assured the relation of "wife, child, parent, brother, or sister," and therefore she was debarred from any recovery on the policy in excess of the indebtedness of the assured to her, by operation of the condition found on back of contract of insurance; second, that, whether the condition indorsed on the policy was applicable to plaintiff or not, the policy was void, as a wager policy, for any excess over plaintiff's claim as a creditor. We will deal with these questions in the order stated.

The condition relied upon as limiting plaintiff's recovery to the amount of her claim as a creditor was upon the back of the policy exhibited as a part of the petition. It was a single condition, and appears under the title "Assignments." It was in these words:

"Assignments: This certificate shall not be assigned or transferred unless notice and copy of the assignment be given to said company, nor unless a claim hereunder made by assignee be subject to proof of interest, nor unless the amount recoverable hereunder by such assignee, an insurable interest, existing at the time of the assignment or transfer must be shown by all claimants at the time of claim hereunder; and claims by any creditors as beneficiary or assignee shall not exceed the amount of the actual bona fide indebtedness of the member to him existing at the time of said death, together with any payments made to the company under this certificate or policy of insurance by such creditor, with interest, and this certificate or policy of insurance, as to all amounts in excess thereof, shall be void (except such assignee shall bear to the member the relation of wife, child, parent, brother or sister), be limited to the value of the interest proven."

The answer denied that plaintiff bore either of the relations mentioned to the assured, but admitted that she was a creditor to the extent of \$496.92, and entitled, as a creditor, to recover to that extent, but denied any other or greater liability. The reply of plaintiff concluded the pleadings. Among other things, this reply denied

that the policy sued on had been issued to her as a creditor, or to secure any indebtedness from the assured to her, and insisted that the indebtedness mentioned in the answer "was a mere incident growing out of the transactions of insurance set forth in the petition," and that the claim of this plaintiff upon the defendant, alleged in the petition, was not affected by her relation as a creditor, but was based upon the express contract of the defendant, for a valid consideration, to pay to the plaintiff the sum of \$5,000 at the death of Mrs. Ritter, the assured. The reply further denied that either the said assured or the plaintiff "were actuated by any speculative motive, but both acted in good faith, without fraud." Under the Kentucky practice act, "every material allegation of a pleading must, for the purposes of the action be taken as true, unless traversed." Under this rule of pleading, every material fact set out in the defendant's answer as a defense must be taken as true, unless traversed either by the petition or reply. The allegation that the plaintiff did not bear to the assured the relation of "wife, child, parent, brother, or sister" is not traversed by the petition or reply, and must be taken as true. How does that fact affect the judgment? The answer depends upon the application of the condition on back of policy to the plaintiff. If plaintiff is within that condition, then her recovery must be limited by it. Upon full and careful consideration, we agree with the judge who tried this case on circuit that the plaintiff is not included in nor affected by the condition relied upon to limit her recovery. That provision or condition was intended to affect transfers of the certificate of insurance, and limits the recovery of an assignee. Plaintiff was not an assignee, and did not sue as an assignee. She sues as the payee named in the contract of insurance, and she must stand or fall upon that relation to the contract. Appellant's contention that every beneficiary who happens to be a creditor at the death of deceased shall be limited in recovery to the amount of the debt, unless it is also shown that such creditor bore one or the other of the relations mentioned, is not supported by any fair construction of the words of the condition. That insistence rests alone upon the occurrence of the word "beneficiary" in the body of the condition, when referring to the extent to which an assignee might recover by reason of a creditor relation. The language of this condition is the language of the defendant company. If its meaning be not plain, and it needs construction, it should be most strongly construed against the maker of the condition. *Insurance Co. v. Wright*, 1 Wall. 468. Looking to the signboard placed over the provision, and looking to all parts of the condition, we are of opinion that it was never intended to apply to any except transferees or assignees of the policy. But, if wrong in this, it is clear that if the beneficiary was not made such as a creditor, nor because of that relation, the subsequent creation of a creditor relation is not affected by this provision. Plaintiff, in her reply, denied that she was made beneficiary as creditor, and insisted that her debt arose subsequently, and as a mere incident. This issue must, on this question, be treated as settled in favor of plaintiff. It follows that if she was not made beneficiary as creditor, nor

because of that relation, this provision cannot affect plaintiff, even if it was intended to limit the recovery of a creditor beneficiary to the amount of the debt so secured.

Appellant's second proposition is predicated upon the assumption that it is essential to recovery, in any action upon a contract of life insurance, and the plaintiff shall aver and prove an insurable interest in the life of the assured, and that in default of such averment the contract will be adjudged void, as a mere wager policy. The answer presented no other issue than that presented by the indorsed condition we have already discussed. It set out that plaintiff was not the "wife, child, parent, brother, or sister" of the assured, and sought to defeat a recovery upon the assumption that unless one of these relations existed there can be no recovery. As the reply was silent concerning this denial, it operated as an admission that none of those relationships existed. In support of the general proposition that a contract of insurance is void, as against public policy, and as a mere gambling speculation, unless the beneficiary has some insurable interest in the life of the person insured, appellant cites *Basye v. Adams*, 81 Ky. 375; *Insurance Co. v. France*, 94 U. S. 561; *Crotty v. Insurance Co.*, 144 U. S. 621, 12 Sup. Ct. 749; *Insurance Co. v. Schaefer*, 94 U. S. 457. But there are other relations than those mentioned in the condition indorsed, and, if that condition has no application, then an action is maintainable by the plaintiff, unless the policy is void, as a mere wager policy. In the case of *Insurance Co. v. Schaefer*, supra, the court, through Mr. Justice Bradley, said: "Precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been a subject of much discussion." He added that "the essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured had no interest." In the case of *Loomis v. Insurance Co.*, 6 Gray, 399, Chief Justice Shaw, in discussing the question of an insurable interest, said:

"In discussing this question in this commonwealth [Massachusetts], we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III., passed about the time of the commencement of the Revolution, and never adopted in this state. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the *cestui que vie*; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life, will be impaired,—so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another. Such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and, whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken."

In the *Schaefer Case*, cited above, the court, after setting out the language of Chief Justice Shaw, said:

"We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being gathered in the recent treatises on the subject. *May, Ins.* §§ 102-111; *Bliss, Ins.* §§ 20-31."

While the pleadings do not set out any particular interest which the plaintiff had in the life of Mrs. Ritter, yet the reply, in almost the exact language of Mr. Justice Bradley, did set up that, "in all the insurance transactions described in the petition, neither said Sarah nor this plaintiff were actuated by any speculative motive, but both acted in good faith and without fraud." Defendant did not demur, and no motion in arrest of judgment, as we have already stated, was made after verdict. The most that appellant can now claim is that upon this writ of error any error appearing upon the record proper shall be now reviewed as it might have been after verdict upon a motion in arrest. Such a motion is not a substitute for a motion for a new trial, and only these material defects apparent on the record proper can be relied upon to sustain the motion, and the evidence is no part of the record for such a purpose. *Carter v. Bennett*, 15 How. 354; *Bond v. Dustin*, cited above. The rule at common law, as stated in 3 Bl. Comm. 394, and adopted by Mr. Black in his late work on Judgments, is that "exceptions that are moved in arrest of judgments must be much more material and glaring than such as will maintain a demurrer, or, in other words, many inaccuracies and omissions which would be fatal if early observed are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings." Black. Judgm. § 89. The policy on its face shows no taint of illegality. The pleadings denied that it was obtained for any speculative purpose. This issue has been found for the plaintiff. It is too late, after verdict, to insist that the plaintiff should have gone further, and affirmatively set out some insurable interest. If good pleading required a more definite statement to take the case out of the category of a gambling transaction, the objection should have been made by demurrer, or presented in some form before verdict. The court will not now presume that the policy was a wager agreement, and unravel all that has been done. We are not prepared to say that it was not the duty of defendant, if it had reason to believe that it had been led into a mere gambling contract, to present that as a defense; that in the absence of such a defense the court will presume in favor of the validity of the agreement. It is, however, unnecessary now to pass upon this question. We content ourselves with holding that on the pleadings, as here presented, the judgment is not void. Petition dismissed.

NORTHERN PAC. R. CO. v. HOGAN.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 357.

1. MASTER'S LIABILITY TO SERVANT—FELLOW SERVANTS—BRAKEMAN AND CONDUCTOR.

A brakeman and a conductor are fellow servants, within Comp. Laws N. D. 1887, § 3753, exempting an employer from liability to an employé for negligence of another person employed by him in the same general business.

2. SAME—STATE STATUTE—FOLLOWING CONSTRUCTION BY STATE COURT.

The state having power to determine the liability of an employer to an employé for injury sustained in his service, the construction put on its statute on the subject by its court of last resort will be followed by federal courts.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Cornelius Hogan against the Northern Pacific Railroad Company for injuries received in its employment as a brakeman. Judgment for plaintiff. Defendant brings error. Reversed.

J. H. Mitchell, Jr., for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. The facts disclosed by the record in this case, which was a suit for personal injuries, are substantially as follows: Cornelius Hogan, the defendant in error, was a brakeman, who had been in the service of the Northern Pacific Railroad Company, the plaintiff in error, for about two years prior to May, 1892. At that time he was serving the company in the capacity of head brakeman on a regular freight train running between Jamestown and Fargo, in the state of North Dakota. This train usually arrived in Jamestown from the west at about 7 o'clock in the evening, and left shortly thereafter for Fargo; but on the occasion of the accident, to wit, on the evening of May 10, 1892, it was an hour or two late. It frequently happened that some car loads of live stock had to be taken up and placed in the train at Jamestown, and such was the case on the evening of May 10, 1892. It appears from the testimony that, after the train in question arrived at Jamestown from the west, the train crew, including Hogan, who were to take charge of the same from that point east to Fargo, were called, and proceeded with the discharge of their several duties in the usual and ordinary manner. Hogan and the conductor of the train took the numbers and seals of all the cars composing the train, after which they went to the yardmaster's office, which was some distance east of the forward or eastern end of the train. After waiting there a few moments for orders and instructions, they again went to the forward end of the train, with a view of attaching the road engine thereto, which was then standing on an adjoining side track. The road engine was let out onto the track on which the freight train was standing, and was backed down to within a few feet of the forward car, preparatory to being coupled thereto when the train was made up and ready to start. At about the same time, another engine, termed the "helper," was let out onto the main track, by Hogan, and was sent back to the rear of the standing freight train for the purpose of being attached thereto, so as to help push the train out of the station on an ascending grade. During these several occurrences, it seems that a party of men were engaged at the rear or west end of the train in the act

of attaching three car loads of live stock thereto. A switch engine was being used for that purpose. It is an undisputed fact that owing to the length of the train, consisting, as it did, of about 30 cars, and owing to the darkness of the night, neither Hogan nor the conductor could see what progress this party of men had made with their work, nor in what part of the train they were placing or attempting to place the three cars of live stock; but they did know that these cars were to be placed in the train, and that a party of men were engaged in that service at the rear end of the train with a switch engine. Hogan testified that the conductor finally gave an order to couple the road engine to the outgoing train, saying at the same time, "Those three cars of stock have been put on the rear end of the train." The conductor testified that he said: "We will couple up now, so as to get ready to go. I think they are putting the stock on the rear end, on the hind end, of the train." In the act of making the coupling, pursuant to the order of the conductor, Hogan lost the thumb and forefinger of one of his hands, by their being crushed between the bumpers of the car and the engine. There was evidence tending to show that the standing train of freight cars was pushed forward about six or eight inches by the movement of one or the other of the engines at the rear end of the train, either the switch engine or the "helper," and that this unexpected movement of the train occasioned the injury of which the plaintiff complains. In the circuit court a judgment was rendered against the railroad company for \$4,500, to reverse which it has brought the case to this court. The railroad company relies upon the following propositions to obtain a reversal of the judgment: First, that by virtue of a statute of the state of North Dakota, where the accident occurred, the railway company is not liable to Hogan for the negligent act of the conductor of the freight train, if, indeed, he was guilty of any negligence; and, second, that, upon the undisputed evidence in the case, the accident was due to one of the ordinary risks of the employment, and that the railway company was in no wise at fault.

The statute to which reference is thus made is section 3753 of the Compiled Laws of North Dakota for the year 1887, and is as follows:

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

It admits of no doubt, we think, that the interpretation placed upon that statute by the supreme court of North Dakota would absolve the railway company from liability, on the state of facts disclosed by the present record. In the case of *Elliott v. Railroad Co.*, 41 N. W. 758, the supreme court of the then territory of Dakota held that a section foreman and a train conductor were coemployés in the same general business, within the meaning of the above statute; and in a late case, decided by the supreme court of North Dakota since its admission into the Union, it was held in an elabo-

rate opinion that a foreman of a gang of laborers, who had authority to hire and discharge the men composing the gang, and to control and direct them while at work, was also a coemployé of the various members of the gang, within the purview of such statute. Vide *Ell v. Railroad Co.*, 48 N. W. 222. The court decided in substance, that whether two persons in the service of the same master are coemployés, and subject to the rule of liability declared by the aforesaid statute, depends not upon the relative rank of the two employés, nor upon the fact that one controls and directs the other, but upon the character of the work in the doing of which the negligent act is committed. The "superior servant doctrine," as it has sometimes been termed, was expressly disapproved in that case, as well as the decision of the supreme court of the United States in the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184. It was ruled, in effect, that, under the provisions of the Dakota statute, a master is not liable to one employé for the negligent act of another, unless the latter is at the time engaged in the performance of some duty that is personal to the master. There seems to be no valid ground, therefore, for dissenting from the view which is advocated by counsel for the plaintiff in error, that the statute of North Dakota, as construed by the highest court of that state, exempts the railroad company from liability for the injuries complained of, and that in the courts of that state the plaintiff below could not have recovered upon the state of facts proven at the trial.

It must also be regarded as a well-established doctrine that the states have the right to regulate the relations existing between employers and employés within their respective borders, and to determine by legislative enactment when and under what circumstances an employer shall be held liable to an employé for an injury sustained by the latter while in his service. So far as we are aware, laws of this description have always been treated as obligatory upon the federal courts to the same extent and with like limitations as other statutory enactments, even where they modify to some extent the pre-existing rules of the common law, and we can conceive of no sufficient reason why they should not have the same effect in the federal courts, as rules of decision, which is accorded to other state statutes. It was said on this subject in the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 378, 13 Sup. Ct. 914, that "there is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others." And in other cases, as well, it has been taken for granted that the states have ample power to regulate the relations existing between employers and employés as they may deem expedient. *Hough v. Railway Co.*, 100 U. S. 213, 226; *Railway Co. v. Prentice*, 147 U. S. 101, 106, 13 Sup. Ct. 261; *Railroad Co. v. Hambly*, 14 Sup. Ct. 983. Indeed, it would lead to intolerable results, which will be readily apprehended, if the federal courts should either deny the authority of such statutes, or refuse to enforce them according to the interpretation placed thereon by the courts of the state, particularly by its court of last resort. We ought to say in this connection that it has not been expressly claimed by counsel for the defendant in

error that the statute of North Dakota now in question is not binding upon the federal courts, but such seems to us to be the necessary result of the argument actually made. It is said that the statute of Dakota is merely declaratory of the common law; that in construing the statute the state court merely gave expression to its views of the common law, and that the federal courts, being courts of co-ordinate jurisdiction, are not bound by the decision of the state court on questions of that character. The argument is ingenious, but, as we think, it is fallacious. The state statute to which reference has been made supersedes the common law in the state where it was enacted, touching the subject to which it relates; and, while it is true that the state court had occasion to refer to the principles of the common law, yet it must be borne in mind that such reference was made solely for the purpose of ascertaining the intent of the lawmaker as evidenced by the statute in question. It is the statute, however, and not the common law, which is now in force in the state of North Dakota; and it is the statute, as construed by the highest court of that state, which must determine the rights of the parties and control the decision in the case at bar. Any other view would render the statute inoperative and nugatory.

In what has thus far been said we have not been unmindful of the observations made with reference to the Dakota statute in *Railroad Co. v. Herbert*, 116 U. S. 642, 653, 6 Sup. Ct. 590. In that case the court was dealing with the liability of an employer for an injury sustained by an employé in consequence of defective machinery and appliances. The court held that the statute did not exempt the employer in such case, because whoever was appointed to provide suitable machinery and appliances was discharging a personal duty of the master, and, while, so acting, was the representative of the master, and not a coemployé, within the purview of the Dakota statute. The decision is accordingly in harmony with the views of the state court in *Ell v. Railroad Co.*, supra.

In conclusion, it is important to add that in a very recent case, heretofore cited (*Railroad Co. v. Hambly*), which originated in Dakota, the supreme court of the United States gave effect to the same statute which is now under consideration, holding that, by virtue of its provisions, a person employed in keeping the track of a railroad in repair was a coemployé of the engineer and conductor of a passenger train on the same road, through whose negligence he had sustained injuries. At the time the last-mentioned suit was instituted, the Dakotas had not been admitted into the Union, and the decision of the territorial supreme court construing the statute in question was said to be merely persuasive authority. It was conceded, however, that the interpretation given to the statute by the highest court of the state after its admission into the Union would, as a matter of course, be adopted and applied by the federal courts, pursuant to the requirements of section 721, Rev. St. U. S.

Our conclusion is, therefore, that the first contention of the plaintiff in error, heretofore stated, should have been sustained by the circuit court, and that the declaration of law embodying that contention should have been given, and that the jury should have been

directed to return a verdict in favor of the defendant. For the error committed in refusing the instruction and refusing to direct a verdict in favor of the company, the judgment is reversed, and the cause is remanded, with directions to award a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. NEEDHAM et al.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 386.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS—OPERATION OF RAILROAD TRAINS.

A railroad company is not liable, under the general law, for the injury of an employé on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close, as the conductor and the injured employé are fellow servants.

2. SAME—PERSONAL DUTIES OF MASTER.

The duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of a master, but a duty of the servant, as a duty of operation.

3. SAME—VICE PRINCIPALS—RAILWAY CONDUCTORS.

Conductors, whether charged with the duty of handling switches or of driving trains, are, so far as actions against the common master for negligence are concerned, not vice principals, but the fellow servants of all other employées engaged in the common object of securing the safe passage of trains.

4. APPEAL—HARMLESS ERROR—GENERAL VERDICT ON SEVERAL ISSUES.

Where several issues are tried, and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the court, a general verdict cannot be sustained.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by Mrs. D. L. Needham and T. B. T. Williams, a minor, by his next friend, said Mrs. Needham, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for the death of D. L. Needham. At the trial the jury found for plaintiffs. Judgment for plaintiffs was entered on the verdict. Defendant brought error.

For report of the decision on writ of error to review a previous judgment for plaintiffs, reversing that judgment, and granting a new trial, see 3 C. C. A. 129, 52 Fed. 371.

George E. Dodge and B. S. Johnson, for plaintiff in error.

James P. Clarke, J. C. Marshall, and C. T. Coffman, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. Is a railroad company liable under the general law for the injury of an employé on one train caused by the negligence of the conductor of another train in leaving a switch open that it was his duty to close?

The writ of error is brought to reverse a judgment recovered by the defendant in error Mrs. D. L. Needham against the St. Louis, Iron Mountain & Southern Railway Company, the plaintiff in error, for the death of her husband. The action was brought under sections 5225 and 5226 of Mansfield's Digest of the Statutes of Arkansas, which permit the personal representatives or heirs at law to recover for the death of a person caused by any wrongful act, neglect, or default that would have entitled the party injured to have recovered if death had not ensued. *Railway Co. v. Needham*, 10 U. S. App. 339, 3 C. C. A. 129, and 52 Fed. 371.

A rule of the company provided:

"That conductors of all trains, when approaching meeting points where they are to take the siding, must go to the forward part of trains, and attend to the switch in person. On train leaving the siding, they must set up switch for the main track in person. Conductors must not assign this duty to any one, but must attend to it in person in every instance."

The decedent was a fireman on a passenger train running south from Little Rock, Ark., December 16, 1889. About two hours before this passenger train arrived at Alexander (a station 10 miles south of Little Rock), the conductor of a construction train of the railroad company caused the switch of the spur track at that place to be opened, ran his train upon that track, and then ran it north to Little Rock, and left the switch open, when it was his duty to close it. The passenger train ran into the open switch, and Mr. Needham was killed. The counsel for the company requested the court to charge the jury that the negligence of the conductor of the construction train was the negligence of a fellow servant of the deceased, on account of which the defendants in error could not recover. The court refused to grant this request, and charged the jury that, if the injury was caused by the carelessness of the conductor of any train in opening the switch and leaving it without being closed properly, then the negligence of that man was not the negligence of the fellow servant, but the negligence of the company, and that, if the death of Needham was caused by that negligence, the defendants in error could recover.

In *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525, 527, this court held that a servant might become the vice principal of his master, either on account of the character of the duties the performance of which was intrusted to him, or on account of the position of general supervision and control of the entire business or a great department of the business of his master in which he might be placed. An effort is made to sustain the ruling below on both these grounds. It is contended—First, that the duty of keeping the switch in proper position for the passage of trains is an absolute personal duty of a railroad company, and that it cannot so delegate it as to relieve itself from liability for negligence in its performance (the learned judge who tried this case below has expressed his views upon this question in *Mase v. Railroad Co.*, 57 Fed. 283); second, that the conductor of a railroad train is the head of a distinct department, and hence is a vice principal for all of whose derelictions of duty the railroad company is responsible.

Prima facie all persons engaged in a common employment in the service of the same master are fellow servants. A servant who enters with others upon a common employment in the service of the common master assumes the ordinary risks of that service. One of these ordinary risks which he thus assumes is the risk of injury from the negligence of his fellow servants.

It is the duty of the master to use ordinary care to employ fit and reasonably careful co-workmen to assist in the common service. It is his duty to use ordinary care to furnish reasonably safe machinery and instrumentalities with which the servant may perform his work, and a reasonably safe place in which he may render his service, and to use ordinary care and diligence to keep the machinery, instrumentalities, and place in a reasonably safe condition. These are absolute personal duties of the master, and cannot be so delegated as to relieve him from liability for their negligent performance.

But is the timely opening and closing of switches in the ordinary operation of a railroad one of these absolute duties?

The quarryman who uses due care to furnish to competent servants, and to keep in repair, a strong and sound derrick, in a reasonably safe place, to handle the product of his quarry, has performed his duty as a master. He is not responsible to one of his servants because another so negligently operates the ropes or the pulleys that the safe place that the master furnished is made unsafe, and the strong derrick dangerous, so that injury results.

The manufacturer of lumber who uses due care to furnish and to keep in repair, in a reasonably safe place, suitable machinery to transform trees into the myriad forms the uses of man demand, has performed his personal duty when he has placed this machinery in the hands of reasonably competent servants to be operated. The risk that the place in which it is operated will become unsafe, or the machinery dangerous, by the negligence of some of the servants in operating it, is assumed by the servants themselves, because upon them rests the duty of careful operation.

In other words, the line of demarkation here between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance.

The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but,

when this duty is performed, the duty rests upon the servants to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch, and to run his train through it upon the spur track. He did so. It then became his duty to take his train off the spur track, and to close the switch. He took his train off, and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars, and every appurtenance of the railroad that every place upon it should at all times be safe, and no negligence of any employé could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury, every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?

In our opinion, the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation,—a duty of the servant,—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover. And so are the authorities.

In *Randall v. Railroad Co.*, 109 U. S. 483, 3 Sup. Ct. 322, a brakeman working a switch for his train on one track in a railroad yard was held to be a fellow servant with the engineer of another train of the same corporation. Mr. Justice Gray, in delivering the opinion of the court, said:

"The general rule is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. * * * Persons standing in such relations to one another as did this plaintiff and the engineman of

the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts, as is clearly shown by the cases cited in the margin."

And he cites numerous authorities.

In *Naylor v. Railroad Co.*, 33 Fed. 801, an engineer who came to his death by the carelessness of a switchman in leaving a switch open was held to be a fellow servant of the latter.

In *Roberts v. Railway Co.*, 33 Minn. 218, 22 N. W. 389, a train ran off the track in consequence of a misplaced switch, negligently left open by the switchman, and caused the death of the baggage master on the train. The court held that the switchman and baggage master were fellow servants, within the rule exempting the company from liability.

In *Harvey v. Railroad Co.*, 88 N. Y. 481, 484, the fireman on an engine which was thrown from the track by a misplaced switch, left open by the negligence of a switchman, was held to be a fellow servant of the latter. The court said:

"This is a plain case. It is evident that the primary cause of the injury was the neglect of the switchman Baldwin to properly adjust the switch after using it to pass the local freight back upon track number three. As Baldwin must be deemed to have been the coservant of the plaintiff's intestate, the plaintiff cannot recover, unless some neglect of the defendant, as principal, also contributed to produce the injury."

In *Slattery v. Railway Co.*, 23 Ind. 81, a brakeman on a train and one whose duty it was to attend to the switch were declared to be engaged in the same general undertaking, and it was held that the company was not liable to one for an injury caused by the negligence of the other.

In *Railroad Co. v. Henry*, 7 Ill. App. 322, the court held that an engineer running a switch engine and a switch tender were engaged in a common employment, and were fellow servants.

In *Walker v. Railroad Co.*, 128 Mass. 10, an engineer and fireman were killed by a misplaced switch, which had been negligently left open; and, upon an action to recover damages from the company, the court below directed a verdict for the defendant, and this verdict was sustained.

In *Miller v. Railway Co.*, 20 Or. 285, 26 Pac. 70, the engineer and fireman upon one train were injured through the negligence of the conductor and brakeman of another, who had failed to properly close a switch. The court held them all to be fellow servants with each other, and refused to permit a recovery against the company. In the opinion in this case the authorities are carefully reviewed, the reasoning is conclusive, and the most satisfactory and exhaustive consideration of this subject we have found in the books is presented.

See, also, *Farwell v. Railroad*, 4 Metc. (Mass.) 49; *Gilman v. Railroad*, 10 Allen, 233; *Railway Co. v. Troesch*, 68 Ill. 545; *Tinney v. Railroad Co.*, 62 Barb. 218; and *McKin. Fel. Serv.* § 138.

But it is said that the conductor whose negligence caused the injury occupied such a position of authority, control, and supervi-

sion that he was a vice principal of the company, for whose derelictions of duty it was responsible, whatever might be the character of the duty he engaged to perform. In support of this proposition are cited *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 988; *Garrahy v. Railroad Co.*, 25 Fed. 258; *Ragsdale v. Railway Co.*, 42 Fed. 383; and *Mase v. Railroad Co.*, 57 Fed. 283.

The first two cases are easily distinguishable from that before us. In the *Ross* Case the engineer on a freight train recovered from the company for the joint negligence of the conductor of his own train and the conductor of a gravel train. The court drew a distinction "between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and supervision" (112 U. S. 390, 5 Sup. Ct. 184), and rested its decision on a ground that has no application to this case, viz. that the person injured was under the direct authority and control of the person whose negligence caused the injury. Moreover, the decision in the *Ross* Case has been so limited and restricted by the subsequent decisions of the supreme court that it cannot now be treated as authority in any case which does not present substantially the same state of facts.

In *Railway Co. v. Callaghan*, *supra*, the plaintiff was not the direct subordinate of the conductor. But he was riding, by direction of the company's superintendent, on a train that was under the entire control and management of the conductor, who directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements; and it was by the negligence of this conductor in discharging his duty of supervision and control over the operation of this train, viz. in driving it too fast, and in failing to stop at proper stations, that he ran it into a defective bridge, and caused the injury.

The opinion in *Mase v. Railroad Co.*, *supra*, rests upon the proposition that the character of the work of a switchman makes him a vice principal,—a proposition that we have already discussed and disapproved.

So far as the cases of *Garrahy v. Railroad Co.*, *supra*, and *Ragsdale v. Railroad Co.*, *supra*, hold that under the general law a conductor or employé on one train, whose negligence causes the injury of an employé of the same master on another train, is not the fellow servant of the latter, it is sufficient to say that they have now been so universally disapproved by repeated decisions of the national courts and by the late decisions of the supreme court that they are no longer authority.

Thus, in *Randall v. Railroad Co.*, 109 U. S. 483, 3 Sup. Ct. 322, which was decided in 1883, the brakeman engaged on one engine was injured while turning the switch for his train, by the negligence of the engineer of another engine, who ran the latter upon him. This engineer had absolute control of his engine and of all

its movements at the time, but he was held to be a fellow servant of the injured brakeman, and the company was declared to be exempt from liability.

In *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, which was decided in 1889, the stewardess of a steam vessel was injured through the negligence of the porter and carpenter of the same vessel. The latter failed to properly secure a railing across the gangway, and the stewardess leaned over it, and fell into the water. The persons composing the ship's company were divided into three departments,—the deck department, the engineer's department, and the steward's department. The carpenter and porter were in the deck department, and the stewardess in the steward's department; but she was held to be a fellow servant of the carpenter and porter, and was denied a recovery against the steamship company.

In *Railroad Co. v. Andrews*, 1 C. C. A. 636, 50 Fed. 728, decided by the circuit court of appeals for the sixth circuit in 1892, a brakeman on one train was held to be the fellow servant of the conductor and engineer of another train, by whose negligence a collision was caused in which the brakeman was killed.

In *Railroad Co. v. Baugh*, 149 U. S. 379, 13 Sup. Ct. 914, decided in 1893, the supreme court held that an engineer who, under the rules of the company, was "regarded as conductor," and who had the direction and control of his engine and of his fireman upon it, was not a vice principal of the company, and that the latter was not liable for an injury to the fireman, caused by the engineer's negligent disregard of his orders.

And, finally, in *Railroad Co. v. Hambly*, 14 Sup. Ct. 983, decided May 26, 1894, the supreme court held that the conductor and engineer of a passenger train who negligently drove their train upon and injured a common laborer, employed under a section foreman in repairing the railroad, were fellow servants of the laborer, and that he could not recover of the company for their negligence.

So far as the national courts are concerned, these authorities conclude the discussion, and establish the proposition that, in the absence of statutory regulation, conductors, as well as other employes, whether they are charged with the duty of handling switches or of driving trains, are, so far as actions against the common master for negligence are concerned, the fellow servants of all other employes engaged in the common object of securing the safe passage of trains; and it conclusively follows that the conductor who left open this switch in the case before us was the fellow servant of the fireman on the train who was carried through it to his death.

But it is said that, if the court erred in its charge upon the subject we have been considering, that error did not prejudice the company, because there was uncontradicted testimony that there was no target on the switch; and the court charged the jury that if the switch was not in proper order because it had no target upon it, and for that reason the injury and death were caused, the company was liable.

This position cannot be successfully maintained. The testimony was such that the jury might well have found that the injury was neither caused nor contributed to by the absence of the target, and that it resulted solely from the negligence of the conductor, who left the switch open. The defendants in error charged two acts of negligence upon this company,—the failure to provide the target; and the failure of the conductor to close the switch. Issues were raised and submitted to the jury to determine whether either of these acts caused or contributed to the injury. The verdict was general, and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *Coal Co. v. Johnson*, 6 C. C. A. 148, 151, 56 Fed. 810; *Maryland v. Baldwin*, 112 U. S. 490, 492, 5 Sup. Ct. 278.

The judgment below must be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

NORTHERN PAC. R. CO. v. MASE.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 383.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS—OPERATION OF RAILROAD TRAINS.

A railroad company is not liable, under the general law, for the injury of an employé on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close, as the conductor and the injured employé are fellow servants. *Railway Co. v. Needham*, 63 Fed. 107, followed.

2. SAME—STATUTORY LIABILITY OF RAILROAD COMPANIES.

Under Comp. St. Mont. 1887, c. 25, § 687, relating to railroad corporations, which makes such a corporation liable to a servant or employé for injury sustained by default or wrongful act of his superior, as if such servant or employé were a passenger, a railroad company is liable for an injury inflicted in Montana, to a fireman in its employment on one train, caused by the negligence of a conductor in its employment on another train in leaving a switch open.

In Error to the Circuit Court of the United States, for the District of Minnesota.

This was an action by Clara Mase, administratrix of Frank B. Mase, deceased, against the Northern Pacific Railroad Company, to recover damages for the death of said Frank B. Mase. A trial by jury was waived, and the case was submitted on an agreed statement of facts. The circuit court rendered judgment for plaintiff. 57 Fed. 283. Defendant brought error.

J. H. Mitchell, Jr. (Tilden R. Selmes, on the brief), for plaintiff in error.

Walter A. Shumaker (W. W. Erwin, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. Is a railroad company liable under the general law for the injury of an employé on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close?

If not, is it liable, under section 697 of the Compiled Statutes of Montana, for an injury to a fireman in its employment on one train, which was inflicted in Montana, and was caused by the negligence of a conductor in its employment on another train in leaving a switch open?

These are the only questions presented by this record. The case was tried by the court below, without a jury, upon an agreed statement of facts and a stipulation to the effect that, if the court was of the opinion that either of these questions should be answered in the affirmative, judgment should be rendered against the plaintiff in error for \$4,000. The circuit court was of the opinion that the first question should be answered in the affirmative, and upon that ground ordered the judgment, to reverse which this writ of error was sued out. *Mase v. Railroad Co.*, 57 Fed. 283.

In our opinion, the conductor of a railroad train, through whose negligence in operating the railroad an employé of the same company on another train is injured, is a fellow servant of the latter, under the general law, and on that account the common master is exempt from liability for an injury caused by his negligence, and the court below should have answered the first question in the negative. Our reasons for this opinion are stated, and some of the authorities that support our conclusions are cited, in *Railway Co. v. Needham* (decided at this term) 63 Fed. 107, and it is useless to repeat them here. We turn to the consideration of the second question.

In the absence of legislative enactments, the liability of a master to one of his employés for the negligence of another is determinable by the general law, and not by the local law, and the decisions of the courts of the state in which the injury is inflicted are not controlling in the national courts. But, whenever this subject is regulated by the statutes of the state in which the injury is inflicted, these become the "rules of decision in trials at common law" in the national courts, under section 721 of the Revised Statutes, and measure the duties and liabilities of the litigants. *Railroad Co. v. Hogan* (decided by this court at this term) 63 Fed. 102; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 185; *Railroad Co. v. Baugh*, 149 U. S. 368, 378, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 14 Sup. Ct. 983; *Hough v. Railroad Co.*, 100 U. S. 213, 226; *Railway Co. v. Prentice*, 147 U. S. 101, 106, 13 Sup. Ct. 261.

This case was tried in the circuit court for the district of Minnesota, but the injury was inflicted in the state of Montana. While

it is true that the statutes of a state have in themselves no extra-territorial force, yet rights acquired under them are always enforced by comity in the state and national courts in other states, unless they are opposed to the public policy or laws of the forum. It is settled by the decisions of the supreme court of the United States and by the decisions of the supreme court of Minnesota that the right to recover in an action of the character of that before us is governed by the *lex loci*, and not by the *lex fori*. *Railroad Co. v. Babcock*, 14 Sup. Ct. 978; *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413; *The Antelope*, 10 Wheat. 66; *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Huntington v. Attrill*, 146 U. S. 670, 13 Sup. Ct. 224.

The result is that the right of recovery in this action, if it exists at all, must rest on the statute of Montana. That statute provides:

"That in every case the liability of the corporation to a servant or employee, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him as if such servant or employee were a passenger." Comp. St. Mont. 1887, c. 25, § 697.

This section is found in a chapter of the general laws of Montana relating to railroad corporations, and it seems to affect the liability of such corporations only. It goes without saying that the purpose of this statute was to extend the liability of railroad companies to their servants for the negligence of servants of a higher grade. It is equally clear that the pronoun "him," in the clause "or to an employee not appointed or controlled by him," refers to the employer's "superior," and that the intention of the legislature was to extend the liability of the companies for the negligence of superior servants for the benefit of two classes of employes, viz. those injured by the default or wrongful act of a superior employé under whose orders they were acting, and those injured by the default or wrongful act of a superior servant who did not appoint and who had no control over them. The statute is inartificially drawn, but its meaning is not doubtful, and its obscurity at once disappears if the clause "or to an employee not appointed or controlled by him" is transposed to its grammatical and logical position in the sentence, and placed before the verb. Then the statute would read:

"That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, or to an employee not appointed or controlled by him, shall be the same in case of injury sustained by default or wrongful act of his superior, as if such servant or employee were a passenger."

Now, the conductor whose negligence in leaving the switch open caused the death of a fireman on another train, in this case, was the superior of that fireman in the employment of the same master. His rank or grade in the service was higher. The fireman, it is true, was not acting under his orders, and was not one of the first class protected by the statute, but he was an employé "not appointed or controlled" by this superior, whose default caused his injury,

and he was clearly one of the second class to whom a right of action for such a default was given by this statute. The effect of the statute is to give a cause of action against the railroad company to every servant who is himself without fault, for the default or wrongful act of any superior servant, whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury. This was the construction given to this statute by Judge Shiras, of the northern district of Iowa, upon the circuit, and we have no doubt of its correctness. *Ragsdale v. Railroad Co.*, 42 Fed. 383, 386.

That the railroad company would have been liable for any injury resulting to a passenger on the train that ran through the open switch, from the negligence of the conductor who left it open, admits of no discussion. It follows that, under this statute and the stipulation in this case, the railroad company was liable to the defendant in error to the same extent for the injury to the deceased fireman that it would have been to a passenger, and on this ground the judgment must be affirmed. It is so ordered.

CITIZENS' BANK OF WICHITA v. FARWELL et al.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 408.

1. GARNISHMENT—PRIORITY—FRAUDULENT CONVEYANCE.

Under Gen. St. Kan. § 4296, authorizing the garnishment of property held under a conveyance void as to creditors, the fact that after the garnishment of such property by a creditor, another creditor, on behalf of himself and other creditors, has commenced a suit to set aside the conveyance, and for an accounting by the garnishee, does not affect the right of the former under his prior garnishment.

2. SAME—SUFFICIENCY OF FINDINGS.

In garnishment, findings by the court, a jury being waived, that the garnishee took possession of certain property under a mortgage void as to the creditors of the mortgagor, and purchased the same at the sale thereunder, and converted it to his own use, and that its value was a certain amount, are sufficient to sustain a judgment against the garnishee for any amount less than the value so found.

3. WRIT OF ERROR—REVIEW OF FINDINGS.

Under Rev. St. § 1011, providing that there shall be no reversal on a writ of error for any error in fact, the sufficiency of the evidence to sustain the findings of the court can only be presented for review by a request for a peremptory holding that on the undisputed facts the finding must be otherwise.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by J. V. Farwell & Co. against the Kansas Furniture Company and garnishee, the Citizens' Bank of Wichita. For former reports, see 6 C. C. A. 24, 30, 56 Fed. 539, 570.

W. E. Stanley, for plaintiff in error.

Edwin W. Moore and Charles H. Brooks, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. On November 28, 1890, J. V. Farwell & Co., the defendants in error, brought an action in the court below against the Kansas Furniture Company, a corporation, and garnished the Citizens' Bank of Wichita, Kan., the plaintiff in error, under sections 4283 to 4296, inclusive, of the General Statutes of Kansas of 1889. March 5, 1891, they recovered a judgment against the furniture company.

Section 4296 of the statutes of Kansas provides that:

"From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession or under his control, belonging to the defendant or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects held by a conveyance or title, void as to the creditors of the defendant, shall be embraced in such liability."

Issue was joined between the defendants in error and the bank upon the question whether or not the latter had any property in its possession or under its control belonging to the furniture company, or in which it was interested; but the real issue was whether or not the bank held any property by any conveyances void as to creditors of the furniture company under this section. A jury was waived, and an agreed statement of a part, but of a part only, of the facts was made, and there was other evidence presented to the trial court, which is not contained in the record before us. The court made a special finding of facts, and upon it rendered judgment against the bank. But one exception was taken to any ruling of the court in the trial of the case. That ruling was that the fact that in February, 1893, another creditor of the furniture company had brought a suit in equity against the bank for himself and all other creditors who saw fit to join with him, and had exhibited a bill for an accounting concerning, and a recovery of, the same property the defendant in error sought to reach by its garnishment, was not competent or material to the issue in this case. The garnishment was made November 28, 1890. The suit in equity was commenced February 2, 1893, and the defendants in error were not parties to that suit. The fact that another creditor had subsequently brought a suit against the bank on account of the same property or liability that Farwell & Co. sought to charge in this action certainly could not affect their right to it under their prior garnishment. The statements contained in the bill were, as against Farwell & Co., nothing but hearsay. The ruling was right.

The only other question this record presents is whether, in any view, the facts found in the special finding are sufficient to support the judgment. Nor is this a fairly debatable question. The finding covers 11 pages of the printed record, and carefully sets forth the results of an accounting, and the facts relative to transactions between the bank and the furniture company, which extend over 22 months. It would serve no useful purpose to review these

facts in detail. Among other things, the court distinctly finds that on October 20, 1890, the bank took joint possession, with one Mrs. Martin, of a stock of goods of the furniture company, under two mortgages made by the latter company to them respectively, which were without any consideration, and void as to the creditors of the furniture company; that on November 24, 1890, the bank purchased at public auction under these mortgages that part of the mortgaged stock which then remained unsold, and converted it to its own use; and that the value of that remaining stock was then \$12,000. The judgment against the bank was for \$11,540. This finding alone is sufficient to warrant the judgment. Moreover, we have carefully examined the finding in detail, and it shows that, if no charge is made against the bank or Mrs. Martin for the accounts uncollected August 10, 1890, concerning which counsel for the plaintiff in error chiefly complains, still there could have been nothing due on these mortgages on November 24, 1890, when the bank went through the form of purchasing the mortgaged property of itself and Mrs. Martin under the mortgages. In any view, the finding well sustains the judgment.

The other questions discussed in the briefs we are unable to reach upon the record as it is presented. This court cannot review the weight of the evidence. The agreed statement of facts in this record does not contain the statement of all the material facts on which the case was submitted. The evidence that supplemented it is not before us, so that the case cannot be treated as one submitted upon an agreed statement. The court below made its finding upon the statement and the evidence, and it must stand. Section 1011, Rev. St., which governs this court in this matter, provides that "there shall be no reversal in the supreme court or in a circuit court upon a writ of error * * * for any error in fact." No requests for any declarations of law were made to the court before the trial closed, and that court made no such declarations. No request for any declaration or holding that the evidence was insufficient to sustain a finding or judgment in favor of the defendants in error was made, and none that the court should make any other finding than that it actually did make upon any of the specific questions submitted to it. The result is that none of these questions can be considered. On a writ of error only those questions of law which were presented to and ruled upon in the court below in the trial of the case are subject to review in this court. The finding of the court, whether general or special, performs the office of the verdict of a jury. When it is made and filed, the trial is ended. Even the question whether or not the evidence is sufficient to sustain the finding can only be presented by a request for a peremptory holding that upon the undisputed facts the finding must be otherwise. Rev. St. § 700; *Adkins v. Sloane*, 8 C. C. A. 656, 60 Fed. 344; *Id.*, 61 Fed. 791; *Trust Co. v. Wood*, 8 C. C. A. 658, 60 Fed. 346; *National Bank of Commerce v. First Nat. Bank*, 61 Fed. 809; *Walker v. Miller*, 8 C. C. A. 331, 59 Fed. 869; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752; *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; *Norris v. Jackson*, 9 Wall. 125, 127; *Insurance Co.*

v. Folsom, 18 Wall. 237, 249; Cooper v. Omohundro, 19 Wall. 65, 69; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

The judgment below must be affirmed, with costs, and it is so ordered.

THOMSON ELECTRIC WELDING CO. v. TWO RIVERS MANUF'G
CO. et al.

(Circuit Court, E. D. Wisconsin. September 7, 1894.)

1. PATENTS — PRELIMINARY INJUNCTION — PUBLIC ACQUIESCENCE — ELECTRIC WELDING.

Where a new art and apparatus, such as that of electric welding, is widely accepted by the scientific world and the public generally as novel and important, and is speedily put in operation, and the machines and rights under the patent are eagerly sought for by manufacturers, thus supplanting to a large extent the older methods,—all with no question as to the validity of the patent, except in the case of the defendant,—this is sufficient evidence of acquiescence to justify the issuance of a preliminary injunction, unless defendant can clearly show that the patent is invalid.

2. SAME.

The Thomson patents, Nos. 347,140 and 347,141, for inventions relating to the art of electric welding, *held* valid and infringed, on motion for preliminary injunction, and injunction granted.

This was a bill in equity by the Thomson Electric Welding Company against the Two Rivers Manufacturing Company and others for infringement of certain patents for electric welding. Complainant moved for a preliminary injunction.

Isham, Lincoln & Beale and Fish, Richardson & Storrow, for complainant.

Miller, Noyes & Miller, for defendants.

SEAMAN, District Judge. This hearing is on an order to show cause why preliminary injunction should not issue to restrain defendants from infringing letters patent granted to Elihu Thomson, and owned by complainant, as follows: No. 347,140, issued August 10, 1886, relating to the art of electric welding, alleged to have been invented by the patentee, and apparatus used therein; No. 347,141, dated August 10, 1886; and No. 385,022, dated June 26, 1888,—each for apparatus employed in carrying out this alleged new art. It is conceded by defendants that they have had ample time to present, and that they have probably shown here, all the defense they can make by affidavits and proof of the prior art. The complainant objects to the reception of two affidavits,—one by George A. Johnson, and one by Leo Daft,—because they were brought in shortly before the hearing, and long after the time stipulated for closing their proofs; but the delay seems to have been excusable, and left opportunity (which was well improved by complainant) for rebutting affidavits. There being no request for further time to meet them, I deem it proper to let in these affidavits under the circumstances, and they are therefore taken into consideration for the purposes of the motion.

Since the argument, in which the points upon each side were well and clearly presented, I have taken such time as I could spare to consideration of the record and briefs, and have read with care all that has been introduced upon the part of the defense, and the impressions which came to me from the argument have not been changed. The invention is employed by the defendants in welding hoops for pails and tubs, and the infringement is unquestioned, and, upon the conceded facts, is deliberate and flagrant, if the patents are valid. All defense rests upon the ground of anticipation or want of invention in the patents. This issue is frankly and squarely presented upon the part of the defendants, and I do not find any denial of complainant's showing that the patents were of great utility; that the alleged new art and apparatus were received and recognized by the world at large, and by electricians and scientists, as novel and important, and the process immediately entered into wide use, and revolutionized the methods of welding metals, especially where different metals were to be welded together; that manufacturers throughout the country have acquiesced in the validity of the patents continuously since their issue; that the great list of those who have operated under them embraces some of the largest in the country, reaches into all the manufacturing states, and there are apparently no contestants other than these defendants; that the defendants entered upon infringement after this general acquiescence and recognition, and after obtaining full information from complainant of the process and apparatus, and after refusal to accept license upon terms accorded to other licensees, which appear reasonable on their face, and are not attacked as unreasonable; that the equities of complainant entitle it to an injunction pendente lite, for protection of its rights and business with licensees, if the patents are valid, or are to be considered valid for the purposes of this motion; that the issuance of an injunction would not close the works of defendants, but would simply turn them back to their former method of welding hoops for their manufactured wares. It is an established rule, for this circuit at least, that the injunctive powers of the court should not be exercised pendente lite against infringement of letters patent without some prior final adjudication of the validity of the patent, or "such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence." *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718; *Electric Manuf'g Co. v. Edison Electric Light Co.*, 61 Fed. 834. There has been no adjudication of the validity of these patents, and, so far as appears, no opportunity has arisen heretofore for testing their validity. Has there been public acquiescence in the claims here asserted, of sufficient definiteness and duration to afford presumption of validity? This inquiry must depend in each case upon all the circumstances shown. Here was clearly an assertion of a new art and apparatus for welding. Its discovery was widely published and accepted by the scientific world, in Europe and America, and by the public generally, as novel and important. It was speedily put into operation by the complainant, and its machines, and

rights for their use, were at once sought by manufacturers and metal workers; and it is unquestioned that the process had extended to an important share of the welding of metals throughout the country when the defendants entered upon its use. With an asserted invention of this character and utility, and operation under it firmly established since 1888, and to a considerable extent supplanting the older methods, I am satisfied that there is a sufficient showing of public acquiescence, and that "there arises such presumption of the validity of the patent as to entitle them to a preliminary injunction to restrain its infringement, unless the party sought to be restrained can clearly show its invalidity." *Blount v. Société Anonyme*, 3 C. C. A. 455, 53 Fed. 98; *Sargent v. Seagrave*, 2 Curt. 553, Fed. Cas. No. 12,365; *Sessions v. Gould*, 49 Fed. 855; 3 Rob. Pat. §§ 1185-1188.

The remaining question is whether the defense have given a clear and convincing showing (1) that the invention was merely the double use or analogous use in the art of a process previously known; or (2) that it was fully disclosed in previous publications or patents, and actually practiced, as a welding operation, prior to these patents, which should be held to overcome these presumptions, and the re-enforcing affidavits produced by complainants. Great research and ingenuity appear in this defense, but I am constrained to the opinion that neither proposition is maintained, to the degree required for preventing an injunction, and that their determination must be postponed to final hearing. They present the story frequently interposed against valuable patents, of laboratory experiments, of announcements, and of patents which may have come to the verge of this discovery; but the demonstrations are not clear, and the important fact stands in their way that they do not appear to have accomplished the electric weld which is shown by Thomson. The employment of heat and pressure for the operation of welding metals is old, and it was long known that heat could be obtained by the application of an electric current. These were not Thomson's discoveries; but he found a method for employing the electric current, localizing the heat at the joint to be welded, and applying simultaneously the requisite pressure, so that the separate pieces of metal could be properly united. I am not satisfied, for the purposes of this motion, that he was anticipated in this by Despritz, Joule, Plante, Cruto, or any of the patents shown, or by any experiments of Daft or Johnson. In this view the complainant is entitled to an injunction pendente lite against infringement of letters patent Nos. 347,140 and 347,141, and injunction will issue thereupon. With reference to letters patent No. 385,022, all determination will be postponed to final hearing.

PAYNTER et al. v. DEVLIN et al.

(Circuit Court, E. D. Pennsylvania. May 22, 1894.)

1. PATENTS—NOVELTY AND INVENTION—STEAM-PIPE UNIONS.

In the construction of steam-pipe "unions," the substitution, for members having flat, hard-metal, ground surfaces, or unground surfaces

adapted to be used with rubber or leather gaskets, of members having concave and convex abutting surfaces, one of hard metal and one of soft, forming, in effect, a ball and socket joint not dependent for perfect contact on the accurate alignment of the pipes, constitutes patentable novelty and invention.

2. SAME—INFRINGEMENT.

The Paynter patent, No. 367,725, for a "union" for steam pipes, held valid and infringed.

This was a bill in equity by Edward P. Paynter and John K. Moore against Thomas Devlin and others, trading as Thomas Devlin & Co., for infringement of a patent. On final hearing,

Connolly Bros., for complainants.

Hector T. Fenton, for defendants.

BUTLER, District Judge. The suit is for infringement of claim 1 of letters patent issued to E. P. Paynter, Jr., for steam-pipe "unions," numbered 367,725, dated August, 1887.

The claim reads as follows:

"A union for steam pipes, comprising a threaded ring or nut, a member having a seat of soft metal with a concave face, and an opposite member with a rounded or convex end, substantially as shown and described."

The validity of the patent and the charge of infringement are denied.

The plaintiffs' expert, Mr. Brown, has described the state of the art, and the invention claimed, so satisfactorily, that we will adopt what he has said on this subject:

"The invention of the patent in suit relates to what is known in the art as a 'union' for pipes. The purpose of a union is to join together the adjacent ends of two pipes through which steam, water or other gases or liquids are to traverse. The purpose of the union, besides joining together the ends of the pipes, is also to render the joint gas and liquid tight under all contingencies. The union upon which the invention of the patent in suit is an improvement consists of three parts, as follows: First, a head member, which is constructed to be screwed upon or otherwise attached to the end of one pipe; second, a tail member, which is constructed to be screwed or otherwise attached to the second pipe; and, third, a ring or nut which fastens the tail and head members together. This fastening ring or nut is slipped over either the tail member or the pipe to which said tail member is secured, and it joins the two members together by screwing upon the head member and drawing the two members tightly together by means of a flange forming part of the ring or nut which abuts against a flange of the tail member. When the tail and head members are thus drawn together by means of the fastening ring or nut, their respective ends are brought into contact with each other, and the perfectness and tightness of this contact determines the character of the joint thus made. If this contact is entirely perfect throughout its entire extent, then the joint would under ordinary circumstances be gas and liquid tight, so that no leakage would occur. An imperfection in the perfectness of the contact, however, would result in leakage. The utility, therefore, of a union of this character depends upon the character of the joint which is formed between the abutting ends of the head and tail members. Unions of this character are not intended to be permanent coupling devices between the pipes which they connect, but they are employed in cases where it may be from time to time necessary or desirable to disconnect the pipes which the union joins. Consequently, if the union is to possess merchantable utility, it must be one which will not only make a gas and liquid tight joint when put together for the first time, but it must also maintain the perfectness of the joint when repeatedly fastened and unfastened.

Obviously this renders the maintenance of a perfectly tight joint a matter of difficulty as well as of importance. Prior to the date of the patent in suit a large number of expedients had been devised for the purpose of maintaining a gas and liquid joint in union. As far as I am aware, however, only two of these expedients have met with any general acceptance and adoption, and in order to explain the improvement introduced by the patent in suit it will be sufficient, I believe, to refer to these two widely adopted expedients.

"The first of these expedients to which I shall refer was to make the abutting ends of the two members of the union of hard metal and to grind them to exact trueness, so that when the two members were forced into contact their two abutting faces should exactly fit together. Several serious objections, however, exist in a union thus made. In the first place, it is a matter of considerable difficulty and one requiring considerable skill to thus grind the two abutting faces so that they shall fit with exact trueness. As a consequence a union thus made is expensive. Practically, also, it is impossible to secure the exact longitudinal axial alignment of the two pipes which are joined together. Ordinary pipes, such as are usually employed for the conveyance of gases and liquids, are roughly and economically made, so that they are rarely perfectly straight, and as the result the longitudinal axial alignment of two such pipes is difficult to secure. The result is that when the tail and head members of the union are placed upon the adjacent ends of two pipes, they are rarely exactly opposite to each other with their adjacent faces exactly parallel. The result is that when the two members of the union are brought tightly together by the action of the fastening ring or nut, contact is not made throughout the entire extent of the abutting faces of the two members of the union. The result is that one of two things usually happens; either a perfectly gas and liquid tight joint is not secured, or if it is secured, for the time being it is only done so by the partial indentation of the face of one member of the union into the face of the other member of the union at the place where the two members of the union first come into contact. The result of this indentation destroys the further utility of the union if the pipes are disconnected and it is sought to again use the union, since it is practically impossible to insure the two members so coming together again the second time under the precise conditions which existed when they were first brought together and so that the imperfection caused in the face of one member shall exactly coincide with the corresponding imperfection in the opposing member. In this connection, also, attention may be called to the fact that it is the usual practice of those who put up pipes to first place the pipes in position, and to then apply the union. In order to thus apply the union it is necessary to spring in succession the adjacent ends of the two pipes out of alignment in order to secure the members of the union to the ends of the pipes, and this springing the ends of the pipes out of alignment adds to the practical difficulty of securing the exact longitudinal axial alignment of the two pipes when the two members of the union are forced together by the fastening ring or nut. I might also add at this point that the fastening ring or nut fits loosely over the tail member of the union, so that it is possible to screw the same tightly upon the head member of the union without bringing the abutting faces of the two members of the union into contact throughout their entire extent, so that where ground faces are relied upon to render the joint tight the application of very great force to the fastening nut or ring is frequently necessary.

"In order to avoid and overcome the objections to ground faces which I have mentioned, the second expedient to which I have alluded has been resorted to. This second expedient consists in interposing between the abutting faces of the two members of the union, washers or gaskets of rubber, leather or fibrous material. Such washers or gaskets compensate for irregularities which may exist upon the abutting faces of the two members of the union, and also for variations from exact alignment of the pipes. New difficulties, however, result from the employment of such washers or gaskets. In the first place, the presence of a washer or gasket in a union doubles the number of joints to be kept tight. Instead of there being only one joint between the abutting faces of the two members of the union there are two joints introduced; that is to say, one between the annular washer and the tail member,

and a second joint between the annular washer and the head member of the union. In the next place, frequent fastening and unfastening of the union results in destroying the elasticity of the washer or gasket, and rendering it hard and incapable of conforming to irregularities in the abutting faces of the members of the union, the result of which is a leaky joint. In the next place, if a washer is employed having rubber in its composition the heat of the steam, if steam is passed through the pipes, destroys the integrity of the washer. In the next place, such washers or gaskets deteriorate rapidly under the action of the liquids or gases which traverse the pipes. This is particularly the case in some instances, as, for example, where ammonia gas or an ammoniacal liquid traverses the pipes. And, again, since these washers or gaskets are necessarily elastic, they are frequently expanded inwardly by the compression which they undergo so as to partially obstruct or throttle the internal passage through the union, thus interfering with the proper passage of the liquid gases.

"The improvement introduced by the patent in suit is designed to overcome all of the difficulties which I have alluded to, and in my opinion the patented improvements are exceedingly effective in accomplishing their objects. The union of the patent in suit comprises, as is usual, head and tail members, and a fastening ring or nut. On referring to the drawing of the patent in suit, it will be seen that the head member is lettered A, the tail is lettered C, and the fastening ring or nut is lettered B. The improvement consists in the relative construction of the abutting faces of the two members of the union in a union of this character. One of the members of the union has its abutting end made convex, and the other member has its corresponding abutting face made concave, so that when these two abutting ends are brought together a joint analogous to a ball and socket joint is produced. As the result of this construction the abutting faces of the two members are brought exactly together, even if the two pipes to which they are attached are not in alignment. Also the abutting face of one member of the union is made of soft metal, while the abutting face of the other member of the union is of hard metal. As the result of the employment of soft metal for one face of one member, when the two members are brought together the soft metal yields sufficiently to accommodate itself to any irregularity which may exist in the abutting face of the opposing member. The soft metal which is employed may be lead or any of the well-known soft alloys, which are usually composed of lead, tin and antimony. The hard metal constituting the opposing face is conveniently and usually the metal of which the union is composed, such as malleable iron, which is the material commonly employed. The soft metal which is employed may be regarded as taking the place of the old annular gasket or washer, but it has conspicuous and marked advantages over such gaskets or washers. In the first place, this soft metal face can be permanently secured to one member of the union so that it is always in place when needed, and so that no joint susceptible of possible leakage is formed between it and the member to which it is secured.

"Again, the soft metal does not deteriorate under the action of such liquids or gases which are conveyed through the pipes. And still, again, it is always ready to accommodate itself to irregularities in the face of the opposing member, irrespective of any variation in the position thereof.

"In the particular embodiment of the invention which is illustrated in the patent in suit, the head member of the union, which in the patent is called the female member and is lettered A, is the member which is provided with a concave abutting face, and this concave face is furnished with or formed of the soft metal which is lettered D. And the tail member of the union, which is called in the patent the male member and is lettered C, is provided with the convex end or abutting face, which is of hard metal."

The proceedings in the patent office show that the letters were granted after a careful examination of the state of the art, in which nearly everything urged here was considered. Without entering upon a discussion of the subject, it is sufficient to say that we have not found anything which repels the presumption arising from these proceedings.

The device is very popular and has largely displaced all others previously in use. Its utility is not questioned; nor is its novelty denied, except in a patentable sense. The novelty consists in the spherical form of the connecting parts which make the joint, and the arrangement of the hard and soft metals; principally in the former, which renders the device especially adaptable to pipes out of axial alignment, and to repeated use. In our judgment it shows invention, and was justly entitled to a patent.

The defendants' manufacture, complained of, is not materially different. It is a combination of the same elements, for the same use, and accomplishes the same result. It shows immaterial mechanical differences, but nothing more. As we have seen, the plaintiffs' consists of a head piece with convex exterior surface of hard metal, a tail piece with interior concave surface of soft metal, and a coupling nut. The defendants' has a head piece with convex face of soft metal, and a tail piece with concave face of hard metal, and the coupling nut. The only difference consists in a slight transposition of parts, and is immaterial in any possible construction of the claim.

The defendants' effort to justify their conduct under a subsequent patent, which they own, is unavailing; and would be if their manufacture was covered by this patent. But we think it is not so covered, that the patent describes and claims an essentially different device.

Let a decree be prepared in favor of the complainants accordingly.

MAITLAND v. GIBSON.

(Circuit Court, E. D. Pennsylvania. June 19, 1894.)

1. PATENTS—COMBINATION—ELECTRIC-LIGHT FIXTURES.

In view of the prior state of the art, there is no invention in a combination comprising an electric-light fixture supported from the piping of a house, and electrically insulated therefrom by an insulating joint.

2. SAME.

The Stieringer patent, No. 259,235, for an "electrical fixture," held to be without patentable combination, as respects claims 1, 7, 8, and 9.

3. SAME—MECHANICAL UNION OF PARTS.

The Stieringer patent, No. 294,697, for a combined gas and electric light fixture, held void as to claims 1, 2, 8, and 9, as showing a mere mechanical union of parts, without patentable combination.

This was a bill in equity by George Maitland against Alfred C. Gibson for infringement of certain patents for electric-light fixtures. On final hearing.

Dyer & Seeley and D. H. Driscoll, for complainant.
Hector T. Fenton, for defendant.

DALLAS, Circuit Judge. This bill charges the defendant with infringement of two patents granted to Luther Stieringer,—No. 259,235, dated June 6, 1882, for "electrical fixture," and No. 294,697, dated March 4, 1884, for "combined gas and electric light fixture."

Of No. 259,235, the claims involved are as follows:

"(1) A fixture for electric lights, supported from the piping of a house, and electrically insulated therefrom, substantially as set forth." "(7) In an electric-light fixture supported from the piping, the combination of an open and insulating joint connecting the fixture and pipe support, and an ornamental shell hiding said joint from sight, substantially as set forth. (8) In an electric-light fixture, the combination, with the main stem or arm and the distributing body carrying the lamp arms, of an open section, out through the sides of which the wires are passed from the stem, or from both the stem and the body, and a central support from such open section for sustaining ornamental or other parts, substantially as described. (9) In an electric-light fixture, the combination, with the main stem or arm and the distributing body, of the open section, outside of which the main and arm wires are connected, the central support from such open section for ornamental or other parts, and an ornamental shell hiding such connections, substantially as set forth."

The first of these claims, as expressed, comprises these three elements: A fixture for electric lights; the piping of a house; and means for electrically insulating the fixture from the piping. The language used in designating the last of these elements is, if literally accepted, inclusive of every kind of insulating device, but it is impossible to accord to the claim any such unlimited scope. The patentee, in his specification, fully and particularly described a particular insulating joint, and to it, I think, he must be restricted. He, of course, could not have intended to broadly assert that he was the first to discover or contrive that two conductive bodies might be mechanically united, and yet be electrically separated, nor is anything so preposterous now contended on his behalf. The position relied upon is that, regardless of lack of novelty of its elements, separately considered, this claim should be construed and supported as for a new combination, viz. of the fixture, of the pipe, and of any joint insulating the former from the latter. But this position is untenable, in view of the prior state of the art, and of the common knowledge of those who were conversant with it before this patent was applied for. The utmost which it can plausibly be contended that Stieringer did, which had not been precisely done before,—and the assumption of this, except for the argument's sake, the Ferryboat Exhibit repels,—was to insert an insulating joint between the piping of a house and a fixture for electric lights. This is the essence of his asserted combination. But similar insulation in analogous situations had been extensively practiced before, and apart from his peculiar joint, which it may be conceded was new, I am unable to perceive that his alleged invention amounts to anything more than electrically parting, while physically connecting, two pieces of metal, by a use of the familiar expedient of insulation, which might well be termed a double one but for the fact that the word "double" would not indicate the frequency of its previous employment. The learned counsel of the complainant insists that, to maintain this view of the first claim, it is necessary to hold "that insulation cannot be combined in a patentably novel combination," but I cannot agree with them. Such an organism may readily be conceived, in which insulation would figure as a potential and essential feature, but the plaintiff's arrangement is not

such an one. He found the gas or other grounded piping ready to his hand, and to this he attached a fixture, in which, in my opinion, there was nothing patentably novel. But such an attachment had often been made before, and therefore, if this was all he had done, it would scarcely be pretended that he had made any contribution to the art. Now, however, he perceived (evolved the "idea," it is said) that unless the fixture should be insulated from the pipe there would be liability to accidental electrical communication between them, and consequent hazard, and that to avert this danger an insulating joint should be inserted at the point of their union. Granting, for the immediate purpose, that he was the first to do this precise thing, can it be reasonably said that in doing it a new combination was created, of which the piping, the fixture, and the insulating piece were the elements? I think not. As well might the like claim be made in every other instance where it may be desired to bar the passage of electricity by resorting to the usual expedient of insulation; for, as is admitted, the fact that the complainant's joint is intended to act only in emergencies, and not to be constantly operative, is not material. But the patent laws do not countenance such claims. The design of those laws, as was said by Mr. Justice Bradley in *Atlantic Works v. Brady*, 107 U. S. 200, 2 Sup. Ct. 225, "is to reward those who make some substantial discovery or invention, which adds to our knowledge, and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device—every shadow of a shade of an idea—which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers, who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens, and unknown liabilities to lawsuits, and vexatious accountings for profits made in good faith." This emphatic language is, in my opinion, clearly pertinent to the present case as I have endeavored to present it. But the proofs go even further, the construction and arrangement shown by what is known in the case as the "Ferryboat Exhibit" being, as it appears to me, absolutely in conflict with the claim under discussion, as it is construed by the complainant. Whether or not he has established an earlier date of invention for his joint alone need not be considered. As has already been said, his title to the specific joint may be admitted; but when he seeks protection for a combination, irrespective of the kind of joint comprised in it, it is not enough for him to show that his peculiar joint was invented prior to the conflicting use: he should show an earlier date for the combination alleged, and this he has utterly failed to do.

Claims 7, 8, and 9 of patent No. 259,235 are subsidiary, and,

in view of what has been said with especial reference to the first claim, may be briefly treated. By the seventh there is claimed an open and insulating joint, in combination with an ornamental shell hiding the joint from sight. But the defendant does not use the plaintiff's joint. An ornamental shell for covering an unsightly connection was not new, and the mere aggregation of these parts, in a manner not novel, and plainly obvious to a skilled workman, certainly does not constitute a patentable combination. The claim which has just been referred to (the seventh) relates to the upper portion of the fixture; the eighth and ninth to its lower end. The ninth differs from the eighth only in that it adds to the eighth an ornamental shell to hide certain connections. Both are combination claims, and each of them is subject to the same objections as the seventh. The elements are not new. The union proposed is but aggregation, not combination, and nothing is suggested with respect thereto which would not naturally have occurred to any one familiar with electric-light fixtures, and with the kindred gas-fixture art. The only possible novelty is not in the combination claimed,—upon which, of course, these claims must stand or fall,—but in the single feature, common to both, of an open-section distributing body; and as to this it is sufficient to say that the defendant does not use the plaintiff's construction.

Of patent No. 294,697, the claims which it is alleged the defendant has infringed are as follows:

"(1) A combined gas and electric light fixture, having separate arms for the electric lamps, and provided with wires passing to such arms, concealed by the ornamental covering of the gas pipe, and with wires extending through the electric-lamp arms, and connected with the main wires within the said ornamental covering, whereby the wiring is wholly concealed, substantially as set forth. (2) In a combined gas and electric light fixture, the combination of separate arms for the gas burners and electric lamps with the central supporting gas pipe stem or arm, the ornamental sleeve covering such central stem or arm, the conducting wires passing to the electric-lamp arms within such ornamental sleeve, and wires passing through such electric-lamp arms, and connected with the main wires within the ornamental covering of the fixture, substantially as set forth." "(8) In a combined gas and electric light fixture, made as a single structure, the combination of a central pipe for supplying the gas, surrounded by an ornamental covering sleeve, a canopy or shell adjustably secured upon the upper or inner end of said covering sleeve, and wires for supplying the electric current, located in the space between the pipe and ornamental covering sleeve, and entering such covering sleeve within the canopy or shell, substantially as set forth. (9) In a combined gas and electric light fixture made as a single structure, the combination of a central pipe for supplying the gas, surrounded by an ornamental covering sleeve, an insulating joint introduced in said pipe above the ornamental covering sleeve, and wires for supplying the electric current entering said covering sleeve below said insulating joint, substantially as set forth."

It is not necessary to further extend this opinion by dealing with these claims in detail. In his earlier patent, Stieringer had proposed "to use in electric-light fixtures the forms of construction heretofore employed for gas fixtures;" in other words, to convert gas fixtures into electric-light fixtures. In this later patent his purpose was to adapt the old gas fixture for use both in gas lighting and in electric lighting,—to make of it a combined fixture. It was not requisite, in the first patent, to provide or retain any means

for the passage of gas; but in the second it was essential that there should be provision for conducting gas, as well as electricity, to the respective burners or lamps. This difference in requirement made it necessary, of course, that the details of the combined fixture should differ somewhat from those of the fixture for electric lighting only. But the changes and additions which were consequently made were structural in character, and in view of the state of the art, including the patentee's prior patent, did not involve invention. The wires were placed between the main pipe of the fixture and its already existing ornamental cover, instead of within the pipe itself; a screw to hold the canopy in place, but admitting of its being moved up and down upon the pipe covering, was provided; arms for the electric lamps were added, through which wires connected with the main wires were extended; and the added arms were fastened to the gas body, just as the old gas arms were, except that any opening from the wire conduit into the gas body was avoided by simply closing the end of the pipe, and placing the opening for the admission of the wires outside of that body. This appears to me to be all that can be claimed to be covered by the second patent, so far as it is alleged that the defendant has infringed it, which was not distinctly disclosed in the first one; and careful consideration of this record, and of the arguments of counsel, has irresistibly brought my mind to the conclusion that what is here claimed to constitute invention entitled to protection under the second patent amounts to nothing more than the mechanical union—not combination—of the electric fixture of Stieringer's first patent, and others shown in the proofs, with an ordinary gas fixture.

The bill is dismissed, with costs.

THE WILLAMETTE VALLEY.

CHANDLER v. THE WILLAMETTE VALLEY.

(District Court, N. D. California. August 7, 1894.)

No. 10,862.

1. ADMIRALTY—SUIT IN REM AGAINST VESSEL IN CUSTODY OF RECEIVER—SALE PENDENTE LITE.

The sale, pendente lite, under admiralty rules 10 and 11, of a ship which is deteriorating in the hands of the marshal, will not be denied because the question at issue is the propriety of entertaining an action in rem against the vessel while in the hands of a receiver appointed by the court of another state, which question the receiver intends to have determined in the appellate court.

2. SAME—DETERIORATION.

Where the claimant refuses to make deposit or give stipulation for the vessel's release, and it appears that her machinery is rusting, her wood-work drying and cracking, and every part showing general deterioration and decay, a sale will be ordered, although it appears that a final determination on appeal may be had within six months.

This was a libel by R. D. Chandler against the steamship Willamette Valley, of which Charles Clark, receiver of the Oregon

Pacific Railway, was claimant. Libelant petitioned for a sale of the ship, pendente lite, on the ground of expense and deterioration in the hands of the marshal.

Andros & Frank, for libelant R. D. Chandler.
Page, Eells & Wheeler, for claimant.

MORROW, District Judge. The petition sets forth that the libelant filed his libel herein December 19, 1893; that the vessel was then taken into the custody of the United States marshal; that on December 30, 1893, the Oregon Pacific Railroad Company filed its claim to said vessel; that the petitioner is informed and believes that, upon the entry of a decree in his favor in the above-entitled cause, the claimant intends to and will enter an appeal from said decree to the supreme court of the United States, and that, as the petitioner is informed and believes, such appeal cannot be heard and determined in said court until the lapse of a long time, to wit, two years or thereabouts; that, if said vessel be retained in the custody of the marshal for such length of time, the said parties will be put to great additional expense for such care and custody; and that said vessel will have become greatly injured, decayed, and depreciated in value. The petition is accompanied by affidavits showing that the machinery of the vessel is rusting, and the woodwork drying and cracking, and that she is showing general decay and deterioration in every part.

A decree in favor of the libelant was directed to be entered in this court, June 22, 1894. The question in controversy in the case was the propriety of this court entertaining an action in rem against the vessel while she was in the hands of a receiver appointed by the court of another state. It was my opinion that this court had such right, and counsel for the receiver proposes to have this question determined by the appellate court, claiming that the circuit court of appeals has jurisdiction to determine the question, and that it will be so determined in a few months. It appears that, pending the appeal, costs will accrue for the care and custody of the vessel, and, as stated in the affidavits, she will suffer decay and deterioration in value. Rules 10 and 11 of the general admiralty rules provide that in all cases where any ship has been arrested, and the claimant declines to make application to have the vessel delivered to him upon depositing the appraised value in court, or upon giving a stipulation for value, the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of the ship, and the proceeds thereof to be brought into court, or otherwise disposed of, as it may deem most for the benefit of all concerned. In rule 10, good cause for the sale of goods or other things would be a showing that the property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the suit. The receiver represents that he is not in a position to deposit the appraised value of the vessel in court, or give a stipulation for such value, and he objects to the sale of the vessel at this time, on the ground that the question at

issue in the case is one of jurisdiction as to the right of this court to entertain proceedings against the vessel; and this question, he contends, would be an infirmity that would enter into and affect the order of sale. I do not understand, however, that the question is really one of jurisdiction. It is a question of comity whether, under the circumstances of the case, this court ought to entertain an action in rem against the vessel while she is in the hands of a receiver appointed by the court of another state. Now, if a sale of the vessel is necessary to save her value, and prevent the accumulation of costs, pending the determination of this question, I do not see how an order of sale can be refused by this court because the appellate court may determine this question adversely. Indeed, I do not see how an order of sale, otherwise proper, could be refused on the ground that a question of jurisdiction is involved. If the court is without jurisdiction, its proceedings may be arrested by the appellate court; but this court cannot with any propriety or consistency discredit its own decrees, and refuse to direct proceedings for the benefit of parties whose interests are involved. The showing presented by the motion and affidavits in this case brings the proceedings within general admiralty rules 10 and 11, and is sufficient, in my judgment, to warrant the court in exercising its discretion in favor of a sale of the vessel.

It is also contended that the case may be taken to the circuit court of appeals, and a final judgment obtain in the course of six months; but it appears from the affidavits that a custody for any period will be injurious to the vessel. The showing in support of the petition appears to me to be sufficient, even though the appeal may be determined in a few months. An order of sale will therefore be entered.

PAXSON et al. v. CUNNINGHAM.

(Circuit Court of Appeals, First Circuit. June 26, 1894.)

No. 91.

RECEIVERS—LIBEL AGAINST VESSEL IN RECEIVERS' POSSESSION—INJUNCTION.

After receivers of a railroad company, appointed by a United States circuit court, had taken possession of a steamship, the property of the company, she came into collision with another vessel, and was libeled therefor by the owners of that vessel in the district court. *Held*, that the circuit court, in its discretion, properly declined to issue, on the petition of the receivers, an injunction against the proceedings in admiralty.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a petition by Edward M. Paxson and others, receivers of the Philadelphia & Reading Railroad Company, for an injunction against Milford T. Cunningham, to restrain the prosecution of a libel in admiralty. The circuit court sustained a demurrer to the petition, and a decree dismissing the petition was entered thereon. The petitioners appealed.

Robert M. Morse and William M. Richardson, for appellants.
C. T. & T. H. Russell, Charles T. Russell, and Charles T. Russell, Jr., for appellee.

Before GRAY, Circuit Justice, COLT, Circuit Judge, and CARPENTER, District Judge.

GRAY, Circuit Justice. This was a petition by the receivers of the property of the Philadelphia & Reading Railroad Company for an injunction to restrain the prosecution of a libel in admiralty against a steamship in their possession. The allegations of the petition were, in substance, as follows:

On February 20, 1893, the petitioners were appointed, by decree in equity of the circuit court of the United States for the eastern district of Pennsylvania, receivers of the Philadelphia & Reading Railroad Company, a corporation of Pennsylvania, and of all its railroads, canals, collieries, boats, and vessels, and other property, real and personal, and were authorized to exercise the franchises of the company, and to run and operate its railroads and canals, and to use and employ its mines in the manner that they had been theretofore used and employed; and on February 21, 1893, a like decree was made by the circuit court of the United States for the district of Massachusetts, appointing them receivers of the property of the railroad company within its jurisdiction. The receivers forthwith exercised the authority conferred by those decrees, and took possession of all the property of the company, including the steamship Williamsport, a steam collier used to carry coal taken from its mines from Philadelphia to Boston; and the use and employment of the steamship was continued by the receivers, and was necessary for the proper management and conduct of the business of the company.

On October 13, 1893, while the Williamsport was in Boston harbor, in the possession and employment of the receivers, she came into collision with the steam tug Bessie B, belonging to Milford T. Cunningham and others. On October 14th, Cunningham, as managing part owner of the tug, filed in the district court of the United States for the district of Massachusetts a libel in admiralty against the Williamsport, to enforce a maritime lien for damages caused by the collision; and the United States marshal, pursuant to a warrant issued by that court, seized the Williamsport, and took her into his custody and possession, and out of the custody and possession of the receivers. On November 8, 1893, the receivers moved the district court to dismiss the libel, and to deliver the steamship to the receivers, on the ground that the seizure by the marshal was illegal, and that that court acquired thereby no jurisdiction over the steamship. But the motion was denied. Thereupon, on the same day, the receivers filed in the circuit court of the United States for the district of Massachusetts this petition, praying for an injunction to restrain Cunningham from proceeding further with his libel, and to command him to release the steamship from the custody of the marshal, and deliver her into the possession of the re-

ceivers, and for further relief. Cunningham demurred to this petition upon the grounds that it did not state such a case as entitled the petitioners to an injunction or other relief, or as authorized the court to grant either, and that the suit which the petitioners prayed to have the respondent enjoined from further prosecuting "is a libel in admiralty, brought by him as managing part owner of the steam tug Bessie B, in due form, and within the jurisdiction provided by the constitution and laws of the United States, against the said steamship Williamsport, as an offending res, to answer for her default and misdoing within the said admiralty jurisdiction, and the said respondent had the right to institute and has the right to maintain said suit, under the maritime law and under the constitution and laws of the United States, against the said steamship Williamsport."

The circuit court sustained the demurrer and dismissed the petition, and the petitioners appealed to this court.

The case, as stated in the petition and admitted by the demurrer, is briefly this: After the steamship Williamsport, and all other property of the Philadelphia & Reading Railroad Company, had been taken possession of by the receivers of that company appointed by the circuit court of the United States, sitting in equity, she came into collision with another vessel, and was libeled by the owners of that vessel in the district court of the United States, sitting in admiralty, to enforce a maritime lien for damages caused by the collision.

The case involves no question of conflicting jurisdiction between the courts of the nation and those of the state, or of conflicting right between different claims existing against the railroad company or its property at the time of the appointment of the receivers. But the question is simply whether the claim of a maritime lien for an injury done by the Williamsport while in the possession and use of the receivers should be tried, in the first instance, in admiralty or in equity.

A maritime lien upon the offending ship for an injury by a collision is a *jus in re* in the ship herself, and carries with it the right to libel her in an admiralty court of the United States, unless the owners institute proceedings in such a court to limit their liability; and an admiralty court has peculiar rules of its own in some respects,—such as the priority of this and other liens, and the effect of contributory negligence of the libellant upon the recovery of damages,—which cannot conveniently, if at all, be applied by a court of equity or of common law. *Transportation Co. v. Wright*, 13 Wall 104; *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019; *The America*, 16 Law Rep. 264, Fed. Cas. No. 288; *Henry*, Adm. cc. 3, 4.

Moreover, by Act Aug. 13, 1888, c. 866, § 3, "every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager

was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." 25 Stat. 436.

If the libel now in question had been in personam against the receivers, it would have been within the very terms of the statute, and might have been filed without leave of the circuit court which appointed the receivers, subject, however, to the control of that court, so far as necessary to the ends of justice. *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905. The libel in rem against the steamboat for a wrong done by her while in the possession and employment of the receivers, if not within the terms of the statute, is within its reason and equity. Independently of the statute, there could be no objection to proceeding with that libel, so far as might be done without interfering with the possession of the receivers. *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 304, 5 Sup. Ct. 135. And, whether the libel in rem against the steamboat in the hands of the receivers is or is not considered as coming within the statute, it was clearly within the discretion of the circuit court to permit the libelants to establish and enforce their maritime lien in the district court in admiralty, as the appropriate tribunal to try and determine that matter. The receivers can regain possession of the steamship, if they have not already done so, by entering into a stipulation in the district court to abide its final decree, and that decree will be subject to review by this court on appeal.

Upon the facts of this case, therefore, the circuit court wisely exercised its discretion by declining to issue an injunction against the proceedings in admiralty.

This conclusion is in harmony with the decisions of the supreme court of the United States in the recent litigation in New York concerning the vessels of the Schuyler Steam Towboat Company. After one Sturges had been appointed by a court of the state of New York receiver of all the steamboats and other property of that company, Moran and others, owners of certain tugs, filed against some of the steamboats, in the district court of the United States for the southern district of New York, libels in admiralty, upon which the United States marshal took possession of them. The receiver, having obtained leave of the state court to contest those libels, made a motion to the district court to order the marshal to give up his custody; and that court denied the motion, on the ground that the question should be raised by answer to the libels, and gave the receiver leave to answer accordingly. The receiver appeared and answered to one libel, contesting the jurisdiction of the district court, and then applied to the supreme court of the United States for a writ of prohibition to the district court, which was denied, on the ground that the question was within the jurisdiction of the district court, to try and determine in the proceedings pending before it. In *re Sturges*, stated in *Re Fassett*, 142 U. S. 479, 484, 12 Sup. Ct. 295. The state court afterwards, on the petition of the receiver, ordered an injunction to issue to restrain the libelants from taking further

proceedings upon the libels. In re Schuyler Steam Towboat Co. (Sup.) 18 N. Y. Supp. 89, 19 N. Y. Supp. 565. And its judgment was affirmed by the court of appeals of the state. 136 N. Y. 169, 32 N. E. 623. But the supreme court of the United States reversed that judgment, as being an unlawful interference with the proceedings in the district court of the United States, not merely because the receivers had neither actual nor constructive possession of the steamboats when they were taken into the custody of the marshal by order of the court of the United States, but also upon the broader grounds that the state court had in effect granted the prohibition which the supreme court of the United States had denied; that a court of a state cannot, by injunction, restrain suitors from proceeding in the courts of the United States; and that, by the constitution and laws of the United States, jurisdiction to enforce a maritime lien by suit in rem is exclusively vested in the courts of the United States. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019.

Our conclusion is also in accord with the practice of the English courts exercising chancery jurisdiction. The high court of chancery habitually granted leave to a creditor claiming a paramount right, by mortgage or otherwise, in property in the hands of a receiver, unless the claim was clearly unfounded, to enforce the right by action at law against the receiver, even when it was necessary, in order to maintain such an action, to seize the property under process from the court of law. *Bryan v. Cormick*, 1 Cox, Ch. 422; *Brooks v. Greathed*, 1 Jac. & W. 176; *Aston v. Heron*, 2 Mylne & K. 390, 396, 397; *Randfield v. Randfield*, 3 De Gex, F. & J. 766.

The English cases cited as supporting the opposite view were controlled by positive provisions of statutes. In *Halliday v. Harris*, L. R. 9 C. P. 668, where a county court, having jurisdiction in bankruptcy, and authorized by section 72 of the bankruptcy act of 1869 (St. 32 & 33 Vict. c. 71) to decide all questions of law or fact which it might "deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property," made an order restraining a creditor from enforcing in a colonial court of vice admiralty a claim of lien on a ship, part of the bankrupt's estate, for necessities supplied abroad, and directing an issue to try the matter in the court of bankruptcy, a writ of prohibition to the county court was refused because the order was within its jurisdiction, and if the jurisdiction had been improperly exercised the only remedy was by appeal; and Lord Justice Brett expressed "a strong opinion that, if this case had been taken on appeal before the lords justices, they would have held that this was not a matter that the county court ought to entertain. It has no efficient machinery, if it decides that these necessities were supplied, for enforcing its judgment in favor of the defendant; and, as its judgment cannot be effective in his favor, it ought not to decide against him." L. R. 9 C. P. 680. In the case of *The Australian D. S. Nav. Co.*, L. R. 20 Eq. 325, the liquidator, under an order for winding up the company under the companies' act of 1862 (St. 25 & 26 Vict. c. 89), obtained an injunction against a pro-

ceeding in the court of admiralty for the arrest of the ship, solely upon the ground that such an arrest was a sequestration, within the meaning of section 163 of the act, by which, "where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding up, shall be void to all intents."

It is also to be remembered that maritime liens, and the admiralty jurisdiction over them, are allowed less effect by the law and statutes of England than by the constitution and laws of the United States. The *J. E. Rumbell*, 148 U. S. 1, 20, 13 Sup. Ct. 498. Decree affirmed.

THE TAURUS.

THE KATE JONES.

SCULLY v. THE TAURUS and THE KATE JONES.

BOSTON STEAMBOAT CO. v. SCULLY (two cases).

(District Court, S. D. New York. July 10, 1894.)

TOWAGE—GROUNDING OF BARGES—NEGLIGENCE—SALVAGE.

The tug T. took the Blackstone, Condor, and two other barges, to tow through the Sound to Boston. When off Wood's Holl, there was a gale from the northeast, and the tug K., a helper, took the two barges named, and the pilots put into Vineyard Haven for a harbor. The latter tug followed the T., but as they approached Vineyard Haven the K. kept more to the southward and westward, too near to the West Chop, and much nearer than the T. The wind hauled to the east, and, before either the Blackstone or Condor swung to anchor, each grounded. The Blackstone was soon got off, and hauled into better water, by the T., but the Condor lay ashore all night. There were no such obstructions by other vessels as to justify the K. in directing the barges to anchor where she did, and they could have been taken further to the southward and eastward. The available water was nearly a mile wide from where they grounded. The master of the K. was not well acquainted with the shoals in that locality, and the T. did not keep near enough to give directions to the K. The Condor had a free board of but 2½ or 3 feet, and drifted slowly, and neither her condition nor the lack of men contributed to her going ashore. *Held*, that the stranding was caused by the negligence of the tugs, that they were liable for damages to the barges, and that their owner was entitled to pro rata freight only, and could not recover salvage compensation.

Three libels,—one by John Scully, owner of the barges Blackstone and Condor, against the steam tugs Taurus and Kate Jones, etc., to recover damages for injuries to such barges caused by stranding while in tow by libelees; one by the Boston Steamboat Company against John Scully, owner of the barges Blackstone and Condor, for towage; and one by the same libelant against John Scully, owner of the barge Condor, to recover salvage compensation.

McCarthy & Berrier, for Scully.

Wilcox, Adams & Green, for Boston Towboat Co.

BROWN, District Judge. The above actions arose out of the grounding of the barges Blackstone and Condor, at about 7 or 8

p. m., on May 3, 1893, not far from the West Chop, while going into Vineyard Haven, in tow of the steam tug Kate Jones. The barges were first taken in tow at Riker's island by the tug Taurus, with two other barges belonging to the Boston Towboat Company, to be towed through the Sound to Boston. Off New London, the weather being somewhat threatening, the Taurus turned for that port; but soon afterwards the tug Kate Jones, which had been sent forward as a helper, overtook the Taurus, and the two thereupon continued on the course up the Sound. At about 6 p. m., when off Wood's Holl, the weather having increased to a gale from the northeast, or east-northeast, the pilots concluded to cross the Sound and put into Vineyard Haven for a harbor; they thereupon divided the tow, the Kate Jones taking the Blackstone and Condor, one behind the other, each on a hawser from 100 to 125 fathoms long, and following the Taurus, which took the other two barges. As they approached Vineyard Haven the Taurus kept more to the northward, and took her tow a little way inside of the line of the East and West Chops, to within about one-quarter of a mile of the East Chop shore; the Kate Jones kept more to the southward and westward, and rounded much nearer to the West Chop. What followed, is a subject of extreme contradiction and dispute; but it is certain that before either the Blackstone or the Condor swung to her anchor, each grounded on the west shore, probably from a quarter to a half mile distant from the West Chop. The Blackstone, after receiving some injury from pounding, was got off about 9 p. m. by the Taurus, which was signaled for assistance, and on arrival, she hauled her away about three-quarters of a mile into better water, without much difficulty. The Condor lay ashore pounding until the next day, when on examination her bottom was found good, so that after being pumped out, and having about one-fifth of her cargo of 715 tons of coal removed, she was towed to New Bedford and discharged. The first action is to recover for the damages to the two barges on the claim that the stranding was through the negligence of the tugs. The second action was by the tug owners for towage, and the third by the tug owners also, to recover salvage compensation; both of the latter actions being based on the contention that the stranding was by no fault of either tug.

The following findings cover the chief points in controversy. I find:

1. That the Condor was sound and strong below the water line, though her top-sides and deck were poor; that she was rather deeply loaded, having a free board of but $2\frac{1}{2}$ to 3 feet, while the other boats had from 4 to 6 feet; that these circumstances were known to the Taurus before starting from Riker's island; and that with careful and prudent management, the Condor was not unfit for the voyage, and was seaworthy for the trip; that although her decks were poor, she did not take in much water, even when in the trough of the sea, when washed by the waves before grounding; and that her condition, whatever it was, in no way contributed to her going ashore; and that her small free board and deep draught of $16\frac{1}{2}$ feet both retarded her drift towards the shore.

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on the average about 330 pounds each; the damaged bags about 314 pounds each. This evidence, even in the absence of proof of the exact weight of each bag at the place of shipment, was sufficient to show beyond any reasonable doubt that there was at least some actual loss of sugar on the voyage for which the vessel should account, besides what was contained in the 88 empty bags; but as proof of loss of weight was abandoned before the commissioner, except as to the 88 empty bags, only the latter can be here considered.

For the 88 empty bags, at least the average weight of sugar in the 314 damaged bags should be allowed. The vessel is not entitled to the benefit of the possibility of having shipped 88 empty bags, when her bill of lading declares them to have been shipped "in good order and condition," as "bags of sugar." There is no exception in the bill of lading that relieves her of whatsoever those words reasonably imply; and those words mean not empty bags, but bags of sugar in the usual "good order and condition;" i. e. not half empty, nor a quarter empty, but in the usual good condition, that is to say, full bags. Deducting from the average weight of the 2,539 damaged bags weighed here (from which there is no reason to suppose the 88 materially differed), $3\frac{1}{2}$ per cent. for water absorbed by those bags, as indicated by the depreciation in quality reported, we have 303 pounds to the bag, or 26,664 pounds in all, for which the vessel should respond for loss of the 88 bags.

For the purpose of proving the damage to the sugar remaining in the 2,539 bags, considerable evidence was given as to the polariscope test of the sound and of the damaged sugars. If this test is properly applied, that is to say, if the small quantity submitted to the chemist for analysis has been fairly taken, so as truly to represent all the sugar damaged, this method exceeds in precision any other known method of determining the actual damage. This test has been adopted by legislation; it is now in ordinary commercial use, and it was referred to with approval by Mr. Justice Bradley, in *Merritt v. Welsh*, 104 U. S. 694. This method determines accurately the amount of saccharine matter per pound. If the sugar has become wet with sea water, the weight of a given quantity of sugar is increased in proportion to the water absorbed; and a given weight of the mixture will therefore necessarily show a polariscope grade comparatively lower. In the present case, a small sample was taken by samplers from every bag, by means of a sampling tube; all the samples taken from the damaged bags were placed upon a table together; the whole quantity thus taken out was then mixed together by hand, and a few pounds then taken from the whole and sent to the chemist for analysis. The result showed a polariscope test of 89.6 for the damaged sugar, while the sound bags, sampled and tested in a similar manner, showed 96.6. This difference upon the ordinary market rate of computation would amount to 7-16 of a cent per pound, besides 3-32 of a cent per pound usually added for impurities.

The commissioner in his report declined to adopt these results, because he was not satisfied as to the accuracy of the witnesses'

testimony, as to their method of sampling, or as to the care taken by them to obtain true and proper samples of the damaged sugar for the chemist's analysis.

On the whole, I am inclined to sustain the commissioner's ruling in this respect, although not because there is any evidence, or any special reason in this case to believe, that there was any intentional unfairness in selecting the samples from the damaged bags; but it is obvious that the samples would be inferior to the average, either if the samples were drawn from the wetter parts of the bag, or if the wetter parts drawn out were not thoroughly mixed with the drier parts upon the table. The liability to considerable error is obvious, unless special care was taken to draw the samples fairly from the bags, and to mix them thoroughly, before the final drawing of samples from the table for the chemist. The practice in other cases of marine damage requires that reasonable protection be afforded to the other side against either mistake or intentional exaggeration of damages, by giving an opportunity to the other side to be present at surveys and examinations. After these sugars were sampled, they went into immediate process of refining, and there was no further opportunity for examination. Had the samples been taken by samplers agreed upon by both parties, or by samplers appointed by each side, I should consider the polariscope test based thereupon of the greatest value and weight.

In the present case, however, the representative of the libellant in submitting the claim for damages, estimated the depreciation at $3\frac{1}{2}$ per cent., or one-half the amount indicated by the polariscope test, in connection with a claim for loss of weight. This depreciation was admitted by the defendant and adopted by the commissioner. To this item should be added the value of the 26,664 pounds, as the least presumable contents of the 88 empty bags above stated, with interest. With this modification the report is confirmed, and the other exceptions overruled.

THE ADVANCE.

HARD et al. v. THE ADVANCE.

(District Court, S. D. New York. July 11, 1894.)

MARITIME LIENS—ADVANCES—BY SHIP'S AGENT.

When bankers, acting as agents for a line of steamers in a foreign port, are used to advance the steamers such moneys as they may need on leaving, and to render an account monthly for such advances and their commissions, and to draw on the steamship company for the amount due, they are giving credit to the company, and have no lien on the ships for their advances.

In Admiralty. Libel by Anson W. Hard and others against the proceeds of the sale of the steamship Advance, for certain disbursements and commissions. Libel dismissed.

Cary & Whitridge and W. P. Butler, for libelants.

Carter & Ledyard and Mr. Baylies, for Atlantic Trust Co., mortgagee.

BROWN, District Judge. The above libel was filed by the libelants, bankers in New York, to enforce an alleged maritime lien for moneys advanced at Victoria, Brazil, by a branch house of the libelants' firm, for the purpose of disbursing the steamship Advance upon her last departure from that port before the failure of the United States & Brazil Mail Steamship Company, her owners, in February, 1893.

The libelants' branch house had been acting as the agents of the company's steamers at Victoria for about a year previous, under a power of attorney executed to them by the steamship company, dated March 3, 1892. This power of attorney authorized them "to sign bills of lading, receive and deliver goods, contract for freight, issue passage tickets, receive money, audit and settle claims, and generally to do and perform the business of steamship agents for and in behalf of said company at the port of Victoria, Brazil, aforesaid." The course of business under this power of attorney was for the Victoria house, as the ship's agents, to advance such moneys as were necessary for the company's various ships on sailing from Victoria, which left there about once a month; to render an account thereof to the steamship company, including their commissions of 5 per cent. on the freights obtained at Victoria, and $2\frac{1}{2}$ per cent. on their advances; and after crediting any collections of money made there, to draw on the steamship company at New York at 30 days' sight for the residue.

The advances in this case were made in the usual course of business, without any agreement for a lien, or any hypothecation of the ship or freight, or any understanding that the advances were made upon the credit of the ship or freight. The balance due for disbursing the Advance when she left Victoria in February, 1893, was \$661.23; and the libel is filed for that amount. Of this balance a little over two-fifths is made up of commissions, and the rest is for advances. A draft at 30 days' sight was drawn on the company at New York as usual, and forwarded to the libelants' principal house here for collection. On presentment it was not accepted or paid, the company being then in the hands of a receiver.

Upon the above facts, and I find no other facts to modify their force, the great weight of authority is, that the dealings between the steamship company and the agents of their ships at Victoria were presumptively on the personal credit of the owners alone, and that no maritime lien can be implied. See *The Esteban De Antunano*, 31 Fed. 920; *Insurance Co. v. Ward*, 8 C. C. A. 229, 59 Fed. 712; *The Raleigh*, 32 Fed. 633, affirmed 37 Fed. 125; and other cases there cited.

It is said that the branch house at Victoria contained some different partners from the New York house, and that the moneys supplied to disburse the ships were really the moneys of the New York house supplied to the Victoria branch. But this does not change the relations of the parties. The only dealings of the steamship company, or of their masters or officers, were with the Victoria branch house under the power of attorney given to that house. The money supplied by the New York house to the Victoria

branch, if the latter was legally a different body, became the mon-
eys of the latter. The libelants, in that event, could claim a lien
by subrogation only, and in this case there was no lien to which
they could be subrogated.

The cases of supplies in a foreign port by material men, and
others, who were not the agents of the owners, are here inap-
plicable.

On these grounds, the libel must be dismissed, with costs.

THE ALVIRA.

DE LANO et. al. v. THE ALVIRA (BATCHELDER et al., Interveners.)

(District Court, N. D. California. August 7, 1894.)

No. 10,849.

1. MARITIME LIENS—LIENS UNDER STATE STATUTES—RULES APPLICABLE.

Liens arising under local statutes for supplies, materials, and repairs
furnished in the home port are assimilated to general admiralty liens, and
the principles relating to maritime liens are in general applied to them.
But the two are not always exactly alike in all their features and inci-
dents. Thus, the principle that supplies furnished in a foreign port when
the owner is with his ship are presumably furnished on his personal
credit is inapplicable to liens in the home port, for, the owner being resi-
dent there, this would wholly defeat the lien.

2. SAME.

Under the general principles of admiralty law relating to maritime
liens, applicable to the creation of liens under a local statute (Code Civ.
Proc. Cal. § 813), to give efficacy to such a lien there must be (1) a neces-
sity for the supplies, materials, or repairs; (2) a necessity for credit; and
(3) credit must be given to the vessel. But proof of necessity for the sup-
plies, etc., carries with it a presumption of the second requisite,—the neces-
sity for credit.

3. SAME—NECESSITY FOR REPAIRS—WHEN SHOWN.

The fact that a freight vessel is chartered to do passenger business, for
which she is totally unfitted unless repairs are made, and that liberty
to make repairs is given, together with an option to purchase at a fixed
price on the expiration of the charter party, is sufficient proof of necessity
for the repairs.

4. SAME—RELIANCE ON VESSEL'S CREDIT—BOOK ENTRIES AS EVIDENCE.

Great importance is not to be attached to the fact that material and
repair men gave credit on their books to the vessel alone, or to both the
vessel and the party ordering the materials and repairs, or to the latter
alone; but the intent is rather to be gathered from all the facts and evi-
dence in the case.

5. SAME—REPAIRS ORDERED BY CHARTERER—WHEN LIEN EXISTS.

The fact that materials and repairs are furnished upon the order of the
charterer, who is personally liable, and that the owner is not personally
liable, does not prevent the vesting of a lien under a local statute (Code
Civ. Proc. Cal. § 813) when the charterer is owner pro hac vice, and the ma-
terial and repair men believe him to be the general owner, and have no
cause to suspect otherwise. The Samuel Marshall, 4 C. C. A. 385, 54 Fed.
396, distinguished.

6. SAME—BURDEN OF PROOF.

It seems that the rule stated in The Patapsco, 13 Wall. 329, in relation
to foreign liens for supplies, namely, that where credit is shown to have
been given to the vessel there is a lien, and the burden of displacing it is

upon the claimant, is applicable to a lien claimed under a local statute (Code Civ. Proc. Cal. § 813) for materials and supplies furnished in the home port.

This was a libel by W. W. De Lano and others against the steamer Alvira, J. R. Rideout and others, claimants, claiming a lien for materials furnished and services rendered to the steamer. Interventions were filed by W. H. Batchelder and others to enforce liens alleged to have accrued for services rendered in navigating the vessel, and for materials furnished and work done in repairing the same.

H. W. Hutton, for libelants and interveners.
Andros & Frank, for claimants.

MORROW, District Judge. The libel and interventions in this case were filed to enforce liens against the steamer Alvira for materials furnished and labor performed in repairing and refitting said vessel, and also for services rendered in navigating the same in the Bay of San Francisco. The libel was filed on November 20, 1893, by W. W. De Lano et al., and is brought to recover the sum of \$219.14, alleged to be due for materials furnished and services rendered in plumbing and ship-furnishing work done to the vessel, it being claimed that the same constitutes a lien by virtue of section 813 of the Code of Civil Procedure of this state. On November 25, 1893, W. H. Batchelder and some 13 other libelants filed a libel of intervention, each claiming specified amounts for personal services rendered, in various capacities, to the vessel on her trips as a passenger boat, aggregating \$509.32. On the same day, Ingler & Atkinson and others filed a libel of intervention for materials furnished and labor performed on the vessel while she was undergoing repairs, liens being claimed therefor under the state law. The claims contained in this intervention are as follows: Ingler & Atkinson, for materials furnished (lumber, moldings, sashes, doors, etc.) and joiner work done to the steamer Alvira, balance due, \$718.56; E. G. Buswell Paint Company, paints and painting, \$369.95; Humboldt Lumber Company, lumber furnished, \$163.21; Puget Sound Lumber Company, lumber, \$416.58. On November 27, 1893, Costello & Boucher and others also filed a libel of intervention for materials furnished and work done in repairing the steamer Alvira, and alleged to constitute liens upon the vessel by virtue of the state law. These claims are as follows: Costello & Boucher (Oakland Boiler Works), materials furnished and work done, \$340.83; J. M. Prairo, furnishing materials and doing work in blacksmithing and ironwork, \$109.05. The claims set out in the original libel of De Lano et al. were not pressed at the hearing, the parties having arrived at some settlement or understanding concerning the same; and those of Batchelder et al. are also eliminated from consideration, they having been satisfied in full, and a dismissal filed, March 27, 1894.

The total demands against the vessel aggregated \$2,846.64, but the claims of De Lano et al., for materials furnished, etc., and those of Batchelder et al., for personal services rendered, having been

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withdrawn from consideration, the demands outstanding amount to \$2,118.18, for which judgment in rem is sought. The question to be determined by the court is whether these remaining claims, which are all for materials furnished and labor performed in repairing and refitting the steamer Alvira, constitute liens against the vessel by virtue of the state law contained in section 813 of the Code of Civil Procedure, as follows:

"All steamers, vessels, and boats are liable: * * * 3. For work done or materials furnished in this state for their construction, repair, or equipment. * * * Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued."

The materials were furnished, and the labor performed, in repairing and refitting the steamer Alvira, under the following circumstances: The vessel was owned by J. R. Rideout, E. V. Rideout, and Alvira J. Rideout. J. R. Rideout was her managing owner. She was designed and employed as a freight boat, navigating the Bay of San Francisco and contiguous inland waters. On the 29th of July, 1893, she was chartered by the Davie Ferry & Transportation Company, a corporation formed and existing under the laws of the state of California. She was chartered for the period of one year, commencing August 1, 1893, at a monthly rental of \$250, with the option to the charterer to purchase her, at the expiration of the charter, for \$18,000, on certain specified terms. She was to navigate the Bay of San Francisco, and was chartered to be used as a passenger boat. The charter party provided, among other things, as follows:

"The party of the second part [the Davie Ferry & Transportation Company] to furnish, at its own expense and cost, all fuel, provisions, and necessary repairs, and at the end of this charter to return said steamer to the parties of the first part, free and clear of any and all obligations, of any name and nature, which may be incurred on said steamer during the term of this charter, and also to hold the said parties of the first part harmless for any and all damages or costs, of every name and nature, for injuries to persons or property, caused by said vessel, or persons managing the same, during the continuance of this charter, and, at the expiration of said period aforesaid, the party of the second part to return and deliver said steamer, her tackle, apparel, and furniture, to said parties of the first part, or their agent, in as good condition, reasonable usage and wear excepted, as said steamer, her tackle, apparel, and furniture were in at the date hereof. * * * It is mutually understood and agreed by the parties hereto that the party of the second part shall have the right and privilege to make such alterations in said steamer as they (it) may deem fit and proper, at its own cost and expense. And in case said steamer shall, during the life of this charter party, be surrendered and delivered by the party of the second part to the parties of the first part [the owners of the steamer Alvira], all improvements made to said steamer shall accrue to, and become the property of, the parties of the first part, save and excepting such equipments as the said party of the second part shall have furnished."

The steamer Alvira was a freight boat. The Davie Ferry & Transportation Company chartered her to do passenger service. To be of any use to the company for that purpose it was necessary that she should be repaired and altered from a freight boat into one adapted to the transportation of passengers and such incidental freight service as is peculiar to boats engaged in the ferry

business. That such was the mutual understanding of the parties is patent. It was in thus repairing and adapting the steamer *Alvira* for passenger duty that the expenses for materials and repairs were incurred. It appears that the *Davie Ferry & Transportation Company* became insolvent some time after the materials had been furnished and the repairs had been completed, and the remaining intervening libelants seek to enforce their claims against the vessel itself, basing their right to do so upon the lien given by section 813 of the Code of Civil Procedure of this state. Therefore, the ultimate fact to be determined is, have the intervening libelants a lien, on the vessel proceeded against, for the materials furnished and the repairs placed by them upon the steamer *Alvira*?

The claimants of the vessel, as I understand their position, do not insist that the repairs were not necessary to fit the vessel for the business she was chartered to engage in, or that they were not reasonable. But, however that may be, the evidence shows that the materials and repairs were necessary for the purpose for which the vessel was chartered, and were reasonable. The claimants certainly have not shown that they were otherwise; but they insist that no lien accrued in favor of the interveners because the latter, as they claim, gave credit to the *Davie Ferry & Transportation Company*, and not to the vessel.

As this is the home port of the *Alvira*, and as her owners reside here, and her owner *pro hac vice*, the *Davie Ferry & Transportation Company*, has its place of business here, the intervening libelants, if they recover at all, must do so by virtue of the lien created by the state statute, subject, however, to the principles of admiralty law which obtains in the vesting and enforcement of maritime liens. By the general maritime law, no implied lien accrues in favor of supply or material men upon vessels in their home ports. To secure themselves for such advances, an express hypothecation is necessary. The implied lien only vests where vessels are in foreign ports, and a necessity for supplies or materials exists, as well as a necessity for credit, and such credit is actually given to the vessel. These are well-settled rules of the general maritime law, and have been repeatedly enunciated by the supreme court of the United States. *The General Smith*, 4 Wheat. 442; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498. See, to the same effect, *The Samuel Marshall*, 49 Fed. 754; *Id.*, 4 C. C. A. 385, 54 Fed. 396. This limitation in the general maritime law as to domestic liens gave rise to the state lien laws. Their object was to afford to supply and material men, in the home port of a vessel, the same protection which, by the general admiralty law, was secured to supply and material men upon foreign vessels. As was stated by Judge Hoffman in *The Columbus*, 5 Sawy. 488, Fed. Cas. No. 3,044:

"It is well known that the state lien laws were passed after the decision in the case of *The General Smith*, which declared that the existence of liens in favor of material men in the home port of a vessel depended on the local law. The case was generally regarded, however (and, it would seem from the case of *The Lottawanna*, justly), as deciding that by the general maritime law, as received in the United States, demands of that kind were

not attended by any lien on the vessel. The statutes in question were passed to remedy this defect, and to give to domestic material men the same protection which the maritime law afforded to foreign material men. There is no reason to suppose that they were intended to do more, or that it was sought to withdraw the demands of domestic material men from the operation of the general rules and principles by which maritime liens are governed."

The validity of these state statutes giving domestic liens was recognized by the supreme court in the case of *The Lottawanna*, supra, and has never since been questioned. In the case of *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, the latest expression by the supreme court of the law on the subject of maritime liens, the following propositions were regarded as settled. Mr. Justice Gray, speaking for the court, said:

"(1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. (2) For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. (3) Whenever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. (4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own procedure. * * * According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*,—a right of property in the vessel,—existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied. It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial, and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

Although the facts of that case are not analogous to those in the case at bar, the question there being whether a prior recorded mortgage of the vessel had priority over liens created by the state

statute, yet the general remarks of the learned justice are in point, as showing that liens granted by state statutes are placed on the same footing with liens recognized by the general admiralty and maritime law. But, while the courts of admiralty are held to have exclusive jurisdiction to enforce these state liens upon vessels, yet, in enforcing them, they do not adopt and apply these statutes in all their terms; they do not necessarily enforce all their provisions; nor do they follow the construction placed upon them by the state tribunals. In applying and enforcing them they subject them to the general principles of the admiralty and maritime law, or rather to those principles of the admiralty law which obtain and apply to maritime liens. In other words, they adopt the local statutes in so far as they create a lien of a maritime character. The Guiding Star, 18 Fed. 268. While it was intended to place domestic liens on an equal footing with foreign liens, yet this, of itself, does not render foreign and domestic liens for supplies and repairs in all respects the same. The lien given to a vessel deemed to be foreign is not always, in all its features, exactly similar to, or a perfect counterpart of, the lien provided by state statutes to vessels in their home port. The two are sometimes qualified by differences which even the application of the broad and general principles of admiralty law do not, in all cases, harmonize. As was said by Judge Hoffman in *The Columbus*, supra:

"In the case of *The Young Mechanic*, 2 Curt. 504, Fed. Cas. No. 18,180, Mr. J. Curtis considered very carefully the nature and effect of a similar lien created by the laws of Maine. He held that it was a maritime lien, conferring a *ius in re*, and constituting an incumbrance on the property, and existing independently of the process used to execute it. He further held that the statute conferred on mechanics and material men such a lien on domestic vessels as the general admiralty law had previously allowed to them on foreign vessels. Of course, it was not intended by this decision to hold that the liens were identical in every respect. The state laws may prescribe the mode in which the lien they create may be acquired or perfected. They may also limit their continuance to a specified period. But, except where the state laws otherwise in terms provide, the lien is to be regarded as maritime, and to be subject, as to its origin and incidents, to the same rules by which liens on foreign vessels are governed."

The two liens not being always identical, the general principles of the maritime law which apply to maritime liens cannot always be unqualifiedly applied to the liens created by the state law. The court of admiralty must, therefore, often discriminate between the two. For instance, it is the law, by the weight of authority, that where a vessel is in a foreign port, and her owner is with her, supplies or materials furnished, or repairs done, to her, are presumably furnished on the personal credit of the owner, and therefore no lien accrues in favor of the supply or material man. *The Mary Morgan*, 28 Fed. 196, and cases there cited; *Stephenson v. The Francis*, 21 Fed. 722; *The Now Then*, 5 C. C. A. 206, 55 Fed. 523; *The St. Jago de Cuba*, 9 Wheat. 416. But, however pertinent the reasons may be for the existence of such a rule respecting vessels in foreign ports, they do not apply to the liens given in the home port by state statutes. Domestic liens for supplies or repairs furnished at the request of the owner or of his agent would never obtain in a

home port, were the same principle which is held to apply to vessels in foreign ports to be enforced, for the very idea of a "home port" assumes that the owner resides there or transacts his business there. We thus see the difficulty that would arise if this principle by which maritime liens are measured and governed, where the vessel is in a foreign port, and her owner is with her, were attempted to be applied, in its full terms, to local liens. Manifestly, the very object of the local lien—the lien itself—would be defeated. It is this attempt to apply in all cases general principles that tends to confuse the subject of local liens. The peculiar facts and equities of each case must often go far in determining the inherent justness of claims for supplies, materials, or repairs furnished in the home port. The observations of Locke, J., in *The Cumberland*, 30 Fed. 451, are directly in point. He said:

"The doctrine of the residence of the charterers being accepted as the home port of the vessel is a fiction of the law for equitable purposes, which will, I am satisfied, be set aside whenever the peculiar circumstances of the case demand. In every case the decision seems to be based upon the knowledge of the charter, and the duties of the charterer under it, and the unwillingness of the courts to aid the material men in obtaining from the owner compensation for that which he had furnished at the request and for the benefit of the charterer, knowing at the time that the charterer had promised to pay."

Keeping in mind, therefore, the obvious purpose of state laws in giving the lien, viz. to give to domestic supply and material men the same protection which the maritime law afforded to foreign material and supply men, and remembering that though foreign and domestic liens are, in their general features, similar, yet they are not identical, and giving the proved facts in this case their proper weight, we proceed to inquire, what are the general principles of admiralty and maritime law which properly obtain and apply to the liens claimed in the case at bar?

The general principles of admiralty law which must exist to give efficacy to a maritime lien for supplies, materials, or repairs are the following: (1) There must be a necessity for the supplies, materials, or repairs; (2) there must also be a necessity to obtain credit; and (3) credit must have been given to the vessel. Proof that the supplies, materials, or repairs were necessary carries with it a presumption of the second requisite,—that there was a necessity for credit; the necessity for credit being presumed to exist where the supplies, etc., were necessary and are proved to have been such. *The Grapeshot*, 9 Wall. 129. In that case the supreme court say:

"Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit."

The third requisite, so far as this case is concerned, will determine whether the intervening libelants have a lien or not. There is no difficulty in arriving at a conclusion as to the first two requisites. That the materials and repairs were necessary is abundantly established by the evidence. The vessel was chartered to do passenger service. At that time she was fitted up and was being run.

as a freight boat. Unless altered, she was totally useless to the Davie Ferry & Transportation Company. I find, therefore, that the materials and repairs furnished were necessary for the purpose for which the vessel was chartered, and that the charges for the same, so far as appears from the evidence, were reasonable. But the question of difficulty is, to whom did the intervening libelants give credit,—to the vessel or to the Davie Ferry & Transportation Company?

The intervening libelants all testify that they were not informed, and did not know, who were the actual owners of the vessel, nor did they know that the relation which the Davie Ferry & Transportation Company bore to the vessel was simply that of charterer. It is true they did not inquire. The materials and repairs were furnished at the instance of John McGrath and Capt. Ebert. The latter was the general manager of the company, and ordered some of the materials, but it seems that McGrath did most of the ordering. When preparations were first being made to carry on the repairs and alterations, Capt. Ebert accompanied Mr. McGrath to several of the intervening libelants' places of business, and introduced the latter, telling them to comply with such orders as McGrath might give them for materials and repairs. McGrath was employed by the company, and acted as a sort of foreman joiner. As such he had charge and superintended the repairs and alterations which were made on the Alvira. He testifies that he was authorized to order such materials or work as he desired. As to what he said when ordering these materials and work, he testified as follows on cross-examination:

"Q. When you purchased these materials, did you tell them who you were purchasing for? A. Yes, sir. Q. Who,—the Davie Ferry Company? A. Of course; the steamer Alvira, or the steamer Rosalie, or the Frank Silvia, or for 'wharf,' or 'general repairs,'—whatever it was. I stated very distinctly what the materials was for. * * * Q. How was that? You told them that you wanted them for the Davie Ferry Company? A. I presume they understood that themselves. I ordered that stuff for the boats. The Court: Q. The question is, what did you tell them? A. They were keeping account with the Davie Ferry Company. Q. Did you tell them that it was for the Davie Ferry Company? A. I presume I mentioned the Davie Ferry Company, for steamer so and so. They knew I was foreman for the Davie Ferry Company. I did not need to mention it."

On redirect examination he testified:

"Q. When you went and ordered that stuff from these different people, did you tell them any more than the steamer it was for? A. No, sir; I said it was for the steamer Alvira, or the steamer Rosalie, or the steamer Frank Silvia, or the wharf, or whatever it was for. Q. Is that all you ever told them? A. That is all I ever told them. Q. Did you ever tell them at any time that the steamer Alvira would not be responsible for that? A. No, sir; I did not. Q. Did you ever tell them at any time that the Davie Ferry & Transportation Company was going to pay for it? A. No, sir. Q. All you ever told them was the steamer for which this stuff was for? A. Exactly; distinctly the steamer it was for, or wharf, or shed, or waiting room, or whatever it was for."

Capt. Ebert was not produced as a witness by either side. The claimants do not produce a single witness to impeach the testimony of McGrath. On the other hand, that witness is corroborated by

the interveners, who testified as to the fact that the materials and repairs were ordered for the vessel particularly, and not for the company generally, and that McGrath said nothing whatever to them about the vessel not being liable for the expenses. Nothing appears in the evidence to the effect that McGrath or anybody else ever advised the interveners—certainly not until after the repairs had been fully completed—that the vessel was under charter, and that the Davie Ferry & Transportation Company was the charterer, and not the owner, of the vessel; and the evidence discloses no fact or facts which, either directly or indirectly, were calculated to put the interveners, as reasonable men, upon inquiry. They were told to send the bills to the Davie Ferry & Transportation Company, who would pay them, and in each instance, according to the testimony of McGrath and of the interveners, they were told that the materials or repairs were for the vessel *Alvira*, particularly designating her. To the entries in the books or ledgers, and the bills, of the material men, I do not attach much importance one way or the other. As a rule, they seem to have contained the name of the company and the name of the vessel,—*Alvira*. But the latter was omitted in some instances, and in others the name of the company was left out. However, as just stated, I do not attach particular importance to these entries. While the entries are entitled to some weight, and, in connection with other facts, may serve to assist in the inquiry, yet they are not always deemed reliable evidence, and other judges, conscious of the opportunity afforded to unscrupulous supply or material men of making evidence for themselves, have inclined to a rule which, under ordinary circumstances, or the peculiar facts of a particular case, would give but little weight to such evidence. In the language of Taft, Circuit Judge, in *The Samuel Marshall Case*, 4 C. C. A. 392, 54 Fed. 403:

"The fact that the supplies were charged against the vessel on the books of the libelants is evidence only of a self-serving practice, which has no particular weight in the determination of the question. As was suggested in the cases of *Beinecke v. The Secret*, 3 Fed. 665, 667, *The Francis*, 21 Fed. 722, *The Suliote*, 23 Fed. 919, and *The Mary Morgan*, 28 Fed. 196, 201, such practice is not infrequently followed in order that the person who furnishes the supplies may not deprive himself of the lien, if he otherwise is entitled to it."

Nor would the mere fact that the entries were made solely against the company, without mentioning the name of the vessel, of itself, under the circumstances of a particular case, have much weight to show that credit was intended to be given to the company, and not to the vessel. The supply or material man may have made such an entry simply to indicate who was to pay the bills, intending all along to give credit to the vessel. In other words, the intention of the parties must be gathered from all the facts of the case. In the case at bar the interveners all say that they intended to hold the vessel; that they thought the vessel was good for the materials and repairs; that they simply sent their bills to the Davie Ferry & Transportation Company, upon the latter's request to do so, for payment. The mere fact that they looked to the company for the payment of their bills does not, of itself, show that they did not

intend to give credit to the vessel. Somebody must pay the bills. The ship itself—the inanimate thing—cannot do so. "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." Vaughan, C. J., in *Sheppard v. Gosnold*, Vaughan, 159, 172. Nor, I take it, would the fact that they gave personal credit prejudice their lien, provided it satisfactorily appeared that they gave credit to the vessel as well. And I think it may be safely said that in almost every case, in domestic ports, a personal credit incidentally accompanies the credit given to the vessel. As was said by Judge Benedict in *The India*, 14 Fed. 476:

"A material man may, and generally does, rely upon a personal credit as well as the credit of the vessel. The question here is whether the coals were furnished upon personal credit alone."

Aside from the testimony of McGrath and of the interveners, the following testimony of one of the material men is significant as tending to show that credit was intended to be given to the vessel. C. L. Ingler, a member of the firm of Ingler & Atkinson, who furnished the Alvira with shipwork, doors, windows, sashes, moldings, and such like, to the value of \$1,307, of which, however, \$588.49 has been paid by the Davie Ferry & Transportation Company, leaving a balance due which is one of the items of this suit, testifies as follows:

"Q. Who did you look to for your money? A. I looked to the boat. Q. You knew where it (the material) was going? A. I knew where it was going, on the principle as we do with a house. We always lien a house when it is not settled for within a certain period of time. Q. You knew, of your own knowledge, that this stuff actually went in her? A. Yes, sir.

On cross-examination he testified as follows:

"Q. You say this was ordered by the Davie Ferry Company. Who appeared on the behalf of the Davie Ferry Company to order this? A. Captain Ebert and Mr. McGrath. Q. What did they say when they first came there after they introduced the subject? How did they introduce the subject in regard to the purchase? A. Captain Ebert came along with Mr. McGrath, and stated that the Davie Ferry Company was about to overhaul this boat, and wanted me to furnish some material for it; and he says, 'Bill it to the Davie Ferry Company, and the bills will be paid from thirty to sixty days; in any event, the vessel is good for it. I told them I understood it was; and we arranged to furnish the material in that way and manner. Mr. McGrath ordered most all of the work and checked up all the bills. All the work went on this boat. Q. You say he said, 'In any event, the vessel is good for it'? A. Yes, sir. Q. Did he volunteer that statement himself? A. Yes, sir. Q. Did you make any inquiry of him in regard to his relations to that vessel? A. No, sir. Q. Then you sold it to him on the understanding that it was to be billed to the Davie Ferry Company on a credit of from thirty to sixty days? A. Yes, sir. Q. And that the Davie Ferry Company was to pay for it? A. That was my understanding of it at the time."

On redirect examination he states that he furnished the materials on the promise that the boat would be good for it. He simply looked to the company for the payment of the bills; he did not look exclusively to it for the money.

Another fact of some significance is that there were credits for the materials and supplies of 30 to 60 days' time. The company had been organized but a short time previously, and it does not appear

likely that materials would be furnished, and repairs made, in amounts ranging all the way from \$109.05 to \$1,307, with no other security than the bare promise of the company to settle in 30 to 60 days' time. The only security possessed by the interveners was the lien given by the state law upon the vessel. Taking all the facts of the case into consideration, I cannot but conclude that they intended to give credit to the vessel, and not to rely exclusively upon a personal credit of the company.

In the case of *The Patapsco*, 13 Wall. 329, a principle of admiralty law was declared which, while it related to supplies furnished a ship in a foreign port, appears to be applicable to this case. It was held that, where the credit is given to the vessel, there is a lien, and the burden of displacing it is on the claimant of the vessel. "He must show affirmatively that the credit was given to the company, to the exclusion of a credit to the vessel." This the claimants have certainly failed to do in the case at bar. The libelants proved, to the satisfaction of the court, that the repairs were necessary for the purpose for which the *Alvira* was chartered, and that they were reasonable; and, further, that they intended to give credit to the vessel, and not to the *Davie Ferry & Transportation Company* exclusively. According to the rule laid down by the supreme court in the case cited, the burden then lay on the claimants to establish affirmatively that credit had not been given to the vessel. Failing in this, the lien attached.

This view of the law would dispose of the case, but counsel for claimants advances another proposition. It is contended that the lien given by the state law could not attach because the expenses for the materials and repairs were incurred, not by the claimants (the owners), but by the *Davie Ferry & Transportation Company* (the charterer); that the materials and repairs were primarily for the benefit of the charterer; and that the latter, and not the vessel, is personally liable for the same. The interveners maintain that they are, notwithstanding, entitled to the domestic lien, because they furnished the materials and completed the repairs in good faith, not knowing or being informed that the vessel was under charter, or who the owner or owners were. The rights and liabilities of charterers are succinctly stated by Mr. Justice Curtis in *Webb v. Peirce*, 1 Curt. 108, Fed. Cas. No. 17,320, in the following language:

"When the possession, command, and navigation of the ship are let by the general owner, the hirer becomes owner pro hac vice; the possession is his; the employment is his; the contracts respecting that employment are his; the master, if he employs one, is his agent; if he commands the vessel himself, he acts on his own account. In the language of Chancellor Kent (3 Comm. 138), 'this may be considered the sound and settled law on this subject.'"

But the fact alone that a vessel is operated by a charterer does not prevent, in proper cases, a maritime lien for supplies, materials, or repairs from attaching. It is well settled that in foreign ports the charterer may create liens on the vessel,—may hypothecate her under the same conditions as the general owner could. Their rights

in that regard are identical. In such case "the whole object of giving admiralty process and priority to privileged creditors is to furnish wings and legs to the vessel to get back for the benefit of all concerned; that is, to complete her voyage." Section 42, Hen. Adm. Jur. & Proc., contains the following:

"It is said that, except in bottomry and salvage, the lien exists as ancillary to the payment of some personal claim. While this is true of claims arising out of contracts, the maritime law in cases of torts treats a vessel as an actor or sentient being having a personality capable of doing wrong, and the lien can be enforced against the vessel as a delinquent, without regard to the question of ownership or agency; and in cases of contract, where the general owner intrusts the special owner, either as master or hirer, with the entire control and management of the ship, he thereby assents to the creation of liens binding on his interest in the vessel as security for the performance of contracts for affreightments and for supplies furnished in the course of the lawful employment of the vessel, and to liens for injuries to cargo and for collision, for which he may not become personally liable."

This would seem to dispose of the contention of counsel for claimants that, as the general owner was not originally or personally bound for these materials and repairs, therefore the vessel could not be.

In the case of *The India*, 14 Fed. 478, 16 Fed. 263, previously referred to, which was a case of coals furnished to a vessel in a foreign port upon the order of the agent of the charterer, the latter resided in New York, and the coal was furnished in Philadelphia. It being the port of a different state, it was, for that reason, by virtue of *The General Smith Case*, supra, considered as foreign for the purposes of applying the principles of the admiralty law. Judge Benedict held that the lien attached to the vessel, although the general owner could not be held personally liable. He said:

"It is not essential to the creation of a lien for supplies furnished a foreign ship that the supplies be ordered by the general owner or his agent. When the general owner of a ship intrusts her entire possession and control to another as her special owner, he thereby assents to the creation of liens upon the ship for necessities supplied by order of the special owner, and, when such necessities are so supplied upon the credit of the ship, the ship is bound, although no personal liability is incurred by the general owner."

In that case the court treated of a lien accruing in a foreign port; but there does not appear to be any good reason why the same principle of admiralty law, that one who intrusts another with the full possession, control, and management of a vessel is deemed to consent that liens for necessary supplies, materials, or repairs may be created on such, should not apply, in proper cases, in determining whether domestic liens have or have not attached, and with entire justice. An owner who charters his vessel must be deemed to consent that such liens may accrue. He is charged with notice that they may accrue. This, it seems to me, is nothing but fair and equitable to the domestic supply or material man, who may know nothing of the real relation existing between the general and special owner, and be deceived by taking the ostensible owner for the real owner. In other words, as to innocent supply men, the general owner is subject, in proper cases, to the principle of an equitable estoppel. But, by giving notice to the supply or material man

of the fact that the vessel is in the hands of a charterer, the general owner may protect his property from maritime liens. Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all.

But in the case at bar the liens cannot be considered as secret, for the reason that the owners knew all the time the exact situation of affairs. They knew that repairs and alterations would have to be made, and that they were being made. In fact, it is in evidence that Capt. Rideout himself, the managing owner, visited the vessel while the repairs were in progress, and even went so far as to suggest some improvements or modifications of the work. The owners, therefore, knew as well as the charterers that the repairs and alterations were being made, and yet not one of them ever gave notice to any of the interveners that they would not be liable for any liens that might accrue from such repairs and alterations. They did not, so far as the evidence discloses, even apprise any of the interveners of the character in which the company operated the vessel. It is testified by Capt. Rideout that he did make some effort to give notice to several of the material men, but this attempt proved ineffectual. It was, confessedly, not given to any of the interveners who now press their claims, and certainly not until after the materials had all been furnished and the repairs entirely completed. Had the owners not known that these materials and repairs were being furnished, a different phase of the matter would be presented; but it appears affirmatively that they were fully aware of what was being done. Can they now be heard to complain, when, with full knowledge of all these facts, they tacitly assented to these material men placing over \$2,000 worth of repairs on the steamer? Are they not estopped, as against these material men, by their own laches, when, having had ample opportunity to protect their property from the vesting of maritime liens, they either omitted or declined to take the necessary steps to secure such protection? To refuse to enforce these liens, in the face of the conduct of the owners, would not be equitable, it seems to me, under the

circumstances, nor would it be consistent with the object of the statute in providing the domestic lien.

But counsel for the claimants contend that the duty devolved upon the material men to find out who the owner of the vessel was, and the relation the vessel bore to the Davie Ferry & Transportation Company. But what was there which, from all the facts in the case, it may be said, placed the material men on inquiry? The vessel had been chartered by the Davie Ferry & Transportation Company for the term of one year. One of the stipulations of the charter party gave the charterer the option of purchasing the vessel for \$18,000 at the expiration of the charter party. It also provided that repairs and alterations might be made by the charterer, and that no lien should accrue therefor. The material men knew nothing of these arrangements or stipulations in the charter party, nor, so far as the evidence shows, did they know that the vessel was chartered at all, or that the company was anything more or less than the general owner of the vessel. Certainly, if complete possession, management, and control are indicative of ownership, the Davie Ferry & Transportation Company was the ostensible owner. To be sure, the interveners did not make inquiry for the purpose of being informed as to the actual fact. But, in view of the circumstances of this case, they were hardly called upon to do so. There was nothing calling for an inquiry. To all appearances the company was the owner. It ran the vessel; hired the captain, officers, and crew. In fact, the captain employed was a son of the managing owner. The company paid the running expenses; engaged to make the necessary repairs and alterations. Everything seemed regular. There was nothing, so far as the evidence discloses, which would tend to arouse the suspicions of a reasonably prudent person; nothing which might be calculated to place one on inquiry. Certain it is that nothing that the owners ever said or did can be regarded as any notice to the material men, or as being sufficient to put them on inquiry. In view of all the facts of this case, I do not think that the interveners' failure to institute inquiries, when not in possession of such facts as would tend to alarm a reasonably prudent person, and impose the duty of ascertaining the condition of affairs, can be said to justify a court, governed by equitable principles, in refusing to enforce the liens claimed, particularly when the owners, who did know the exact situation of affairs, failed to protect their property by giving timely notice to the material men. In the absence of notice, or of facts sufficient to put them upon inquiry, the interveners had a right to rely upon the apparent authority and ownership of the Davie Ferry & Transportation Company. In *The Cumberland*, supra, Judge Locke used the following language:

"In truth, wherever the question of a lien on account of the vessels being in a foreign or domestic port has been under advisement, the presumed or apparent knowledge of the creditor is looked upon as the principal question, and the actual state of facts, whenever justice demands, yields to the reasonable belief of the party dealing with the vessel. * * * Admiralty law does not favor secret liens, contracts, or agreements; and, unless the owner takes some means of giving notice of a charter, the courts will not aid him in resisting liens that have been given by the master when the party furnishing supplies was ignorant of it, because there may have been some

unknown arrangement which, when brought to light, changes the home port of a vessel, and consequently her relations with the commercial community. It does not intend to assist owners in having their vessels run at the expense of merchants dealing with her under the mistaken impression caused by her papers and the name of her home port on her stern. The presumption of her home port is in accordance with these, and the knowledge of their falsity must be shown before it can be presumed of the material man. It is within the power of the owners who charter to protect themselves by either providing for new enrollment or registry, or taking a bond from the charterers, as was stipulated for, but never given, in this case. I have found no case where any one dealing regularly with the master, without notice that the terms of a charter protected the vessel from hypothecation, has had his lien denied because the debt was incurred in a port of a state in which a charterer resided, nor do I think such has ever been declared as law."

The same judge, sitting as a member of the circuit court of appeals for the fifth circuit, in the case of *Norwegian S. S. Co. v. Washington*, 6 C. C. A. 313, 57 Fed. 224, said:

"The duties of consignees or agents of ships, or the agents of charterers or owners, are so similar and undistinguishable that without some positive knowledge of their relations, contracts, and agreements it is impossible to determine to which class an agency may belong; and the fact that a merchant purchases supplies, or procures services to be rendered a vessel, raises no presumption that he therefore sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances, in ordinary practice, the material man or stevedore contracts with, and takes his bill for payment to, the agent of the ship, whether he represents the owners or the charterers, without the intervention of the master; but by so doing he does not abandon his right to look to the vessel in event of a non-payment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties, in each particular case. Examining this case in the light of these general principles, we fail to find any affirmative proof that the libellant was informed of the character or conditions of the charters, or either of them, or the responsibilities of the vessel or charterers, or in any way gave the agent personal credit, to the exclusion of the vessel, or that the circumstances are shown to be such that he should be held to have done so. The final charter—the one under which he was loading at this time—specified distinctly that the vessel should pay for the stevedoring; and, had he known of this, it was in no way compulsory upon him to go back of that, and find to whom the term 'vessel,' there used, referred,—whether owners or previous charterers; and, were he ignorant of the provisions of either charter, it cannot be presumed he knew of, or contemplated, any paymaster but the vessel. * * * It is not enough to show that an agent who employs labor or procures supplies for a vessel is a charterer, and under that charter liable for the bills incurred, but it is necessary that the creditor also be aware of the relation, and furnish the supplies or services with such an understanding."

The case of *The John Farron*, 14 Blatchf. 24, Fed. Cas. No. 7,341, decided by Johnson, J., in the circuit court for the second circuit, is quite similar in principle to the case at bar. It was held that a domestic lien attached, under the following circumstances, somewhat analogous to the present case. The statute of New York of April 24, 1862 (Laws 1862, p. 956, § 1), gave a lien on a vessel for a debt contracted by her "master, owner, charterer, builder, or consignee," "or the agent of either of them," within the state, on account of labor or materials furnished in the state for repairing such vessel. H., the owner of a vessel, contracted in writing to sell her to S., and delivered possession and control of her to S., who, as her apparent owner, contracted in New York, upon her credit, a debt for repairs

to her. In the contract of sale it was agreed that S. should have possession, and might make repairs, but that such repairs should not be a lien on the vessel or a claim against H.; but the creditor had no notice of such agreement. The case had been appealed from the district court, where it was held that the lien could not attach. Subsequent to that decision, and before the case was determined in the circuit court, the supreme court decided *The Lottawanna Case*, upholding the validity of domestic liens. In view of this fact, and of the further fact that the owner had intrusted the possession of the vessel, under the contract of sale, to the prospective vendees, by which they were enabled to appear as owners to third persons, Judge Johnson held that the lien should be enforced against the vessel, although the owner incurred no personal liability. The learned judge said:

"It was not the intention of the parties that the title of the vessel should pass from Hamill to Stevens and Gardner by the delivery of her into their possession; but it was their purpose to put her under their entire control, leaving the unfulfilled portion of the contract to be carried out in the future, by the completion of the bill of sale and the execution of the mortgage. Stevens and Gardner, being thus in possession, by the consent of the owner, were enabled to appear as owners to third persons, and thus to obtain credit for the vessel as her owners, or through Stevens as her master. * * * The agreement between Hamill and Stevens and Gardner, that they should subject the vessel to no lien by repairs, cannot prevent a lien occurring as to persons having no knowledge or notice of that agreement; and this appears to have been the fact in respect to the libellant."

The counsel for claimants object that, in the above case, the statute of New York mentioned the classes of persons who could contract a debt which would become a lien on the vessel, viz. "master, owner, charterer, builder, or consignee," "or the agent of either of them;" and as the debt in that case was contracted by the charterers, and the statute of this state makes no such specification of persons competent to incur debts for which liens would attach, that therefore the case is different in principle from the case at bar, and is not of authority. But I do not think the distinction is well taken, for by the law of this state, previously referred to, a lien attaches to vessels "for work done or materials furnished in this state for their construction, repair, or equipment." The preceding subdivision of the same section, relating to "supplies" and "services," gives a lien when such are furnished and rendered "at the request of their respective owners, masters, agents, or consignees," thus specifying the persons at whose instance debts for "supplies" or "services" may become liens. The subdivision relating to liens "for work done or materials furnished in this state for their construction, repair, or equipment," it will be noticed, makes no such specification. This very fact disposes of counsel's objection, for the effect of the subdivision is to make all persons, who possess the authority, competent to contract for work or materials, including, of course, charterers. Therefore, whatever question there may be whether, under the peculiar phraseology of the local lien law, a "charterer" would be competent to contract for "supplies" or "services" for which a lien would attach in this state, there would seem to be no doubt that such a person may contract for "repairs" or "materials,"

and that a lien would vest therefor, provided, of course, that, tested by those general principles of admiralty law which are held to apply to domestic liens, it proves otherwise valid.

Counsel for claimants rely greatly upon *The Samuel Marshall Case*, 49 Fed. 754; *Id.*, 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district judge and of the appellate tribunal (circuit court of appeals, sixth circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able to find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the *Samuel Marshall Case* are not analogous, in their main features, to the case at bar.

Capt. Rideout claims that the vessel, as a freight boat, has not been increased in value, although over \$2,000 worth of repairs and alterations have been made. But this statement is flatly contradicted by other witnesses, entirely disinterested, so far as it appears, who say that the *Alvira* is a much better boat than she was before. Of course, it is to be remembered that the vessel is now fitted up as a passenger boat. Certainly, Capt. Rideout cannot be heard to object against this, for he himself consented to it, and, it seems, very willingly, as it is in evidence that the vessel had been unemployed for some months. A witness testified that she could be turned into a freight boat again, if desired, at an expense of about \$100, and that she would be in a much better condition than she was prior to the repairs. Capt. Rideout says that it would require some \$500, but, when asked to detail the items, he was unable to do so.

Taking into consideration all the facts and equities of this case, and the law applicable thereto, it is my opinion that the interveners are entitled to the process of this court to enforce the lien provided by section 813 of the Code of Civil Procedure of this state, and a decree for their several claims will be entered in their favor, with costs.

THE ILLINOIS.

HEFFERIN v. THE ILLINOIS.

(District Court, E. D. Pennsylvania. August 7, 1894.)

No. 12 of 1894.

1. SHIPPING—INJURIES TO STEVEDORE—UNSAFE DECKS.

A laboring stevedore, being ordered into the forward hold of a steamship to stow cargo, in passing down the forward hatch got off on the orlop deck, immediately above the hold, and, going forward about twelve feet in the dark to strip, and leave his clothes, stepped into an unguarded hole four to six feet long and four to six inches wide, and was injured. It is the custom of such workmen to leave their clothes on the deck above which they work. Held that, in view of the custom, it was the duty of the steamship to keep the deck in a safe condition, and, the hole being an unusual one in such ships, she was liable for the injury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

The stevedore was not guilty of contributory negligence, for he had a right to assume that the deck was safe, and was not bound to get a light, or to wait until his eyes became accustomed to the darkness.

This was a libel by Michael Hefferin against the steamship Illinois to recover damages for personal injuries.

Samuel E. Maires and Curtis Tilton, for libelant.

N. Dubois Miller and Biddle & Ward, for respondent.

BUTLER, District Judge. I find the facts to be as follows: The libelant, a laboring stevedore, who was employed to assist in stowing cargo on the steamship Illinois, was ordered into the forward hold to work. In passing down the hatch he got off on the "orlop" deck, immediately above the hold, and going forward about twelve feet to strip and leave his clothes, stepped into an open and unguarded hole, four to six feet long, and four to six inches wide; and was seriously hurt. This deck is dark, and around the hatch for a considerable distance was covered with dunnage, which consisted of blocks of wood, soiled with oil and dust. It is the custom of such workmen to strip off and leave their outer clothing on the deck next above where they work. The water for their use is also kept there. Two unguarded holes, as described, at least, existed in the deck at the point where the accident occurred. Whether more existed, as the libelant asserts, need not be determined. If the two admitted by the respondent to be there were in a part where the libelant had a right, and therefore might be expected, to go, they should have been guarded; and the respondent's negligence is as great as if more existed. They were unusual holes, such as are not found in vessels of this character, devoted to the service in which it was engaged. The deck was dark, and the holes could not be seen by one entering as the libelant did.

On these facts the case cannot be distinguished from *The Protos*, 48 Fed. 919. The libelant had a right to go where he did to strip and leave his clothes. He was not restricted to any particular part of the deck, convenient to the hatch, in the absence of notice to that effect. He could use his own discretion in selecting a place. He

was justified in assuming that the entire deck in that vicinity was safe. He passed but a few steps from the hatch; little, if any more than far enough to get beyond the soiled dunnage. Some of his fellow workmen left their clothes near by. It follows that the respondent was guilty of negligence in allowing the holes to be uncovered and unguarded.

Was the libellant also guilty of negligence? I do not think so. It is said he should not have gone forward in the dark; but he could not be expected to get a light, or to wait until his eyes became accustomed to the situation. He might justly have been censured if he had. It was his duty to assume that the deck was safe so far as he had occasion, or it was customary for workmen to use it. Any delay on account of the darkness would have subjected him to ridicule if nothing worse. The respondent produced testimony to show that it is not customary for men laboring in the hold to change their clothes on the "orlop" deck. The weight of the testimony is, however, as I have found the fact. Nevertheless, if it were true, as the respondent's witnesses state, substantially that it is customary to strip off and leave the clothes on any one of the decks the workmen see fit, then it would be the respondent's duty to have all the decks safe for this use. Wherever the workmen have occasion to go, or customarily go, in the course of their employment, the vessel must be safe.

It was urged that the libellant should not have gone so far forward. He gives his reasons for going there, and they sustain him, as does also the testimony of other witnesses called. But in the absence of this testimony he would be justified. He could not be expected to confine himself to any particular part of the deck convenient to the hatch. One man would go to one part, and others to other parts, as their minds suggested. Nor could he be expected to go directly, in a straight line, to the spot where he proposed to strip, and straight back; it would not correspond with what men generally do under such circumstances, and would therefore be unreasonable. Every part of the deck to which it might be anticipated the men would go should have been made safe.

It is further urged that the libellant went to this particular place to urinate, that this was an improper object, and consequently that the respondent is not liable for the injury. Two questions are thus raised. The last of them need not be considered. The testimony respecting the first is conflicting. The burden of proof is on the respondent. I do not propose to discuss the testimony. It is sufficient to say that it does not prove that the libellant did not go there to strip and leave his clothes. That he urinated there, and that he intended doing so, when he went, is not in my judgment proved; on the other hand, I believe the weight of evidence is against it. But to prove that he urinated there, and even that he intended to do so when he went, would not be sufficient to sustain this defense—granting it to be sound. It must further appear that he did not go there to leave his clothing, but simply to urinate. He left his clothing there, and the presumption, even in the absence of his positive statement respecting it, is that he went for

that purpose. If he did go for that purpose, the fact that he urinated there, would be unimportant; and that he intended to urinate there when he went would be equally unimportant, if he went to leave his clothes.

To sustain this branch of the defense, the facts, on which it rests should not be left in doubt. The respondent was guilty of plain, if not gross negligence, which tended directly to the accident—negligence which, in the ordinary course of events, would lead to it. When therefore he charges the result to misconduct of the libelant, he should be held to clear proof of his charge. While I abstain from the useless task of discussing the conflicting testimony on this point, I may call attention to the fact that the respondent's witnesses are almost exclusively his employés, or agents (of the ignorant class engaged in such work); that the testimony consists in alleged confessions of the libelant, made immediately after the accident, when he was suffering intense pain, or after being taken to the hospital, and when, as his attendants and nurses say, he was generally insane in consequence of his injuries. That the witnesses should have held such conversations with him as they relate at the times referred to, seems very extraordinary; that he should have been substantially scolded or remonstrated with by them (his fellows) for going where he went, just after the accident, in his then deplorable condition seems incredible; and it is not less so that men who had learned how the accident occurred should have gone to the hospital, and in his condition at the time, sought to have him explain the occurrence. The witness relied upon to prove that he saw the libelant urinating on the deck does not say in terms that he saw it. The language is equivocal. If he meant this, as probably he did, he should have said it; should have been required to say it. But if he had said it, it would simply be saying that while there changing his clothes, he urinated—which as we have seen would be unimportant. This witness, in substance, says he changed his clothes there. In view of the libelant's positive statement, and the testimony of his witnesses on this subject, I cannot, as before stated, regard the allegation as proved.

A decree may be prepared sustaining the libel.

THE GRACE SEYMOUR.

THE EDWIN REED.

FULTON v. THE GRACE SEYMOUR.

HANSCOM v. THE EDWIN REED.

(District Court, S. D. New York. July 19, 1894.)

COLLISION—SAIL VESSELS—RIGHT OF WAY—LOOKOUT—LUFF IN EXTREMIS.

The night was moonlight; the wind, N. N. W. The bark R., deeply laden, headed east, and the schooner S., sailing light, headed each a point free of the wind, and making five to six knots, were approaching one another. Each had seen the other's sails two miles off on the lee bow. The bark's pilot could not see ahead, and the watch noticed no more of the

schooner until her red light was close aboard, though it must have been steadily visible for five to seven minutes. There was evidence that the officer of the watch was busy with other things. Both vessels then ported hard, and the schooner luffed two points, and received a glancing blow. Held, that since the bark was on the port tack, with a free wind, it was her duty to keep out of the way, and that she had failed in this by reason of neglect to keep a proper, continuous lookout.

Libels by Allen Fulton against the schooner Grace Seymour and by Howard H. Hanscom against the bark Edwin Reed. The first dismissed, and a decree allowed on the second.

Wing, Shoudy & Putnam and Mr. Burlingham, for the Edwin Reed.

Owen, Gray & Sturges, for the Grace Seymour.

BROWN, District Judge. The above libels were filed to recover the damages sustained by the bark Edwin Reed and the schooner Grace Seymour through a collision between those vessels which occurred at about 10 p. m. of November 30, 1892, in Long Island Sound about two miles west of Norwalk island.

The night was clear, with moonlight; the wind, about N. N. W., and the sea light. The bark was of 1,164 tons burden, about 240 feet long, deeply loaded, and drew 21 feet. She had been previously heading about N. E. by E. $\frac{1}{4}$ E., and was in charge of a pilot. The Seymour was a three-masted schooner, of about 600 tons burden, 167 feet long, sailing light, drawing but 8 feet of water, and she was heading about west. Each was making from five to six knots per hour. The sails of each were first seen by the other when they were at least two miles apart, and on the lee bow of each. Just before collision each ported hard; the schooner luffed, as I find, about two points before collision, and the bark paid off probably not over half a point; so that at collision the bark's port bow struck the schooner's port side just aft of the fore rigging, by a glancing blow, which raked her fore and aft, and started several knees, timbers, and plank sheer, but without breaking any hole in her side. The bark's port cathead and anchor caught and carried away the schooner's fore rigging and sails, and having got foul carried the schooner astern along with her. The bark had her jibboom broken and sustained some other damages. The schooner being to windward dropped her anchor, and after an hour the bark drifted clear.

The bark contends that the collision was caused by the schooner's luff; the schooner contends that the luff was in extremis, to ease the blow, and that the bark was solely in fault, in not keeping out of the way.

The pilot testifies that the bark was not sailing close-hauled, and the other evidence satisfies me that she was one point free. I think the schooner also had the wind one point free. This, however, is immaterial; because the bark, being on the port tack and also having a free wind, was bound by the rules to keep out of the way of the schooner, which was on the starboard tack, and was bound to keep her course.

I am persuaded from a careful consideration of all the testimony, that the sole blame for this collision rests with the bark, by reason of her failure to keep a proper, continuous lookout; and by reason of the preoccupation of the first mate, who was the officer in charge of the deck, with the duty of superintending the seamen on the fore-castle in heaving on the windlass, and taking care of the bars, ropes, etc., on the fore-castle; so that the necessary attention was not given to the schooner, or to the navigation of the bark, so as to enable her to perform her duty to avoid the schooner. The bark was so high forward that the pilot and seaman at the wheel could see nothing ahead; and though one or more reports of the schooner were made by the lookout on the bark, the first mate, who was forward, did not give even a look at the schooner until the last moments, at or near the time when she luffed to avoid immediate collision. The lookout also, after first seeing and reporting the schooner's sails bearing a little on the bark's starboard (lee) bow, and not long afterwards reporting what he thought was a dim green light on the same bearing, paid no further attention to the schooner until her red light was seen to be very near, about the time she luffed; the bark's wheel was then ordered, and put, hard-a-port, but too late to avoid collision.

In the meantime, the bark had been showing to the schooner, whose officers and men were attentively observing her movements, first, her green light, then the red only, then the green, then the red, and last, when very near, the green again. These lights were always seen about a point on the schooner's port (lee) bow, as the witnesses testify, and without much change of bearing. Even if the schooner's green light was seen at all, which I greatly doubt from the courses of the two vessels, there must, nevertheless, have been a very considerable interval of from five to seven minutes at least during which her red light was steadily visible to the bark, i. e. showing twice on the bark's starboard bow, and twice a little on her port bow (in consequence, no doubt, of the bark's own changes), during all which time this red light of the schooner was not seen by the bark at all, because no continued attention was paid to the schooner; and it was not seen until the vessels were close aboard, within two or three lengths at furthest, too late for any effectual maneuvers.

The situation was one that made careful observation by the bark necessary. The schooner, from the time at least that she was a mile and a half away, was showing her red light, and showing it mostly to the bark's green light. The headings of the two vessels differed only $2\frac{1}{4}$ points from opposite; while the combined leeway of the two amounted probably to at least $1\frac{1}{2}$ points, the bark's leeway being probably about $\frac{1}{3}$ that of the schooner; so that their actual courses, from the first, differed from opposite by less than a point. Each was thus all the time heading to windward of the other, except when the bark yawed enough (say about one point) to show her red light. The fact that there was no substantial change in the bearing of the lights, as the vessels came nearer to each other, would have made it obvious to the bark, had any con-

tinuous watch of the schooner been kept up, that decided and timely maneuvers were necessary on her part in order to perform her duty to keep out of the schooner's way. Through the bark's inattention, nothing was done by her until too late. The fault of the bark is plain and inexcusable.

I see no sufficient ground for holding the schooner chargeable with legal fault, even if her final luff was a mistake, which is by no means certain. The bark's evidence on that point is entitled to very little weight, as after the first light seen by her there was no observation of the schooner till collision was imminent. The bark's exhibition of her red light twice, was indicative of her intent to go to leeward. It was not until the bark's last change to green, when quite near, and when she seemed coming straight upon the schooner's course after two contradictory changes, that the schooner luffed. The situation was threatening in the extreme. It was brought about by the gross fault of the bark, continued down to within a few moments of collision,—faults that baffled all calculation by the schooner as to the bark's intent; so that even if the schooner's luff was a mistake, the bark would be precluded from taking advantage of it, as it was done in extremis. *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468.

The bark contends that the schooner luffed four points. This is improbable. Her wheelman says he noticed the compass just at collision, and that the change was but two points, her heading being then W. N. W. The blow was certainly a glancing one, and it seems improbable that the angle of collision was as much even as four points; if so much as that, the great weight and force of the bark would, I think, have broken a hole in the schooner's hull, instead of raking along her side; and if the angle of collision did not exceed four points, supposing the bark to have paid off only a half point before collision, which is as much as her testimony will admit, the schooner could not have headed at collision north of W. N. W. She was liable to make so much leeway, being light (one to one-half point says the master) that I credit the positive testimony that her previous heading was west. Her luff, therefore, was not over two points; and a luff of only two points would make very little change in her actual position, as a drawing of the curve will show,—a difference, I think, insufficient, as the schooner's witnesses testify, to have avoided the collision. Considering the bark's gross fault, the schooner cannot be held unless her fault is clear; and this is not made out. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The libel against the *Seymour* is, therefore, dismissed, with costs, and a decree allowed against the *E. Reed*, with costs.

THE ROBERT GRAHAM DUNN.

GRANT v. THE ROBERT GRAHAM DUNN.

(District Court, D. New Hampshire. April 2, 1894.)

No. 222.

1. COLLISION—SAILING VESSELS—HOLDING COURSE—LOOKOUTS.

A vessel sailing free is bound to keep out of the way of one sailing close-hauled, and if she fails to change her course, or, after changing it, fails, through the inexcusable absence of her lookout, to maintain it steadily, and thus causes a collision, she is liable.

2. SAME—ABSENCE OF LIGHT.

The alleged absence of a green light is immaterial, when, from the situation, its presence could not have averted, or its absence contributed to, the collision.

This was a libel by Isaac N. Grant against the schooner Robert Graham Dunn to recover damages for a collision by which the schooner Captain John was sunk.

Benjamin Thompson, for libellant.

Carver & Blodgett, for claimant.

ALDRICH, District Judge. The Captain John, a two-masted schooner, sailed from Roundout, in the district of New York, September 16, 1893, Boston-bound. September 20th, the Robert Graham Dunn, a three-masted schooner, left Portland harbor for Newport News; and about 10 o'clock of the same evening, through the fault of the Dunn, the two vessels were in collision off Chatham bar, the bluff of the starboard bow of the Dunn striking the starboard bow of the Captain John, carrying away her jib boom, disabling her foremast, and cramping her boat, resulting in the total loss of the Captain John and cargo, together with her crew. The Dunn was running light and free at the log rate of about eight knots,—her rate over the ground being accelerated three knots by the action of the tide,—when the red light of the two-masted schooner, which was the Captain John, was sighted about a mile away. At this time her light bore about a half a point on the lee side or port bow of the Dunn. The sails of the two-master were plainly seen, and she was closehauled, with the wind N. by W. or N. N. W. The breeze was quite strong, and she was heading N. E. or N. E. by N. The tide was running westerly, or towards the shoals, and she was about holding her own. Under such circumstances the Captain John had the right of way, and it was plainly the duty of the Dunn to keep clear; and, as there was plenty of sea room, with reasonable care the collision could have been avoided.

The contention of the Dunn is that, recognizing such duty to keep clear, she luffed a point or a point and a half for the purpose of passing under the stern of the two-master. It is probable, if this be true, that if the two vessels had held their courses the Dunn would have passed at least an eighth of a mile to the windward of the Captain John; and it would follow, therefore, that the vessels were in collision by reason of the failure of one vessel or the other to

hold its course. The theory of the Dunn is that while she was holding to her course, adopted for the purpose of crossing under the stern of the other vessel, an eighth of a mile away, the two-master suddenly luffed, and, running into the wind, crossed her bow, and brought on the collision, while the theory of the Captain John is that she kept her course until the Dunn was coming down upon her, and that her course was changed in extremis for the purpose of avoiding a collision.

I find the latter theory to be the true one. The Dunn either failed to change her course so as to run clear, or failed to maintain her watch and course, if she did make a change. It is admitted that the lookout left his post for some minutes, and I find that this was without reasonable excuse, and that no observation was kept of the varying effects of the wind. Whether the collision was brought on by failure to change her course, or failure to exercise care thereafter with a view of maintaining it, it is impossible to say; but it is apparent that the collision resulted from fault in one respect or the other, and it is perhaps immaterial which. It being the duty of the closehauled vessel to keep her course, the theory that she abruptly changed her course, and ran across the bow of the larger vessel, running free, is highly improbable; and it is quite as improbable, in the event of her changing her course, that she could have run into the wind a sufficient distance to cross the bow of the Dunn, if the Dunn had kept the course claimed for her. The story of the Dunn is not a reasonable one, on its face, and moreover it is discredited by the conduct of her officers after the collision. According to the evidence of Edwin Coombs, master of the Willie L. Newton, which passed under the stern of the two-master a few moments before, she was running near the wind, with her sheets flat and both lights burning; that soon after he heard a crash, and saw her in collision with a three-masted schooner which had followed him from Cape Cod light down to Chatham; and that in less than 10 minutes the two-master disappeared. The officers of the Dunn seek to attach blame to the Captain John on the ground of the absence of a green light. I think it more probable than otherwise that her green light was burning; but, however this may be, its absence could not have contributed to the collision, for the reason that when her red light was closed in the vessel was in plain sight, and its presence, therefore, could not have averted, or its absence contributed to, the injury.

The libellant claims that the Dunn should be deemed in fault in bringing on the collision, for the reason that she did not lie by and render the assistance contemplated by chapter 875, Laws 1890, and to relieve themselves from this charge the officers of the Dunn give evidence quite contradictory and unsatisfactory. Notwithstanding they admit they heard the cry of distress and for boats, and that they could see the sails of a vessel a mile or more, and that the two-master, although she was only holding her own, suddenly disappeared from the surface of the water, they say they assumed that she had gone on her course without serious injury, and maintained that the crash was so slight they were excused from doing more than

they did do. They did wear ship,—some of the officers claiming that they came within a half an hour to the place of collision; others, that they were a quarter or a half a mile to the leeward. But it is apparent from the evidence that they could and should have done more to save the crew of the vessel, which they must have known was suddenly sunk. The conduct of the officers was inexcusable, and their account of their doings after the collision is wholly unreliable. The collision took place about 10 in the evening. The officers of the Dunn say they lay to an hour or more at or near the place of collision. This statement is not sustained. The steamship H. F. Dimock, with freight and passengers, passed over the wreck at 10 minutes past 11, and heard the shrieks of the men then clinging to the rigging, which were sufficiently loud to be heard in the state-rooms of the steamer. The engines of the steamer were reversed, the vessel brought about, and boats lowered, which reached the wreck within 20 or 30 minutes, but the men had disappeared. At this time there was no vessel lying to in that vicinity, and none in sight; and I therefore must find that the account of the officers of the Dunn is not reliable in this respect.

On the whole, the Robert Graham Dunn must be adjudged in fault, and responsible for the collision; and at the proper time, in view of the limited liability proceedings now pending, a decree will be entered accordingly.

THE RELIEF.

GRADDICK v. THE RELIEF.

(District Court, E. D. South Carolina. August 9, 1894.)

1. COLLISION—TUG AND SAIL—FAILURE TO FILL OUT TACK.

A sloop met by a tug and barge near the shore of a river, and struck shortly after going about, must be *held* in fault for failing to fill out her tack, by two or three lengths, or to luff into the wind until the tug had passed.

2. SAME—DUTY OF TUG—FAILURE TO GIVE ROOM.

Under the rule that the steamer must keep out of the way, a tug meeting a sloop tacking towards the shore must be *held* in fault for passing so close as to involve danger of collision in case the sloop should not beat out her tack to the utmost limit.

This was a libel by Henry T. Graddick against the steam tug Relief to recover damages for a collision with the sloop Shamrock.

Mitchell & Smith and R. W. Memminger, for libellant.
J. N. Nathans, for respondent.

BRAWLEY, District Judge. This is a libel for a collision which occurred in the Ashley river about noon on April 26, 1894. The sloop Shamrock, loaded with gravel, was beating down the Ashley river with a light wind from the southeast, the tide being just past the flow. The steam tug Relief, with a large barge in tow, was coming up the river, and sighted the sloop near the west bank, as she was about tacking to the eastward. The collision occurred

near the east bank, and the sloop was sunk. The master of the sloop testifies that he had beaten out his tack to the eastward, and had turned upon his starboard tack, when the barge ran into him. If this testimony is to be taken as true, there can be no doubt as to where the fault lies, for the rules of navigation applicable thereto have been settled by repeated adjudications, and are embodied in the statute law, which prescribes that:

"If two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such direction as to involve risk of collision the steam vessel shall keep out of the way of the sail vessel." Rev. St. U. S. § 4233.

As the collision did occur, and as there were no circumstances which rendered it inevitable, it is manifest that there was blame somewhere; and, as is usual, there is conflict of testimony.

The master of the sloop is not supported by any other witness near the scene of the accident, in his version of the story. There were two other men aboard the sloop. Neither of them were examined. It was stated by counsel for the libellant that one of these men could not be found; but one of them was present, and not called. It may not be fair to attach too much significance to this omission, for, having made out a *prima facie* case against the steam vessel, the libellant could rest, but he does so at his risk. As there is always conflicting testimony in these cases, the court is entitled to hear and see all the witnesses, so that it may, notwithstanding such conflict, reach a conclusion as to how the accident really occurred; and, while it will not be assumed that the other witnesses would have contradicted the master, the omission to produce them leaves him unsupported upon a material point. Such omission, considered in connection with the testimony of the master that he was not called upon to look out for steamers, as it was the steamer's duty to keep out of his way, rests upon an erroneous conception of the law. While it is true that it is the duty of the steam vessel to keep out of the way of the sail vessel, there is a correlative duty on the part of the sail vessel, when approaching a steamer, to keep its course, and a failure so to do must be imputed to it as a fault.

The witnesses for the respondent all say that the master of the sloop changed his course almost immediately after passing the bow of the tug, instead of beating out his tack to the eastward, where he had room enough to do so in safety. The river at this point is about 400 feet wide; the channel lies near the eastern shore; and the Shamrock, having been struck by the bow of the barge on her port side, just aft her shrouds, is sunk in 17 feet of water, near the bank. There is no direct testimony as to the exact distance of the sloop, as she now lies, from the shore. Counsel for libellant state that her stern is about 20 or 25 feet from the shore. The master of the tug testifies that she did not sink at the point where she was struck, but that the barge, in veering around, carried her further in shore.

Three classes of witnesses have testified,—the master of the sloop, the master and crew of the tug, and certain disinterested onlookers. On the vital question as to whether the sloop had filled out her tack to the eastward, the master of the sloop stands uncor-

roborated, save by the testimony of two witnesses who were on the western bank. They are disinterested, but their testimony upon this point is of little value, because, from their position and distance from the scene, it is impossible that they should know accurately whether the sloop had room, while the testimony of the master and crew of the tug is supported by a disinterested witness,—a gentleman of high character and intelligence,—who happened to be on the tug that day. He was in the pilot house. His attention was closely fixed upon the sloop, and his testimony is positive and direct that the sloop was two or three boat lengths from the shore when she tacked, and that if she had filled out her tack to the eastward, instead of changing her course in face of the approaching steamer, she would have avoided the collision. All of the witnesses for the respondent concur in the statement that there was room for the sloop to beat out her tack to the eastward, and that the sudden change of course caused the collision. When it is considered that the shore at this point is in no sense a dangerous one, that it is bordered by a marsh which at high tide might have had water sufficient to float the sloop, and that no great peril would have ensued even if the sloop had gone ashore at that point, it is impossible to escape the conclusion that the sloop was badly handled, and that the peril might have been avoided altogether, or minimized, if the master of the sloop had not lost his head. If he had held his course but a very short time longer, or had luffed up into the wind, either of which was available by competent management, he would have avoided the collision, and his failure to do so must be imputed to him as negligence.

But this conclusion does not relieve the tug from all blame, and she cannot escape condemnation. It was the primary duty of the tug and tow to keep out of the way. From the time the sloop was sighted, it was the duty of the steamer to watch her progress and direction, and to adopt such timely measures of precaution as would necessarily have avoided the collision. The fact that they did collide shows that there was a danger to be guarded against, and it does not satisfactorily appear that the master of the tug took such account of all the circumstances of the situation as prudence obviously demanded. He testifies that he blew two whistles to indicate that he was going to pass to the stern of the Shamrock. Yet he did not change his course. The man at the wheel testifies that his wheel was amidships until just before the collision, when he put it hard down. Although the channel was near the east bank, there was, in the then state of the tide, plenty of water in the river; and he could have borne away, or slacked his speed, stopped, and reversed. He took no such timely precautions until it was too late. When there was abundant room to keep properly out of the way, it cannot be held to be prudent or justifiable navigation to take such a course as would bring him into dangerous proximity to the sloop. Although it is held that the sloop did not run out her tack as near to the shore as she possibly might have gone, she did not come far short of it; and although the master of the sloop might, by good seamanship, have escaped collision by letting her sheets go, and

shaking in the wind, yet some allowance must be made for the confusion incident to such dangerous proximity, and the master of the tug cannot be absolved from the charge of obvious imprudence in failing to keep a reasonably safe margin between himself and the sloop. Holding, therefore, that the close line which the steamer was making upon the sloop's course was not a reasonable and substantial compliance with her maritime obligation to keep out of the way, she must also be held in fault.

Let the damages and costs, therefore, be divided.

KILLIEN v. HYDE et al.

(District Court, S. D. New York. August 25, 1894.)

1. COLLISION—FERRYBOAT AND TUG—CONTRIBUTORY NEGLIGENCE.

A fireman of a tug which, because of a collision, had so careened as to be in apparent danger of capsizing, who jumps into the water under the belief that the boat is about to upset, is not guilty of negligence.

2. SAME—OVERTAKING VESSEL—MID RIVER—STATE STATUTES.

A ferryboat and tug were going down the East river. The tide was strong flood. The ferryboat was to port of the tug, and about 200 feet astern, when both stopped to allow a crossing steamer to pass. When they went ahead the ferryboat sheered out towards the middle of the river, but soon placed her wheel to port, to turn her head down the river, which brought her course to starboard. When the tug reached Corlear's Hook, she felt the force of the flood tide, and was turned to port, towards the ferryboat, which was then about 100 feet to port of her, and shortly after the collision occurred, about 300 feet from the New York shore. *Held*, that both vessels were at fault,—the tug, for not sufficiently porting her wheel when approaching the hook so as to counteract the cross-tidal current; and the ferryboat, because she did not keep as much away from the tug as reasonable prudence demanded, she being the overtaking boat, and nothing preventing her going in midstream, as required by statute.

3. SHIPPING—INJURY TO SEAMAN—NEGLECT—FELLOW-SERVANTS.

Where the owner of a tug, who is also captain and pilot, and in charge thereof, temporarily places at the wheel, when the boat is in a difficult situation, an unlicensed person, not of the experience required, and by reason of his want of skill a collision occurs, causing the death of a fireman of the tug, the owner is liable.

Libel by Mary Killien, administratrix of Martin Killien, against the owners of two vessels, alleging negligent collision by which intestate lost his life.

E. N. & T. M. Taft, for libelant.

Alexander & Ash, for respondent Hyde.

Wm. J. Kelly, for Long Island R. Co

BROWN, District Judge. The above libel was filed by Mary Killien, as administratrix of Martin Killien, her husband, to recover damages under the statute of this state, for the death of the deceased, a fireman on the tugboat William H. Walker, on the afternoon of June 13, 1893, through an alleged negligent collision between the Walker, owned by the respondent Hyde, and the ferry-

boat Garden City, owned by the respondent, the Long Island Railroad Company.

The collision occurred on the East river, from 200 to 300 feet off the New York docks, about opposite the marble yard, just below the turn of Corlear's Hook. The weather was clear and pleasant, the tide, strong flood. Both boats were going down river; the Garden City, on one of her regular trips from Hunter's Point to James' slip; the Walker, going down under one bell, near the docks, looking for a job. About 200 feet in front of them was the transfer tug No. 5, also going down. All three boats had come to a stop just above the Grand street ferry for two ferryboats of that line on the New York side, one coming out of that ferry, and another going in. At that time the Garden City was a little outside of the Walker, and about 200 feet astern of her.

As soon as the inward-bound ferryboat at the Grand street ferry would permit them to pass, the three boats started ahead, the Garden City sheering at first somewhat outwards into the river. Soon afterwards she put her wheel to port, to turn her head down river. This brought her course more to starboard while rounding the hook, and gave the appearance of a sheer towards the Walker, as in a certain sense it was. The Walker at the same time on passing from the eddy, as I find, and striking the force of the true flood tide, which there sets strongly across towards the Brooklyn shore, was turned by the tide to port towards the Garden City, which, going faster, was overtaking and passing her on the Walker's port side. The Garden City was in fact passing so near, viz. from 40 to 100 feet, that after their approach to each other sideways was observed, before either could do anything effectual to prevent it, they came in collision, the port bow of the Walker striking the Garden City about 40 feet forward of her paddle box, and running under her guard, where she stuck fast. The blow itself was not violent, the Garden City having reversed, and the Walker having stopped her engines just before collision; but as the Walker swung round with the tide against and under the other's guard, she took and kept such a strong list to starboard, that observers thought she was going to roll over. Just at that time the engineer, who had been at supper in the kitchen, and heard the bell to stop a moment before collision, in trying to run around the house from port to starboard, so as to reach the engine room and attend to the engine himself, was unable to keep his footing, through the strong list to starboard, as above stated, so that he could not help running off the deck into the water. A few moments afterwards, the deceased, who during the engineer's absence at supper, had been temporarily doing the engineer's duties at the engine, was also seen to run off the deck on the starboard side, a little forward of the engineer. The engineer after some ten or fifteen minutes was rescued; but the fireman was drowned. He was a fair swimmer, but seemed to have incurred some disability. He was 30 or 40 feet away from the engineer in the water, and they exchanged a few words; the last heard from the fireman being, that he could not hold out much longer. Soon after he sank.

1. There is no trustworthy evidence to indicate with certainty whether the fireman jumped off the boat voluntarily, or whether, like the engineer, in coming suddenly and quickly upon the sloping deck, he was unable to hold his footing, and was forced overboard. That he went off after the Walker had careened greatly, is clear from the fact that his position in the water was to the southward of the engineer, so that he must have gone over after the engineer. There seems to me small probability that he went overboard voluntarily; and if he did, it must have been done presumably from fright at the position and list of the Walker when he reached the open deck, and from apprehension of immediate capsizing; and even on that hypothesis, I could not hold him legally chargeable with negligence, or legal fault, for such an act done when apparently in extremis. The City of Norwalk, 55 Fed. 102, where the court says:

"The attempt of the deceased to jump to the float should not be treated as a legal fault, though a mistake and an error of judgment. He had doubtless seen one or both of his shipmates jump just before. Coming suddenly from the engine room immediately upon the crash of the collision, when a considerable part of the side of the steamer had been carried away, and in the alarm attending such a catastrophe in the night time, there was no time nor opportunity for the exercise of deliberate judgment, and his act should, I think, be treated as errors in extremis are treated, viz. as a mistake made under the apprehension of immediate danger, for which those who wrongfully brought about the situation, and not himself, should be held to blame." Affirmed on this point, 9 C. C. A. 521, 61 Fed. 364.

2. There is considerable conflict in certain parts of the testimony as to the faults causing the collision; but I am satisfied that the collision occurred from several contributing causes which inculcate both vessels. The weight of evidence shows that the collision was in the true tide, and not in the eddy; that the Walker, in passing out of the eddy into the true tide as the Garden City drew abreast of her, swung two or three points to port, towards the line of the ferryboat's course, while the latter was swinging to starboard under the port wheel. The Walker swung to port, because she did not sufficiently port her wheel in time to counteract the effects of the cross-tidal current which she met in rounding the hook. She was going slowly, under one bell; and this made a stronger port wheel necessary than when going at ordinary speed. The deck hand was at the wheel, temporarily taking the place of the master who was the pilot, but who was then at supper in the kitchen, and did not leave the kitchen until a few moments before collision when he saw the Garden City abreast, and said to the engineer, "She is going to plug into us." The deck hand was a young man, not licensed as a pilot, and he was left alone in a position requiring thorough skill, experience, and matured judgment in order to avoid accident in one of the three most dangerous places about New York harbor.

I do not think the witnesses from the Garden City are correct in supposing that the deck hand starboarded his wheel instead of porting it. The cross current, and the necessity of a port wheel to counteract it, were perfectly well known. But the precise amount of porting needful was a question of skilled judgment, depending

as it did upon the various circumstances, of the distance of the Walker from the shore, the speed and the draft of the tug, the time of tide, and correct observation of the line where the true tide was reached. The near presence of the Garden City on the port side made special care as to all these points necessary, in order to avoid the natural set of the tide towards her. The evidence leaves no doubt in my mind that the Walker swung, as I have said, from two to three points to port, through lack of efficient and timely means to prevent it, and thus contributed to the collision. The deck hand, who had the wheel, testified that even at collision the Walker was in the eddy tide; and if he was acting on that supposition at the time, inasmuch as that supposition was clearly wrong, his swing to port was the result of faulty observation of his position. If the master, who was also both owner and pilot, had been at his proper post, at a place of such danger, I think his better observation, experience and skill would have prevented mistake, and the collision would have been avoided.

There was no other pilot aboard; and the master is himself chargeable with negligence for absence from his post at so dangerous a point, and for substituting in his place a person neither legally certified as qualified therefor, nor sufficiently proved to possess the requisite experience and skill to be able to act alone as sole pilot in so difficult and complicated a position. Much of the master's testimony I am unable to accept as correct, both from his strong interest, and from its inconsistency with the testimony of others, and with his own testimony before the inspectors. He came on deck forward just before collision; but too late, as I find, to be of any service.

3. The evidence is equally conclusive that the Garden City did not keep away from the Walker as much as reasonable prudence demanded, in that peculiar locality. The Garden City was the overtaking vessel; she was bound to keep out of the way of the Walker; she had the port side of the river open to her; the state statute required her to go as near the middle of the river as possible, and there was nothing to prevent her going in mid-river. On going astern of the Grand street ferryboat, she sheered out somewhat towards mid-river; but instead of continuing on into the middle of the river, as she should have done, she ported her wheel when not a quarter of the way across from the New York shore, and thereby hauled up again towards the Walker, so as to overtake and attempt to pass her within from 40 to 100 feet of her, and just at a time and place when the Walker would strike the cross current of the flood tide, and be likely to be deflected, as often happens, from her proper course, and where in case of any miscalculation, such as happened in this instance, the vessels were sure to be carried dangerously towards each other. This was not a reasonable performance of the duty of an overtaking steamer "to keep out of the way" of the vessel she is overtaking; and the violation of the state statute also is by the result shown to have been material. She was not allowing a reasonable margin for the contingencies of navigation in that peculiar situation, and its well-known peculiar dan-

gers. *The Ogemaw*, 32 Fed. 919; *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795; *The Oceanic*, 61 Fed. 338, 362. Besides this, there is so much evidence tending to show that under her port wheel, the *Garden City* more than broke her sheer to port so as to head the tide, and actually came again somewhat to starboard towards the *Walker*, that I think it probable that this also contributed to the collision; though the *Garden City* again ported when it was too late to avoid collision; but this element was probably much less than it appeared to be to the *Walker*, in consequence of the latter's change to port.

4. It is urged that the deceased fireman was a fellow servant of the deck hand by whose negligence the *Walker's* fault was caused; and that there can, therefore, be no recovery against the owner of the *Walker*. Had the master and owner not been in any personal fault, I think that result would have followed. The decision of the court of appeals in *McCullough v. Steamship Co.*, 9 C. C. A. 521, 61 Fed. 364, 368, I think, is not applicable here. It is the nature of the duty or service, in the course of which the negligence occurs, and not the person who happens to be performing it, that, as I understand, determines whether the case is to be treated as one of fellow servants, or not. *Quinn v. Lighterage Co.*, 23 Fed. 363; *The Queen*, 40 Fed. 694, 696, 697; *The City of Alexandria*, 17 Fed. 392; *The City of Norwalk*, 55 Fed. 98; *The Victoria*, 13 Fed. 43; *The Harold*, 21 Fed. 428. Here the owner, who was also master, was himself negligent, as I have above said, for absence from his post in a difficult situation, and for practically substituting in his place as pilot, temporarily, an unlicensed person not of the proved experience and skill required in such a situation. That was a fault, not merely of one of the details of navigation, but in the general management and control, which makes the owner liable. *Railway Co. v. Ross*, 112 U. S. 394, 5 Sup. Ct. 184; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914.

The statutory limit of \$5,000 is not in excess, I think, of the pecuniary loss sustained by the family of the deceased; and a decree for that sum and costs may, therefore, be taken against both defendants in the usual form.

FERGASON v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court, N. D. Iowa, W. D. October 11, 1894.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—WHAT CONSTITUTES.

In an action by a switchman against a railroad company, S., and P. for personal injuries sustained by being run over by the company's switch engine, the petition alleged that the engine was improperly constructed; that after plaintiff fell on the track, having been thrown down in an effort to step on the defective footboard, he was pushed along the track; and that such company, together with the engineer, S., and yard master, P., were negligent in that they did not keep a proper lookout, and did not heed plaintiff's signals to stop. *Held*, that such petition contained two distinct, separable causes of action.

This was an action by George W. Fergason against the Chicago, Milwaukee & St. Paul Railway Company, John Smith, and D. W. Pollard for personal injuries. Plaintiff moved to remand the case to the state court, where it originated. Motion overruled.

Argo, McDuffie & Argo, for plaintiff.

Taylor, Shull & Farnsworth, for defendants.

SHIRAS, District Judge. The questions arising upon the motion to remand this case to the state court, where it originated, grow out of the following facts: The plaintiff, George W. Fergason, on the 21st day of December, 1892, was in the employ of the Chicago, Milwaukee & St. Paul Railway Company, engaged in the business of switching in the yards of the company at Sioux City, Iowa. On the day named he was run over by a switch engine in the yard of the company, resulting in the loss of his leg. To recover damages for this injury he brought suit in the district court of Woodbury county, Iowa, against the railway company, which action was removed into this court by the railway company, and on the 1st day of June, 1894, the case came on for trial before the court and jury. At the conclusion of the plaintiff's testimony the court intimated that his evidence showed that he himself was responsible for the accident, and thereupon the plaintiff dismissed the action without prejudice, and then instituted the present suit in the district court of Woodbury county, naming as defendants therein the railway company, John Smith, the engineer in charge of the engine, and D. W. Pollard, the yard master. The railway company thereupon filed a petition for the removal of the case into this court, upon the ground that it was a corporation created under the laws of the state of Wisconsin; that the plaintiff was a citizen of Iowa; that the suit was for \$20,000; and that it involved a separable controversy existing between the plaintiff and the railway company, and hence was removable, even though the defendants Smith and Pollard were citizens of Iowa, and therefore cocitizens with plaintiff. The state court granted the order of removal, and, the transcript having been filed in this court, the plaintiff moves to remand on the ground that this court is without jurisdiction.

The question to be determined is whether the petition sets forth a cause of action existing solely between the plaintiff and the rail-

way company, and which is separable from the cause of action alleged against the defendants Smith and Pollard, so as to bring it within the third clause of section 2 of the act of August 13, 1888, which enacts that "when in any suit, mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." Under this clause of the statute regard is had solely to the cause or causes of action declared upon and set forth by the plaintiff in his petition or declaration. By the rulings of the supreme court in *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034,—and other cases based thereon, it is well settled that the question of the existence of a separable, removable controversy is to be determined upon consideration of the allegations of the petition; that the defendants, by separate answers or defenses, cannot create a separable controversy, within the meaning of the statute, out of a cause of action upon which the plaintiff has declared jointly; and therefore the true query is whether the case as made and set forth in the petition or declaration of the plaintiff is or is not separable into parts, "so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of different states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90. If the plaintiff in fact counts or declares upon one cause of action, and no more, then the case cannot contain a separable controversy. If, however, the petition in fact contains more than one cause of action, then a separable controversy exists; and, if the requisite diversity of citizenship exists between the adversary parties thereto, a ground for removal may thus be shown. Examining the petition filed in this case, we find it sets forth that the engine used in switching in the Sioux City yards, and under which the plaintiff was thrown, was improperly constructed and equipped, it being averred "that it was the duty of the defendant company to furnish an engine for doing said work so constructed with sloping sides and top, and of such width, that the servants of the defendant other than the plaintiff could readily see the plaintiff as he might step upon said board, or while riding thereon in the discharge of his duties, as well as the track in front of said engine, and so the defendant might have done with the exercise of ordinary care and caution." It is also averred that the engine was not built for switching purposes, but was a road engine, and that the foot-board placed in front thereof had not a railing or hand-catch placed above it, and that it had been permitted to become covered with ice or snow.

It is also averred that after the plaintiff had fallen upon the track,—having slipped and been thrown down in an effort to step upon the footboard of the engine while it was in motion,—he was pushed along the track for some distance, and that the defendant company, together with the engineer, Smith, and yard master, Pollard, were negligent in that they did not keep a proper lookout, did not heed plaintiff's signals to stop, nor promptly halt the engine in time to prevent injury to the plaintiff. Does this petition declare upon a single joint cause of action against all the defendants, or does it contain two distinct causes of action? If a person fails to perform a duty which the law imposes upon him, and as a consequence of such failure an injury is caused to the person or property of another, to whom the duty of performance was due, then a right to maintain an action arises in favor of the injured party. In this sense of the word, and as against the wrongdoer, the cause of action is the failure to perform the legal obligation. It is clear, in the present case, that the plaintiff counts upon the legal duty of the railway company to furnish for the use of its servants machinery and appliances properly constructed and equipped, and avers as a breach of this legal duty that the engine was not built for switching purposes, and was not properly equipped with railings, catch-rods, etc. If the company had come short of its duty in this respect, and the plaintiff suffered injury by reason thereof, then a right of action existed in favor of plaintiff, based upon the cause named, to wit, the failure of the master, in the performance of its duty, to furnish proper machinery and appliances for the use of its employes. The petition does not, nor could it rightfully, charge the engineer or yard master with this duty, and with the consequence of a breach thereof. These men were but coservants with the plaintiff, and were under no legal obligation to furnish any machinery for his use. It is certainly clear that if the plaintiff had sued the engineer or yard master alone, and had based his action upon the averment that the engine was not properly equipped, he could not recover, because it could not be shown that they were under any legal obligation to furnish a safely-equipped engine for his use. That was the obligation of the master, and not of the coservant. The petition in fact counts upon two causes of action,—one, the failure to furnish a properly equipped switch engine; the other, negligence in the handling of the engine after plaintiff had been thrown upon the track. The first cause named exists only against the railway company, and is wholly distinct from the second cause of action. If it be true that the engine was not properly constructed, and was lacking in appliances needed for the safety of the men employed thereon, then this breach of duty existed from the time the engine was put to work as a switch engine; and thus a cause of action existed against the company from that time, which would ripen into a right of action in favor of an employé whenever such employé received injury by reason thereof. The cause of action for the negligent handling of the engine and failure to exercise a proper lookout did not arise and was not in existence until the parties in charge of the engine

undertook to move the engine along the track upon which plaintiff was injured. The first cause of action is based upon alleged negligence of the master in failing to furnish proper machinery; the second, upon alleged negligence of the coservants of the plaintiff in the handling of the engine. Under the rules of the common law, the first is a cause of action against the railway company, but the second is not. The first cause is therefore based upon the legal duty, imposed by the common law upon the master, but not upon the employes, of furnishing safe machinery for the use of its servants, whereas the second cause, so far as the railway is concerned, is based upon the statute of Iowa, which makes the railway company liable, under given circumstances, for the negligence of its servants resulting in injury to a coemployé. It seems clear, therefore, that this suit is clearly separable into parts, and in fact, upon the trial, must be so separated; and that, when thus separated, there is presented a controversy between the plaintiff and the railway company over the question whether the engine used for switching purposes in the yard at Sioux City was or was not properly constructed and equipped, and to this controversy the defendants Smith and Pollard are not parties. If this be true, then, as the suit involves a controversy wholly between citizens of different states, it was properly removed by the defendant company, and the motion to remand must be overruled.

MUTUAL LIFE INS. CO. OF NEW YORK v. CONOLEY.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 81.

1. APPEAL—ASSIGNMENTS OF ERROR—TIME OF FILING—EXTENSION OF TIME.

Assignments of error not filed in the trial court by plaintiff in error or appellant at the time he files his petition for writ of error or appeal, as required by rule 11 of the circuit court of appeals, will not be considered on appeal, though the trial court, at the time such petition is filed and the writ or appeal is allowed, grants additional time for filing assignments of error, and they are filed within the time granted.

2. SAME—REVIEW.

Questions of law depending on facts which have not been certified in a bill of exceptions will not be disposed of in this court.

Error to the Circuit Court of the United States for the Eastern District of North Carolina.

This was an action by Margaret E. Conoley against the Mutual Life Insurance Company of New York on a life insurance policy. There was a verdict and judgment in favor of plaintiff, and defendant brings error. Affirmed.

Walter H. Neal, for plaintiff in error.

D. L. Russell, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

GOFF, Circuit Judge. This action was instituted by Margaret E. Conoley against the Mutual Life Insurance Company of New York to recover the sum of \$5,000 on an insurance policy issued by said company on the life of Simeon Conoley, payable to the plaintiff. The case was tried to a jury, and, on the verdict rendered, the court, on the 9th day of January, 1894, entered judgment in favor of the plaintiff for \$5,383.33, with interest and costs. This case was an action on the law side of the court, and the judgment so rendered could only be reviewed by writ of error allowed on petition filed with assignment of errors accompanying the same, tendered before the granting of the writ. *U. S. v. Goodrich*, 4 C. C. A. 160, 54 Fed. 21; *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53.

Rule 11 of this court provides that:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed." 1 C. C. A. xiv., 47 Fed. vi.

In this case the court below, on the petition of the defendant below, filed January 24, 1894, praying an appeal, granted the same on that day, and, in the order so granting it, allowed said defendant 30 days in which to file assignments of error. The assignments were filed February 21, 1894, 43 days after the judgment was rendered, and 28 days after the order had been entered allowing an appeal. It is plain that this court cannot consider the errors so assigned if it regards and is governed by its rule as cited. We have had occasion several times heretofore to request attention to the rules applicable to the questions now under consideration, and to the necessity for a strict adherence to the mode of procedure designated by them. We now do so once more, indulging the hope that no occasion will arise in the future requiring us to refer to them again in this connection. *Van Gunden v. Iron Co.*, 8 U. S. App. 229, 3 C. C. A. 294, and 52 Fed. 840; *Improvement Co. v. Frari*, 7 C. C. A. 149, 58 Fed. 171.

The record discloses the fact that the defendant below did not except to the action of the court in entering the judgment complained of, and did not tender a bill of exceptions, and have it signed and made part of the record as required by the law and the rules of practice. The defendant below contends here that the court below erred in entering said judgment, because the questions of law arising on the findings of the jury and the construction of the policy of insurance were with the defendant. But the plaintiff below now insists it was shown by the testimony which, under the circumstances of this case, it was proper to consider in construing the application for and policy of insurance, that there was no error in the judgment of the court. In the absence of a bill of exceptions certifying the evidence applicable to the same, it is impossible for this court to pass on the questions presented by several of the assignments of error, even if the latter could be considered. We feel compelled to enforce the provisions of the rules and the requirements of the practice alluded to, and to again an-

nounce that this court, in order to secure uniformity in the proceedings of the circuit and district courts, as well as in its own, will hereafter insist upon a strict compliance with the same; and we do this in the present case the more readily for the reason that its record shows that no substantial error was committed by the court below, and that, consequently, no injustice will in fact be done to the parties thereby, while much good may result therefrom, we hope. The judgment below is affirmed.

THE DAGO.

UNITED STATES v. THE DAGO.

(Circuit Court of Appeals, Fourth Circuit. June 2, 1894.)

No. 67.

APPEAL—REHEARING.

A rehearing will not be granted on a petition not complying with any of the requisites prescribed therefor by rule of court, but containing merely an argument as to the insufficiency of the proof to sustain the decree.

Appeal from the District Court of the United States for the District of Maryland.

This was a petition on behalf of the steamship Dago to rescind a decree reversing a decree of a district court dismissing a libel by the United States against the vessel. 61 Fed. 986. The libel was filed to enforce a forfeiture, under the act of February 15, 1893, for entering a port of the United States without having obtained a bill of health from the consul, vice consul, or other consular officer of the United States at the port of departure, as required by section 2 of the act.

The petition was as follows:

The petition of the steamship Dago and William Scroggie, her master, humbly shows unto your honors that by the third section of the Acts of Congress of 1893 (chapter 114),—the act construed in the opinion of this cause,—it is provided: "None of the penalties herein imposed shall attach to any vessel or owner, or the officer thereof, until a copy of this act with the rules and regulations made in pursuance thereof, has been posted up in the office of the consul or other consular officer of the United States for ten days in the port from which said vessel sailed; and the certificate of such consul or consular officer over his official signature, shall be competent evidence of such posting in any court of the United States." By the Revised Statutes of the United States (section 1674), the following definitions are given: "Consul general, consul and commercial agent, shall be deemed to denote full, principal and permanent consular officers, as distinguished from subordinates and substitutes. * * * Consular officers shall be deemed to include consuls general, consuls, commercial agents, deputy consuls, vice consuls, vice commercial agents and consular agents and none others." The certificate of posting of the act of February 15, 1893, and the regulations of the treasury department, was made February 24, 1893, and signed by "Gerald Moseley, Acting U. S. Consul for Bristol" (Record, 7). The signer, according to his signature, was not a full, principal, and permanent consular officer, as distinguished from a subordinate and a substitute, which is defined to be the meaning of the word "consul" by section 1674. Hence, his certificate of the posting was not such a posting as is contemplated by the act now under construction. Hence, there is no proof of the posting, and none of the penalties of the act can be visited on the Dago under section 3, supra. The provision which allows a certificate of the doing

of some act as evidence in a criminal proceeding may perhaps be of doubtful constitutional validity, as every man is entitled to be confronted with the witnesses who testify to the facts which are necessary to make out a criminal charge against him, but certainly no latitudinarian construction can be permitted to supplement or eke out the inadmissible proof offered. "Statutes Prescribing Forms of Proceeding or Modes of Proof. In regard to these the maxim holds good, 'Non observata forma, infertur adnullatio actus.' In these cases the proof or procedure required by law is rigidly exacted, the restriction rigidly insisted, without regard to the facts or the hardship of the case, and this with abundant reason, for it is the evident intention of these statutes to prescribe fixed forms or rules to guard against certain abuses likely to occur from the absence of an arbitrary and peremptory provision." Sedg. St. Const. 275, 276. It is therefore submitted that there is no proof in the record of a posting of the law as is required by section 3 of the act, and that, therefore, the steamship cannot be visited with any of the penalties mentioned in the act. The appellee therefore respectfully moves the court to rescind the decree heretofore passed, and to affirm the decree of the district court, because of the insufficiency of the proof upon the point mentioned.

J. Wilson Leakin, for appellee.

SIMONTON, Circuit Judge. This is a petition praying that this court will rescind the decree heretofore passed, and that it will affirm the decree of the district court because of the insufficiency of the proof upon a point mentioned in the petition. The paper is wholly abnormal in its character. It is not a petition for rehearing, for it does not comply with any of the requisites prescribed by rule 29, 1 C. C. A. xxiii., 47 Fed. xiii. It is an argument applicable to a motion made after a rehearing had been granted. The petition cannot be entertained.

It is proper to state that, were this matter presented in proper form, we see no reason to change the conclusion which the court has reached in this case, and a rehearing would have been denied.

DUDEN v. MALOY.

(Circuit Court of Appeals, Second Circuit. September 26, 1894.)

No. 102.

1. PARTNERSHIP—ACCOUNTING—INTEREST CHARGED BY ONE PARTNER AGAINST ANOTHER—WAIVER OF OBJECTION.

In an action by a partner who furnished the capital, against the other partner, for an accounting, the master found that not only did defendant not insist on his objections to certain charges for interest made against him by plaintiff, when the items were brought to his notice, but that from time to time during the partnership, when such charges were made, he acquiesced in them. *Held*, that neither the finding of the master nor the charges would be disturbed, though such charges were large, and such as would not have been allowed on proper objection by defendant.

2. SAME—LAND PURCHASED WITH PARTNERSHIP ASSETS—INTEREST OF PARTNERS.

In an action between partners for an accounting, it appeared that defendant was to furnish nothing but his time, and the contract provided that he was to have one-fourth of the profits of each fiscal year by itself, computed in the manner specified, guarantied to amount, for him, to \$5,000; that, if they exceeded that sum, he should draw out only \$6,000, and leave the balance in the business at 7 per cent. interest, until the end of the partnership, when such balance and interest should be paid to him; and that either party could terminate the partnership by six months' writ-

ten notice. Defendant was paid his full share of the profits, and all money left in the business, and interest, and more. After June 30, 1883, the business continually resulted in loss, and, after such date, land was purchased, and paid for from the firm assets, but the sum paid for it was not large enough to cover the losses, and enough more so that defendant's share of actual, would have exceeded his guaranteed, profits. *Held*, that defendant had no interest in such land. Brown, District Judge, dissenting.

3. SAME—SALE OF PROPERTY—WHEN NECESSARY.

In an accounting between partners, it appeared that defendant put in no capital, and the articles provided for the ascertainment of his share in money annually, and, at its close, that all profits standing to his credit, with interest, should be paid him. *Held*, that a sale of the land was not necessary. Brown, District Judge, dissenting.

4. SAME—GOOD WILL.

In such case, defendant had no interest in the good will of the business.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was an action in equity by Hermann Duden against Michael Francis Maloy for an accounting of the partnership affairs of the firm of Duden & Co. There was a decree in favor of complainant, and defendant appeals. Affirmed.

For former reports, see 37 Fed. 98; 43 Fed. 407.

William McArthur and David M. Neuberger, for appellant.

Mark D. Wilbur, for appellee.

Before WALLACE, Circuit Judge, and BROWN and WHEELER, District Judges.

WHEELER, District Judge. This suit was brought in a state court to close the affairs of a partnership, and recover an alleged balance due to the appellee, and was removed into the circuit court for the eastern district of New York, and proceeded with there in equity to an accounting before a master, and a decree for a balance due to the appellee, from which an appeal was taken to this court. The assignment of errors raises questions as to the rights of the parties upon the accounting, and to property remaining. The appellee was before this partnership a member of the firm of Duden & Co., lace dealers, having a principal house at Brussels, in Belgium, other houses at other places in Europe, and a store in New York. The appellant was employed in a responsible position in the New York store. In April, 1878, he was admitted as a partner under articles into the New York business. The arrangement contemplated a continuance of the former business, to which the appellant should contribute nothing from without but his personal services. The articles witnessed that the appellee, as party of the first part, and the appellant, as party of the second part, "agreed to become copartners to conduct the business of dealing in lace goods at the city of New York, under the firm name of Duden & Company, the partnership to commence on the fifth day of April, one thousand eight hundred and seventy-eight, and to terminate on the thirtieth day of June, one thousand eight hundred and eighty-

three, with liberty to either party to terminate the same at any time, by giving six months' notice in writing to the other of his intention so to do;" that the party of the second part should devote his whole time and attention to the business; that true and correct books of account should be kept by him, or under his supervision, in which all the transactions of the copartnership should be properly entered; that an account of stock should be taken, and the books balanced, on the 30th day of June in each and every year; and—

"Third. It is mutually agreed that the net profits of the business shall be divided as follows: Seventy-five per centum thereof to the said Hermann Uden, and twenty-five per centum thereof to the said M. Francis Maloy; such profits to be arrived at by deducting all the expenses of the business, including traveling expenses, all losses from bad debts, interest on the capital employed in the United States business, and, in addition thereto, ten per centum each year on all goods remaining unsold and in stock at the city of New York or any part of the United States at the time of taking stock. And the party of the first part agrees with and guaranties to the said party of the second part that his share of the profits shall amount to not less than five thousand dollars currency of the United States each and every year during the continuance of this copartnership." "Fifth. And it is mutually understood and agreed that, in case the share of the profits of the party of the second part exceeds the sum of five thousand dollars currency per annum, he shall not draw more than one thousand dollars of such excess, but the residue thereof shall be left in the business, and draw interest at the rate of seven per centum per annum, which interest may be drawn by the party of the second part on the last day of June and December in each year, or credited to his account, and left in the business at his option. Sixth. That, in case of the death of the party of the second part before the expiration of this agreement, his share of the profits up to the time of his death, including any amount that may remain due to him from previous years, shall be paid to his executors or administrators. In determining the amount so to be paid, the profits from the first day of July preceding his death up to the date of his death shall be computed to be the same as the profits for the corresponding period in the previous year. Seventh. Upon the expiration of this agreement, all profits that may be standing to the credit of the party of the second part, including any interest that may be due thereon, shall be paid to the party of the second part, his executors or administrators, in four equal installments, payable in three, six, nine, and twelve months, respectively, from such expiration."

An account of the stock of the store in New York was taken at the commencement. Goods for that store were furnished, and charged to it, by the house in Brussels and other European houses. Accounts of stock were taken on each 30th of June afterwards, and computations of profit and loss were thereupon made, as provided for in the partnership agreement, which, after that first taken June 30, 1878, showed profits for each year to and including the one ending June 30, 1883. In that year the partnership was extended five years upon the same terms mentioned, and land was bought, for which \$8,000 was in the next year paid out of the proceeds of goods of the New York store, and upon which a factory was built and furnished for the manufacture of goods for that store, the cost of which was reckoned in computing profit and loss afterwards. The account of stock and computation of June 30, 1884, showed a loss in the year preceding of \$22,740.46, and that of June 30, 1885, a loss of \$1,517. The appellant gave notice of termination of the partnership at the expiration of six months from its receipt,

which would be January 23, 1886; and an account of stock was afterwards taken as of that date, and a computation made according to the articles, with proportionate reductions of the 10 per cent. for the part of a year expired, which showed a loss of \$34,002.67. The appellant had overdrawn his share of profits, actual and guaranteed, according to these computations, to the amount of \$4,262.06. As the appellant, according to the master's findings, had received this sum more than his share of profits, the master reported this sum to have been due from the appellant to the appellee at the close and as the result of the partnership business. The title to the lands bought for the factory stood in the name of one Myron Winslow. After this suit was brought the appellant brought a suit in the supreme court of the state against the appellee Winslow and others, as having interests, in which he obtained a final decree for a conveyance from Winslow and wife, by "a quitclaim deed unto the firm of Duden & Company, of New York, of all interest in and to said lands and premises, the subject-matter of this action, with the improvements therein and the appurtenances thereunto belonging, the same to inure to the benefit of the said copartnership of Duden & Company, of New York, according to the respective rights of the partners therein, including the above-named plaintiff." Upon the bringing of that decree into this suit, the master herein was directed to take a further account, "on the theory that the 'factory business,' so-called, referred to in the testimony herein, was a partnership enterprise, and that the land, business, and appurtenances formed part of the assets of Duden & Co., of New York, at the dissolution of that partnership, and that all money paid out for land, factory buildings, machinery, appurtenances, labor therein, etc., together with all other like costs and disbursements incidental to the operation of the said business, are chargeable to the said firm of Duden & Co., of New York; and also to take and state the profits and losses from the said factory business with the other accounts of the said firm," and the value of the good will of the firm of Duden & Co. at the beginning and at the end of this partnership. Upon the taking of this further account, the master reported that the factory enterprise was carried on at a loss in each of the years while the firm was engaged in it, and at a loss in the whole, reckoning the land at its cost when bought, and the factory property at \$32,000, its value as found by him at the close; that the value of the good will of the New York store taken by the partnership equaled the value of that left by it; and that the amount due from the appellant was not by these additional findings varied. Many of the exceptions to the master's report, upon the overruling of which by the circuit court error is assigned, were to findings of fact upon contradictory evidence submitted to the master. The case was referred to the master, "to take and state the accounts between the parties," upon consent in writing, signed by counsel, after exceptions sustained to the answer, upon the bill, without being taken pro confesso or admitted by further answer or otherwise established. This course submitted to the master all of the issues which would be involved in taking the accounts.

The accounts appear to have been taken by the master with much painstaking care, and his conclusions appear to have been reached upon warrantable evidence, well weighed and considered by him. The statements of the accounts so taken are to be presumed correct, unless plain errors are pointed out by specific exception, and not left to be sought out under general statements of error. *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343.

One important question attempted to be raised relates to interest amounting in the whole to a large amount charged in behalf of the Brussels house on the price of goods for the New York store. These charges may have been large, and such as would not have been allowed if they had been objected to, and the objection had been insisted upon when the items were brought to the notice of the appellant; but the master has found, upon evidence so weighed and considered, not only that the objection was not insisted upon, but that from time to time during the partnership, when such charges were made, the appellant acquiesced in them. This finding cannot with propriety be disturbed, and with it these charges cannot be disturbed.

Other important questions relate to the interest of the parties in the property, and especially in the real estate of the factory. As these questions are wholly between the partners themselves, and not between them, or either of them, and any third person, these rights are to be determined according to the effect of their partnership agreement as the foundation of their respective rights. In *Paul v. Cullum*, 132 U. S. 546, 10 Sup. Ct. 151, Mr. Justice Harlan said:

"While, in the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses, it is entirely competent for them to determine as between themselves the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience, to the common stock. *Story, Partn.* §§ 23, 24. Such matters are entirely within the discretion of parties about to assume the relations of partners."

By the terms of the agreement, the appellant was to have one-fourth of the profits of each fiscal year by itself, computed in the manner prescribed, guarantied to amount, for him, to \$5,000. With this provision in his favor, he would not share in losses which would bring the profits of a year below \$20,000, whereby his share of actual profits would be less than \$5,000, and he could resort to guarantied profits; and these losses were not cumulative from year to year in reduction of future profits, but were to remain as they should fall in each year upon the appellee. If the profits in any year should exceed \$20,000, so that his share would be more than \$5,000, as he could not draw out more than \$6,000 he might still have a part of his share of profits remaining from year to year in the business; but as the articles provided for the repayment thereof to him, with interest, he took no risk of losses as between himself and the appellee as to that.

It was entirely competent for the parties to provide that, upon the dissolution of the partnership, the firm assets should be retained by the appellee, and the interest of the appellant therein be satisfied

by a payment in money. Col. Partn. § 17; Assurance Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442. While the articles do not contain any specific provision to this effect, it is plain from what they do provide that it was the intention of the parties that upon a termination of the copartnership, whether by lapse of time or upon notice by either party, the appellant should be paid in money for his interest in the business and assets, and, upon a termination by his death, such payment should be more speedily made to his legal representatives. They provide for a payment in money for all profits to which he was entitled to credit at the time of dissolution, upon the basis fixed by the articles. The surplus profits remaining in the business, under the fifth clause, are to be repaid, with interest. The profits not liquidated at a preceding annual accounting are to be ascertained, and paid upon the basis prescribed by the third clause. The seventh clause, in providing the terms of the adjustment to take place upon the expiration of the agreement, necessarily provides for the same adjustment, whether the expiration occurs by lapse of time or by notice. It cannot be imagined that the parties, without making any such express provision, intended to have one mode of adjustment upon a dissolution caused by death or by the expiration of the original term of the copartnership, and another in case of a dissolution by a six-months notice under the articles, if either should find such earlier expiration to be desirable. The provision for a money payment to the appellant, which must fall upon the appellee at the termination of the partnership, is wholly inconsistent with any idea that the appellant was to have any further interest in the firm assets. It implies decisively the understanding of the parties that the appellee was to have the assets, and suggests that they probably contemplated that these assets would be the source from which the appellee should realize the money which he would be called upon to pay.

The statement of the appellant's account upon the computation of profits to June 30, 1883, which was furnished to him, and as to which he replied, "Its correctness is hereby acknowledged," showed that he had received his full share of all profits to that date, and has been repaid all profits left by him in the business, with interest, according to the articles, and \$400.18 more. The state court did not construe the partnership articles, or state the partnership accounts, or in any manner ascertain the respective interests of the partners, but merely found and held that the land and factory became partnership property, because they were paid for with partnership assets. They were paid for from the assets after June 30, 1883; and, as the business ever after resulted in a loss, this payment would not affect the appellant's share at all, unless the amounts paid would cover the loss, and enough more so that his share of actual would have exceeded his guaranteed profits. This payment for the land was not nearly large enough for that, and, making it out of partnership property, was, in effect, a mere transfer of what might, and ultimately did, become the sole property of the appellee from the store to the land. The payments on account of the factory otherwise resulted in a net loss, as the master has found and reported; and the

result of them in the partnership assets could not and did not in any way affect the appellant's share. The judgment of the state court was, and appears to have been assumed by the circuit court to have been, conclusive of the fact that the land was bought with partnership assets, which raised a trust in favor of the partners, and it is so considered here; still, as the trust and conveyance were by the decree to inure to the benefit of the partnership, according to the respective rights of the partners therein, and as the appellant, as partner, had no such right resulting as a trust from the payment, or remaining to him after receiving in money his full share of the result of the partnership venture, nothing thereby inured to his benefit. His interest in the land rested upon no firmer foundation and was no more permanent than his interest in the goods or other property; and the full measure of all of his rights to the goods, lands, or property was satisfied, and his interest therein terminated, when he had received in money his actual or guarantied share, ascertained and computed according to the terms of the partnership articles. For what he had received more, he was liable to the appellee, and the decree appealed from charged him with that only.

Ordinarily, as has been urged, goods or property of a partnership must be, by sale or other process, converted into money on winding it up, and neither partner can take it on an appraisal, or hold it against the other, and leave its value to be found. But in this case, as the articles themselves provide for the ascertainment of the appellant's share in money annually during the continuance of the partnership and at its close, they, in effect, provide for the sale of the interest of the appellant to the appellee at the price ascertained in determining his share. This disposes of the question of property in good will also, in which no right would remain to him more than in the other property, and which the master disposed of upon the finding that the good will taken equaled in value that left. These considerations cover all questions properly raised, and show that there was no error in the decree of the circuit court. Decree affirmed.

BROWN, District Judge. I concur in the disposition of the points raised on appeal, except as respects the land, which, in an action in the supreme court, conclusive as between these parties, has been adjudged to be partnership assets, and ordered to be conveyed to a receiver. The land has been so conveyed, and is now held by the receiver so appointed, for the benefit of the firm. In the account taken, the plaintiff, Duden, has been charged \$32,000, as the value of the land and factory property at the close of the partnership, several years before that adjudication. The necessary effect of that charge, if allowed to stand, will be to transfer the land equitably to Duden, at that valuation; and to require the receiver to convey it to Duden without any sale of it, or any determination of its value by a sale, as is usually required. The defendant, Maloy, has duly excepted thereto, claiming that the land is worth far more than the valuation put upon it; and he insists upon a sale. Unless the articles otherwise provide, or unless the partnership was a partnership in profits only, as the plaintiff on the argument of this ap-

peal contended, Maloy is entitled to a sale, under the well-settled rule that forbids any preference to be shown to one partner over another in the liquidation, and hence disallows either partner to take the assets at a valuation, in case of disagreement, and requires that the firm property be sold. 3 Kent, Comm. 64; Lindl. Partn. 857; Ccl. Partn. §§ 308-313.

This was not, however, a partnership in profits only. That means that the property used, or dealt in by the firm, is not firm property, but remains always the individual property of one or more of the partners. That is a rare and exceptional kind of partnership. That such is not the present case seems to me evident (1) from the face of the articles themselves, which declare a general commercial partnership for "dealing in lace goods," and (2) from the fact that millions of dollars' worth of laces have been bought and sold in the firm name, in the ordinary course of commercial partnership dealings; all of which appear in the firm name, in the partnership books, which the defendant was required to keep, and did keep. It is impossible, as it seems to me, to hold that all these goods were intended to be bought and sold as Duden's individual property. Every line of the firm accounts contradicts this theory. The adjudication of the supreme court also has adjudged as between these parties that the property was firm property, the land being held to be firm assets because bought with funds of the firm.

Nor do the articles, as far as I can perceive, contain anything to exclude or vary the ordinary legal rules applicable to the winding up of a partnership on dissolution in case of disagreement. They contain no provision giving to either partner any preference, or any right to take the firm assets to the exclusion of the other partner, either at a valuation, or otherwise. There is nothing whatsoever in the articles upon that subject.

By the second article, Maloy, who was to keep the books of account, agreed "that an account of stock should be taken, and the books balanced on the 30th of June in each and every year." By the third article, after agreeing that the net profits should be divided, 75 per cent. to Duden, and 25 per cent. to Maloy, it was declared: "Such profits to be arrived at by deducting expenses, bad debts, interest on capital, and 10 per cent. each year, on all goods remaining unsold, etc., at the time of taking stock," i. e. June 30th.

These provisions for taking an account of stock, and balancing the books, on each 30th of June, had, in my judgment, no reference to the final liquidation of the firm business. They were expressly designed for each year during the copartnership, and they were for the purpose of ascertaining approximately the profits of each year, and how much might be drawn out by each partner. As the account was to be taken on each June 30th, and was to embrace the business up to that same day, much would necessarily remain uncertain in the outstanding credits, and subject, therefore, to correction, in case of subsequent losses in collections on that year's business. Every such annual account was, therefore, provisional only; and if any such account was taken on the last June 30th, at the end of the partnership, it could not possibly be final. It is plain, therefore,

that these annual accounts had no reference, and were not intended to have any reference, to the liquidation of the firm business, or to the accounts to be taken on liquidation. Similarly the 10 per cent. deduction in the price of stock on hand, was merely for the purpose of taking these annual accounts, and to ascertain provisionally the share of profits distributable to each. When this deduction was made in each annual account, that did not give the stock to either partner to the exclusion of the other. The stock remained firm property as before. It was the same at the close of the partnership. The stock on hand remained still firm property, to be disposed of as such in liquidation; and there is not the least intimation in the articles that either partner should have any preference in the right to liquidate the business for his own profit, to the exclusion of the other partner, or to take the stock at a valuation, contrary to the settled law; nor is there anything in them requiring Duden rather than Maloy to take the stock at a loss, if it should prove to be worth less than the estimate. Duden was bound by his personal guaranty to make good to Maloy \$5,000 as his share of the profits annually; he was bound to nothing more, except what the ordinary rules of law impose.

The provisions of the fifth and seventh articles seem to me to be without the least prejudice to the equal rights of both partners in liquidation, and to have no bearing thereon. The seventh article, provided that Maloy at the termination of the partnership, "should be paid * * * all profits that may be standing to his credit, including interest that may be due him thereon." This has evident reference to the fifth article, which required Maloy to leave "in the business" "all excess of his share of the profits" over \$6,000, "drawing interest at seven per cent." The seventh article did not require Duden in the first instance to pay those profits; they would be "paid," quite consistently with the articles, out of the assets, if the firm was solvent, in due course of liquidation, by whoever had charge of the final liquidation, i. e. by both partners together, or by either alone, as might be agreed on, or in case of disagreement, by the receiver necessarily to be appointed. If the firm was insolvent, these back profits would be absorbed by creditors, and could not be paid from the assets at all; although Duden would be ultimately bound by his personal guaranty to make them good to Maloy, through his guaranty of profits in the subsequent business. The postponement of Maloy's right to be paid his apparent profits, to 3, 6, 9 and 12 months, was appropriate and necessary for the correction of errors, according to the ultimate results of the liquidation, as well as to know whether they could be paid out of the assets, or must be paid by Duden personally. There was no similar express provision for paying Duden's profits, inasmuch as Duden was not required to leave any profits in the business.

The provisions of the fifth and seventh articles, therefore, seem to me to contain nothing any more than the second and third, to render inapplicable the ordinary rules of law as to the equal rights of partners in liquidation, and Duden, therefore, could not take the land at a valuation against Maloy's consent.

The assets, other than the land, have been disposed of by Duden, after an injunction obtained by him; and no exception is taken by Maloy as to the disposition of the goods; but the land, in a special suit, has been procured by Maloy to be conveyed to a receiver, to be disposed of on the firm account. The only possible purpose of the judgment of the supreme court in ordering the land to be conveyed to a receiver was, that it should be sold. If Duden was only to be charged with its value at the close of the partnership, the conveyance to a receiver was useless, and improper. To refuse a sale, and require in effect that the land be now conveyed by the receiver back again to Duden without a sale, seems to me to refuse to abide by that adjudication, and in effect to annul it *pro tanto*. The land, moreover, has never been treated as stock; never subjected to the 10 per cent. yearly deduction; and is not so treated in the commissioner's account, and it would evidently be improper to treat it in that way. It is still a firm asset.

Independently of the adjudication of the state supreme court, the refusal of a sale of the land seems to me to be erroneous, because opposed to the well-established rule that disallows to one partner the advantage of taking the assets at a valuation, when the other partner demands a sale; because it refuses to admit the proper legal criterion of value; and because the articles in this case cannot justly be construed to vary that most important rule, or to have intended any variation of it, inasmuch as they contain no express provision on the subject; and because full effect can be given to every word in the articles without any such result; and when that is the case, a different construction of them is not admissible to set aside so important a rule of partnership law.

BOGAN v. EDINBURGH AMERICAN LAND MORTG. CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 438.

1. PUBLIC LANDS — PRE-EMPTION — DECLARATION OF INTENTION TO BECOME A CITIZEN.

Rev. St. § 2259, grants pre-emption rights to citizens and those who file a declaration of intention to become such, with certain limitations therein specified. Section 2289 grants to any one of such persons the right to enter 160 acres or less on which he may have filed a pre-emption claim, or which is subject to pre-emption at \$1.25 per acre. Section 2301 provides that nothing in the chapter relative to homesteads shall prevent one who has availed himself of the benefits of section 2289 from paying the minimum price for land so entered, and obtaining a patent therefor, on making proof of settlement and cultivation as provided by the pre-emption laws. *Held* that, in the absence of an adverse claim, a qualified pre-emptor is not deprived of his right to enter and purchase land, as such, by the fact that he made an application for and occupied the land as a homestead before he declared his intention to become a citizen.

2. SAME—FORFEITURE OF PRE-EMPTOR'S RIGHTS—POWER OF COMMISSIONER.

An alien applied to enter land as a homestead, and the register and receiver of the proper land office accepted the application, received the fees, and issued to him the proper receipt. Nearly a year afterwards he

declared his intention to become a citizen, and then proved up, paid the minimum price for the land, and received from the register and receiver the usual final certificate and receipt under Rev. St. §§ 2259, 2301. Afterwards, and before any adverse claim intervened, he gave a mortgage on the land. *Held*, that the commissioner of the land office could not thereafter forfeit the rights of such pre-emptor and his mortgagee because the former was an alien when he entered the land as a homestead.

3. SAME—RIGHTS OF MORTGAGEE.

Even if the register and receiver had the right to refuse to sell the land to such pre-emptor until he proved that he declared his intention to become a citizen before he made his homestead application, the rights of his mortgagee, who took the mortgage and parted with his money in reliance on the patent certificate issued by the United State to his mortgagor, could not be forfeited or affected by the action of such commissioner.

4. SAME—QUALIFICATIONS OF PRE-EMPTOR—WAIVER BY THE UNITED STATES.

In the absence of any adverse claim, the sale of land under Rev. St. § 2301, to one who has declared his intention to become a citizen is a waiver by the United States of any objection that the purchaser was an alien when he made his application under section 2289, and entered the land; and the commissioner of the land office cannot afterwards retract such waiver, and forfeit the purchaser's right to the land on account of such objection.

5. PATENTEE OF HOMESTEAD—BONA FIDE PURCHASER—WHAT CONSTITUTES.

Where a pre-emptor's certificate and a mortgage given by him are of record in the proper county at the time a patent is issued to another person, who entered the land as a homestead under Rev. St. § 2289, and such patentee was one of such pre-emptor's witnesses when the latter proved up his claim, the former is not a bona fide purchaser.

6. SAME—RIGHTS OF MORTGAGEE AND PATENTEE.

In an action by such mortgagee, after purchase by him of the land at a foreclosure sale, against the patentee, to recover the land, it appeared that the amount due complainant was about \$864, and that the land was worth about \$3,000, and had been occupied as a homestead and cultivated by defendant many years. *Held* that, on payment by defendant to complainant of the sum due on the mortgage within three months, title would be quieted in defendant, and that otherwise the title would be decreed to be in complainant.

Appeal from the Circuit Court of the United States for the District of North Dakota.

This was a bill by the Edinburgh American Land Mortgage Company, Limited, against Patrick Bogan, to compel defendant to convey certain land to complainant. There was a decree for complainant, and defendant appeals. Reversed and remanded.

This is an appeal from a decree of the circuit court for the district of North Dakota to the effect that the appellant, Patrick Bogan, holds the patent to a quarter section of land in that district in trust for the Edinburgh American Land Mortgage Company, Limited, a corporation, and that he shall convey the title he holds to the mortgage company. The equitable rights of the company, on which the decree rests, arose as follows: January 6, 1881, James Irwin filed in the proper land office of the United States his application to enter the land as a homestead under section 2289, Rev. St., and that application was accepted, the fees received, and the proper receipt issued to him by the register and receiver of the local land office. December 21, 1881, he proved up, paid the minimum price for this land, and received from the register and receiver the usual final certificate and receipt under sections 2259 and 2301 of the Revised Statutes. Irwin was an alien when he filed his application for this land, but on December 21, 1881, and before he purchased the land, he declared his intention to become a citizen as required by the naturalization laws. Immediately after he purchased the land he mortgaged it to the appellee for

\$400, and the patent certificate and the mortgage were recorded in the office of the register of deeds in the county in which the land is situated before any of the rights of the appellant accrued. November 20, 1882, the commissioner of the general land office canceled the entries of this land by Irwin on the ground that he was an alien when he made his application to enter the land as a homestead. In October or November, 1883, the appellant, Patrick Bogan, applied to enter this land as a homestead, and a patent was issued to him for it September 17, 1890, pursuant to that application. In 1892 the mortgage company foreclosed its mortgage against Irwin by advertisement, and, soon after the year of redemption had expired, brought this suit.

Tracy R. Bangs (Charles J. Fisk, on the brief), for appellant.
F. B. Morrill, for appellee.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

On December 21, 1881, under section 2259 of the Revised Statutes, the United States sold the land in dispute to one who had then declared his intention to become a citizen, received the purchase price, and issued to him the usual final receipt or patent certificate. Upon the statements contained in that receipt the mortgage company loaned its money, and by the foreclosure of its mortgage acquired all the rights of the purchaser. Had the commissioner of the general land office the right to declare a forfeiture of the rights of the mortgagor and of the lien of the mortgage 10 months later, because the purchaser, Irwin, had not declared his intention to become a citizen January 6, 1881, before he filed his application for a homestead? Where the register and receiver hear the application of a party to enter land, as a pre-emptor, or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent, he thereby acquires a vested right to the land that can only be divested according to law. *Johnson v. Towsley*, 13 Wall. 72, 85. There is no doubt that the commissioner of the general land office may review and set aside the action of the register and receiver before the patent issues, where their decision is induced by fraud, perjury, or mistake, or results from an erroneous view of the law. *Swigart v. Walker* (Kan.) 30 Pac. 162; *Jones v. Meyers* (Idaho) 26 Pac. 215; *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *Fernald v. Winch* (Kan.) 31 Pac. 665; *Mortgage Co. v. Hopper*, 56 Fed. 67. But the supervisory or reviewing power of the commissioner of the land office or of the secretary of the interior is not an arbitrary, unlimited, or discretionary power, but a power that must be exercised according to the law, and not in violation or in disregard of it. Where it is so exercised, and its exercise is not induced by fraud or mistake, the results it produces are sustained by the courts. Where its exercise has been induced by fraudulent misrepresentations or by material mistake of fact, or where the power has been exercised in violation or in disregard of the law, the results produced are uniformly so modified by the decrees of the courts that those who are entitled in equity to the titles to the lands ultimately obtain them. No principle is more firmly established in American

jurisprudence than that, after the title has passed from the United States to a private party, it is the province of the courts to correct the errors of the officers of the land department, which have resulted from fraud, mistake, or erroneous views of the law, to declare the legal title to the lands involved to be held in trust for those who have the better right to them, and to compel their conveyance accordingly. *Cunningham v. Ashley*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Lytle v. State of Arkansas*, 22 How. 193; *Lindsay v. Hawes*, 2 Black, 554, 562; *Johnson v. Towsley*, 13 Wall. 72, 85; *Moore v. Robbins*, 96 U. S. 538; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244. Thus in *Johnson v. Towsley*, supra, the register and receiver held that *Towsley* was entitled to the patent to the land in question, and issued the final receipt to him under the pre-emption law, notwithstanding the fact that he had previously filed his declaratory statement on some unsurveyed land that he subsequently abandoned. The secretary of the interior held that filing fatal to his right, and issued the patent to *Johnson*. *Towsley* then brought his suit in equity, and the supreme court held that he had the better right, and that *Johnson* held the title in trust for his benefit. In the opinion that court declares that in every case where the register and receiver, by their decision, sale, and patent certificate, vest the right to the land in the entryman, and the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. So in *Silver v. Ladd*, 7 Wall. 219, the register and receiver held that *Elizabeth Thomas*, an unmarried woman, was entitled to the benefits of the act of June 25, 1862, which in terms confers its benefits on single men and heads of families only, and issued a donation certificate to her. The commissioner held otherwise, and issued the patent to another. The supreme court sustained the ruling of the register and receiver, and declared the title under the patent to be held for the benefit of *Miss Thomas* and her grantees. From these authorities it clearly appears that it was the province and duty of the court below to consider and determine the question presented in this case. Here there was no question of fact, no fraud, no mistake,—nothing but a question of law.

Was the action of the commissioner, forfeiting the rights of the entryman and of his mortgagee to this land, 10 months after the register and receiver had vested them by their sale and certificate, on the sole ground that the entryman had not declared his intention to become a citizen until just before he made his purchase, in accordance with or in violation of the law? Section 2259 of the Revised Statutes, which grants pre-emption rights, provides:

"Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by

legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

Section 2289 of the Revised Statutes, granting homestead rights, provides, among other things, that:

"Every person who is the head of a family or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre."

Section 2301 of the same chapter provides that:

"Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine, from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

If the entryman, Irwin, had never made any application for a homestead under section 2289, he would have been a qualified pre-emptor, entitled as such to enter this land and purchase it when he did purchase it, on December 21, 1881, under section 2259. He had made his settlement in person upon it. He was then inhabiting and improving it. He had erected a dwelling thereon, and he had declared his intention to become a citizen. Section 2259 does not require that the pre-emptor shall have been qualified to enter the land for 10 months, or for any length of time, before his purchase. It is sufficient if he has filed his declaration to become a citizen an instant before he enters and pays for the land. But it is said that he deprived himself of this right because he availed himself of the benefit of the homestead act (section 2289) for 11 months while he was an alien. This position is in the very teeth of section 2301, which expressly provides that nothing in the chapter relative to homesteads shall be construed to prevent any person who has availed himself of the benefits of section 2289 from paying the minimum price of the land so entered, and obtaining a patent therefor, on making proof of settlement and cultivation as provided by the law granting pre-emption rights. If Irwin had been qualified when he made his application for a homestead, that claim would have been valid, but it would not have deprived him of the right to enter the land as a pre-emptor under section 2259. The utmost effect of his lack of qualification was that his homestead claim was invalid, and that he had no claim on the land until he made his entry and purchase of it, December 21, 1881. But he was entitled to enter and purchase this land, under section 2259, at that time, without any prior claim to it. It cannot be that because he had asserted an invalid claim he was deprived of his right to make a lawful purchase.

Our conclusion is that, in the absence of an adverse claim, a qualified pre-emptor is not deprived of his right to enter and purchase land as such by the fact that he made an application for and occupied the land as a homestead before he declared his intention to

become a citizen. It follows that the commissioner's action in attempting to forfeit the rights vested in Irwin and his mortgagee 10 months after the purchase was in violation of the law, and cannot be sustained.

Moreover, if the claim of counsel for the appellant, which we have shown to be unfounded,—that the register and receiver had the right under the law to refuse to sell this land to Irwin until he proved that he had declared his intention to become a citizen, before he made his homestead application,—were conceded, the result must be the same. Under that concession the question is not whether, as against an adverse claimant to the land who had interposed his claim before Irwin had bought, paid for, and received his final receipt for it, he could have maintained his right to purchase it. That was the question presented in all the cases cited by the appellant. *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, and 8 Pac. 621; *Golden Fleece, etc., Co. v. Cable Con. etc., Co.*, 12 Nev. 312; *Anthony v. Jillson* (Cal.) 23 Pac. 419; *Wulff v. Manuel*, Id. 723; *Ross v. Poole*, 4 Dec. Dep. Int. 116; *Railroad Co. v. Saunders* (Mont.) 6 Dec. Dep. Int. 98; *Railroad Co. v. Painter*, Id. 485; *Titamore v. Railroad Co.*, 10 Dec. Dep. Int. 463.

If it be conceded that an adverse claimant, whose right to purchase the land has seasonably intervened, may compel strict proof that the applicant was a citizen, or had filed his intention to become a citizen, at the inception of his claim, before he can be permitted to purchase (and that is as far as any of these authorities go), the question before us is still unanswered. No one claimed the land here in question before Irwin declared his intention to become a citizen, nor before he bought and paid the purchase price for the land, nor before the commissioner undertook to forfeit the right that purchase vested in him. During all this time he was either an applicant to purchase or a purchaser of this land from the United States. Until the day that he made his purchase he was an alien. Before he paid the purchase price and obtained his patent certificate he declared his intention to become a citizen. The United States, with full knowledge of these facts, accepted him as a purchaser, received his money, and certified to the sale. A third party parted with its money in reliance upon this certificate. What right had the commissioner of the land office to declare a forfeiture of this title, on his own motion, 10 months later?

In *Cross v. De Valle*, 1 Wall. 1, 13, the supreme court said:

"That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish."

In *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332, it was held that:

"An alien may take real property by grant, whether from the state or a private citizen, and may hold the same until his title is divested by an inquest of office, or some equivalent proceeding."

In *Osterman v. Baldwin*, 6 Wall. 116, Baldwin, who was a citizen of New York, had purchased and paid for three lots in the then republic of Texas and transferred the certificates to a Texan to hold in trust for himself, because the constitution of Texas prohibited

aliens from holding land there. In 1845 Texas was admitted into the Union. In a contest over the title to the lots the defendants pleaded Baldwin's alienage and incapacity to hold. The supreme court said:

"Even if the defendants could have made this objection while the Republic of Texas existed, they cannot make it now, because when Texas was admitted into the Union the alienage of Baldwin was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeit, and a confirmation of his former title."

See, also, *Jackson v. Beach*, 1 Johns. Cas. 399; *Jackson v. Green*, 7 Wend. 333; *Baker v. Westcott* (Tex. Sup.) 11 S. W. 157, 159; *Harley v. State*, 40 Ala. 689.

In *Lawless v. Anderson* (decided in 1877) 1 Copp, Pub. Land Laws, 532,—a case in which the claimant Lawless was an alien when he made his filing, but filed his declaration of intention to become a citizen before he made his final proof,—Assistant Secretary Chandler cited the cases of *Cross v. De Valle* and *Osterman v. Baldwin* and said:

"I am of opinion that this doctrine is applicable to the case of Mr. Lawless, and that his claim is as valid as though he had been naturalized before he made his filing."

From 1877 to the present time that ruling has been uniformly followed by the secretaries of the interior in all cases in which no adverse claim intervened before the original entryman filed his declaration of his intention to become a citizen. *Dougherty v. Railroad Co.*, 2 Copp, Pub. Land Laws, 929; *Stanley v. Fairchild*, 1 Copp, Pub. Land Laws, 575; *Kelly v. Quast*, 2 Dec. Dep. Int. 627; *Mann v. Huk*, 3 Dec. Dep. Int. 452; *Ole O. Krogstad*, 4 Dec. Dep. Int. 564; *Railroad Co. v. Painter*, 6 Dec. Dep. Int. 485; *Jacob H. Edens*, 7 Dec. Dep. Int. 229; *Paul O. Brewster*, Id. 471; *Railroad Co. v. Booth*, 11 Dec. Dep. Int. 89; *Lyman v. Elling*, 10 Dec. Dep. Int. 474; *Leary v. Manuel*, 12 Dec. Dep. Int. 345. In the reports of these cases will be found opinions by Secretaries Delano, Teller, Vilas, Lamar, and Noble in support of this view of the law, and no opinions of any of the secretaries to the contrary have been called to our attention. The opinions of these eminent lawyers, one of whom subsequently became one of the justices of the supreme court, are very persuasive. They are in accord with the decisions of the supreme court to which we have referred, and the case at bar falls far within the rule they establish. When Irwin bought this land that rule had been established at least four years. The only objection to his purchase was that he was not properly qualified to apply for the land as a homestead 11 months before. At the time he made the purchase he was so qualified. No one claimed the land adversely, and there was no one to raise this objection but the United States. They had decided that they would waive that objection in every such case, and that decision was the settled rule of the interior department, repeatedly announced by its chief officers. It was the law of the land until it was changed by legislative or judicial action. The register and receiver, in accordance with this law, accepted the purchaser,

sold the land, and received the purchase price. This was a complete waiver by the United States of all objection on account of his alienage, and vested in the purchaser a right to the patent, which it was not in the power of the commissioner to forfeit. It would be peculiarly inequitable to permit the United States to retract, through its commissioner, such a waiver, after a third party, such as the mortgage company in this case, had invested its money on the faith of it.

Our conclusion is that in the absence of any adverse claim the sale of land, under section 2301 of the Revised Statutes, to one who has declared his intention to become a citizen, is a waiver of any objection on the part of the United States that the purchaser was an alien when he made his application under section 2289, and the commissioner of the general land office cannot subsequently retract that waiver, and forfeit the right to the land on account of that objection.

Nor can the appellant maintain his title on the ground that he was a bona fide purchaser without notice of the claim of the appellee. He was one of Irwin's witnesses when he proved up his claim to this land. The patent certificate and mortgage were on record in the office of the register of deeds in the county in which the land was situated. He took the land with both actual and constructive notice of the material facts on which the equitable rights of the appellee rest.

The doctrine of laches has no just application to this case. It is applied, by analogy to the statute of limitations, to promote, not to defeat, justice. It was not until November 17, 1890, that the patent to this land was issued, and this suit could not have been maintained before that date. It was brought April 8, 1893. This ought not to be held to be a fatal delay, especially in view of the fact that the time limited by the statutes of North Dakota for the recovery of real property is 20 years. Comp. Laws Dak. 1887, § 4837.

But this is a suit in equity. All the evidence is before us, and it is the province of this court, in such a case, to consider the rights and equities of both the parties to the controversy, and to affirm, reverse, or modify the decree below as in our opinion will best subserve the ends of justice. This record discloses the fact that the land in question is the homestead of the appellant, that he has occupied and cultivated it for many years, and that it is worth \$3,000. The amount due to the appellee on its note and mortgage, including interest, costs, expenses of sale, and attorney's fees, as provided in the mortgage, was \$863.89, March 30, 1892. In our opinion a more equitable result than that attained by the present decree may be reached by a decree to the effect that in case the appellant pays to the mortgage company the sum of \$863.89, and interest at 7 per cent. per annum from March 30, 1892, and the costs of the mortgage company in this court and in the court below, within three months from the rendition of such a decree, then that the title to the land be quieted in the appellant, but that in case he fails to make such payments within that time the title be decreed to be held in trust for and to be conveyed to the mortgage company, substantially as in

the decree already rendered. The decree will accordingly be reversed, with costs against the appellant, and the cause remanded, with instructions to enter a decree not inconsistent with the views expressed in this opinion. It is so ordered.

THOMAS et al. v. WABASH, ST. L. & P. RY. CO. et al. (LANCASTER MILLS OF CLINTON, Intervener).

(Circuit Court, S. D. Illinois. September 24, 1894.)

1. **CONFLICT OF LAWS—LIMITING LIABILITY OF CARRIERS.**

St. Ill. March 27, 1874, provides that, whenever any property is received by a carrier to be transported from one place to another within or without the state, the carrier cannot limit his common-law liability safely to deliver such property by any stipulation in the receipt given for such property. *Held*, not to affect a contract made in Tennessee for the through shipment of cotton to Massachusetts, although the charter of the carrier so contracting was granted in Illinois.

2. **CARRIERS—LIMITING LIABILITY.**

A carrier cannot limit his common-law liability to the extent of exemption from loss of goods intrusted to him for transportation, and injured or destroyed through his own negligence.

3. **SAME—NEGLIGENCE—LOSS OF FREIGHT.**

When cotton is delivered to a carrier for shipment, and, after transportation for part of the distance, is left on a barge, constantly exposed to fire from boats and engines, for 18 days, the delay and exposure constitute such negligence as to render the carrier liable for the loss.

4. **SAME—DELAY IN TRANSPORTATION.**

A carrier is bound to know, when he accepts property for shipment, that he has or can obtain facilities for its transportation within a reasonable time.

5. **SAME—REBATE TO SHIPPER.**

Where the evidence was conflicting as to whether money paid by the carrier to the shipper was the consideration for the assumption by the shipper of all risk by fire or a rebate to obtain the shipment, the presumption that it was for the customary rebate controls.

Petition by the Lancaster Mills of Clinton, Mass., for the use of the Insurance Company of North America, against Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo Division of the Wabash, St. Louis & Pacific Railway Company.

John F. Lewis and Curtis Tilton (W. L. Gross, of counsel), for petitioner.

John M. Butler, for Thomas and Tracy, receivers.

ALLEN, District Judge. The proceedings in this cause were commenced by the Insurance Company of North America to recover from the Cairo, Vincennes & Chicago Line, in the hands of Thomas and Tracy, its receivers, the invoice value of 700 bales of cotton destroyed by fire at Cairo, Ill., on the 28th day of December, 1886. The cotton was insured under the provisions of a general policy, in February, 1886, in favor of the Lancaster Mills, and the petitioners, having paid the loss, claim to have been subrogated to the rights of the assured, and seek a recovery against the carrier. Bowles & Son, of Memphis, Tenn., seem to have bought the cotton for, or as agents of, the Lancaster Mills, had the same sent to a compress company

in that city, and afterwards it was delivered by such agents of the Lancaster Mills to Joseph Nash, agent of the Cairo, Vincennes & Chicago Line, who gave in return bills of lading. The bill of lading covering the cotton on barge 49, acknowledged its receipt from Bowles & Son at Memphis, and has on its face the words, "Notify Lancaster Mills, Clinton, Massachusetts." It is a through bill, issued by the "Cairo, Vincennes & Chicago Line, in connection with all trunk lines between Cairo, Toledo, Cleveland, Detroit, Chicago, Buffalo, Pittsburgh, Philadelphia, Boston, New York, New England, and intermediate points," and undertook the carriage of the cotton from Memphis to Clinton, Mass. It is signed by Joseph Nash, agent of the Cairo, Vincennes & Chicago Line, and contains a clause exempting the carrier from liability "for loss or damage to any article or property whatever, by fire or other casualty, while in transit, or while in depots or other places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on the seas, rivers, lakes, or canals." It bears date, on its face, December 13, 1886, but there is evidently an error as to this date, as barge 49, with the 700 bales of cotton subsequently burned, reached Cairo about midnight of December 10th. The bill of lading was probably made on or about the 8th of December. The petition is answered by the receivers of the railroad carrier, and raises numerous questions of fact and of law pertaining to the alleged right of recovery. Much evidence has been taken, and great zeal and ability have been exhibited by counsel on both sides. Many of the issues of fact made by the answer, and questions of law discussed, have ceased to be important, much less controlling, in view of the character of the evidence and the presentation of authorities bearing upon them. No question is made as to the fact that the insurance company paid the Lancaster Mills the amount of the indemnity agreed on between them, nor of law that, having made such payment, it has the same right to recover the insured would have possessed had no payment or subrogation occurred.

One of the first questions presented is made by the denial on the part of petitioners of the validity of the fire exemption clause in the bill of lading, on account of the force of an Illinois statute passed March 27, 1874, which provides "that whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." When it is remembered that the bill of lading was executed, delivered, and accepted at Memphis, Tenn., that it contemplated a through carriage of cotton from Tennessee to Massachusetts, and that the power of the carrier to make such contract has not been challenged, the authority of the state of Illinois to declare invalid a clause in the contract cannot be admitted. The legislature of Illinois, in regulating commercial contracts, cannot, in binding effect, go beyond the boundaries of the state; and it does

not matter, in this regard, that the franchise to the corporation represented by the receivers, Thomas and Tracy, was granted by the Illinois legislature. They had the same rights at Memphis, or in any other place outside the boundaries of Illinois, to limit their common-law liabilities, that were possessed or belonged to any other contracting party, natural or artificial. It may be assumed, then, that the carrier had the right to limit his common-law liability, but this privilege cannot be held to extend to loss of goods, intrusted to him for carriage, caused by his own carelessness or negligence. Counsel for receivers make no such contention. The intervening petition in this case alleges "that the loss of cotton by said fire was the result of the carelessness and negligence and delay of said receivers of said Cairo, Vincennes & Chicago Line while the said cotton was in their possession in course of transportation in pursuance of the contract of transportation aforesaid." Under the contract of affreightment, evidenced by the bill of lading, the Cairo, Vincennes & Chicago Line had the privilege of selecting its own line of transportation. It made choice of the Mississippi Valley Transportation Company from Memphis to Cairo. The barge containing the cotton left Memphis on the 8th or 9th of December, 1886, and was in the city of Cairo about midnight of the 10th of December. The undertaking bound the carrier to safely carry and deliver the cotton to the consignee within a reasonable time. I cannot, after the best consideration I have been enabled to give the evidence, resist the conclusion that the cotton was unreasonably detained at Cairo. Reaching there on the 10th, it remained on the same barge in the same harbor until the 28th, when it was burned. It is urged, in explanation by counsel for the receivers, that when all the circumstances existing in Cairo at that time are duly and fairly considered, press of business, limited facilities, the precedence of cotton coming on steamboats to that arriving on barges, etc., the 18 days between the arrival and the destruction of the cotton do not constitute negligence or unreasonable delay on the part of the carrier. And it is also urged that Bowles & Son, agents for the Lancaster Mills at Memphis, knew of the conditions at Cairo when the contract for transportation was made with Nash. It is sufficient to say, with reference to this explanation, that the carrier was bound to know, when he accepted the cotton, that he had or could avail himself of facilities to transport it within a fairly reasonable period. Knowing the conditions at Cairo, he should not have received the cotton at Memphis. It is unnecessary to cite authorities in support of the position that a carrier is not bound to receive freight when he has no facilities for transporting it, or when his line is already overtaxed and congested by freight previously accepted for transportation. The Cairo, Vincennes & Chicago Line was under no obligation to accept or receive freight at Memphis, when it had no ability to transport it to the destined point within a reasonable time. It chose to do so, however, and cannot be relieved from its undertaking because of difficulties in the way of the performance of the contract, when its agent knew of such difficulties at the time the contract was executed.

The contention is made, however, by counsel for receivers, that, even if unusual delay had occurred at Cairo after the arrival of the cotton, and before it was destroyed,—which is denied,—this would not render the receivers liable for the loss of the cotton burned, because such delay would, at the most, only be a remote, and not the proximate, cause of the loss of the cotton by fire. Many well-considered cases have been referred to by the learned counsel for the receivers in support of his position, and it may be that it announces a sound rule. It will be borne in mind, however, that the negligence imputed to the carrier in this case in the petition is not merely delay, but “that the loss of the cotton by said fire was the result of the carelessness and negligence and delay of said receivers while the said cotton was in their possession, in course of transportation in pursuance of the contract of transportation as aforesaid.” If mere delay constituted all the alleged negligence to be found in the pleadings and evidence, the question might present less difficulty, for the negligence must be the proximate, and not the remote, cause of the burning, to render the carrier liable. Had lightning set the cotton on fire, or had one of the frequent river storms destroyed it, the delay preceding the accident might not be regarded as the proximate cause of the destruction; and in such or a like case in facts or principle the cases cited by counsel for the receivers, of *Railway Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554; *New York Lighterage & Transp. Co. v. Pennsylvania R. Co.*, 43 Fed. 172; *Hoadley v. Transportation Co.*, 115 Mass. 304,—and others on that line, would be in point. The petition, however, and the evidence in support of it, go far beyond mere delay, charging and proving satisfactorily that the carrier company, on reaching Cairo with the cotton, on December 10th, did not proceed to North Cairo, where the Cairo, Vincennes & Chicago Line had a wharfboat, from which cotton on that line of transit was carried up an incline by tracks into the cotton shed, to be loaded on cars for the east, but, on the contrary, tied up Barge 49, containing the cotton; a distance of more than one mile, at the foot of Tenth street, at the public levee, in a position, not only exposed to the sparks of passing steamboats, but in close proximity to the tracks of the Illinois Central Railroad upon the top of the levee. A position more exposed to sparks from the numerous vessels in a busy harbor, and from the smokestacks of the engines almost constantly passing on the railroad, could not have been chosen in Cairo. And it was at this exposed point that the barge containing the cotton was moored, till it was destroyed by fire on the 28th of December; the fire originating most likely from sparks emitted from boats on the river or engines on the levee. It is not mere delay, therefore, but negligent delay in a dangerous place, wilful, it may be said, and deliberate exposure of the cotton to danger from fire, that fixes the liability of the carrier. The danger could have been foreseen, should have been foreseen, and guarded against.

Another ground of defense, urged apparently with much con-

fidence by counsel for the receivers, is that the owner of the cotton burned on barge 49 expressly assumed the fire risk while the cotton was on the barge, and expressly relieved the Cairo, Vincennes & Chicago Line and its receivers from liability for loss of the cotton by fire while on the barge; or, to put the matter in the language of counsel's brief: "The receivers, by Nash, their agent, purchased and paid for an interest in the insurance of the cotton already effected by the owner in its open policies of insurance issued by the Insurance Company of North America, to the extent of the risk while the cotton was on barge 49. By these contracts the insurance held by the owner insured to the benefit of the receivers to the extent of the risk while the cotton was on barge 49." This defense, and the alleged facts on which it is founded, are controverted and vigorously denied by petitioners. The receivers insist that the shipper assumed the river risk, and produce two instruments of writing purporting to be signed by William Bowles & Son, per Hayes, in support of this view. Nash testifies that the money mentioned in the instruments was for the assumption by Bowles & Son of the river risk. These two papers and Nash's testimony constitute the substance of the receivers' evidence upon the point. The petitioner produces William Bowles, Jr., and Mr. Hayes, who characterize the two papers as forgeries, and deny positively that the shippers, Bowles & Son, ever assumed the "river risk" or insurance risk between Memphis and Cairo. These two witnesses and others do say, however, that Bowles & Son were paid a rebate by Nash of two to eight cents per 100 pounds; that competition at Memphis for eastern consignments was sharp, and the payment of rebates usual, if not universal. The cross-examination of the witnesses upon the disputed point, together with the various circumstances and explanations offered in evidence, satisfies me that the shipper did not assume any such risk; and that, if he was paid anything by Nash in connection with the transportation of the cotton, it was in the nature of a rebate. No other point or question is deemed of sufficient importance to warrant further discussion in the case. There will be a decree in favor of petitioner for \$35,867.

WALKER et al. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 375.

1. LIEN—WHAT CONSTITUTES.

An agreement made with a prospective creditor of a firm, by one who has loaned bonds to it, that such bonds, "or the value thereof," shall not be returned to him until any money owing to such creditor shall be paid, and that the bonds, "or the value thereof," shall remain at the risk of the firm's business, so far as any claim of such creditor is concerned, does not create a lien on the bonds themselves, as the owner may take them back at any time by paying their value to the firm. 58 Fed. 23, affirmed.

2. BREACH OF CONTRACT—REMEDY.

Defendants' decedent agreed with plaintiffs that certain bonds loaned by him to a firm seeking credit from plaintiffs should not be returned to him

until any money owing plaintiffs should be paid, and that the bonds, "or the value thereof," should remain at the risk of such firm's business, so far as any claim of plaintiffs was concerned. The bonds were afterwards returned to decedent without consideration. *Held*, that plaintiffs' remedy was by action at law for breach of contract, rather than in equity to subject the bonds, as no lien on the bonds was created. 58 Fed. 23, affirmed.

8. EQUITY—SUIT AGAINST ADMINISTRATOR.

Suit cannot be maintained on the equity side of a federal court to enforce a purely legal demand merely because the demand is against the estate of a deceased person. 58 Fed. 23, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

In Equity. Bill by James H. Walker, Columbus R. Cummings, and William B. Howard against Anna L. Brown, Willis S. Brown, and Edward L. Marsh, administrators of the estate of Tallmadge E. Brown, deceased. There was a decree dismissing the bill (58 Fed. 23), and complainants appeal.

This is a bill which was preferred by the appellants, composing the firm of James H. Walker & Co., of the city of Chicago, against the appellees, as administratrix and administrators, respectively, of the estate of Tallmadge E. Brown, deceased, to enforce an alleged equitable lien upon certain bonds of the city of Memphis, Tenn., aggregating in amount the sum of \$15,000. The bill charged that prior to May 9, 1889, the deceased, Tallmadge E. Brown, was a stockholder of the Lloyd Mercantile Company, he having theretofore transferred the bonds now in controversy to said corporation in payment for stock therein by him purchased; that on the 1st day of August, 1889, Brown became anxious to withdraw his capital from the Lloyd Mercantile Company, whereupon a partnership was formed by J. Collins Lloyd and Copley Lloyd, under the name of Lloyd & Co., which latter firm bought all of the assets of the Lloyd Mercantile Company, except the Memphis bonds aforesaid, which were at that time surrendered to said Brown, and also assumed to pay all of its debts, including a debt in the sum of \$1,524, which was then due from the Lloyd Mercantile Company to the appellants. The bill further charged: That on the 20th day of September, 1889, the firm of Lloyd & Co. applied to the firm of James H. Walker & Co. to make a purchase of merchandise on credit, whereupon said Tallmadge E. Brown, for the purpose of inducing the appellants to extend such credit, executed the following agreement, in the form of a letter, to wit:

"Chicago, September 21, 1889.

"Messrs. James H. Walker & Co., Chicago, Ill.—Gentlemen: I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd and Company, Ellensburg, Wash. Ter., is with the understanding that any indebtedness they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, or that these bonds, or the value thereof, are at the risk of the business of Lloyd and Company, so far as any claim you may have against said Lloyd and Company is concerned.

"Yours, truly,

T. E. Brown."

That, in reliance on the agreement evidenced by the aforesaid letter, Walker & Co. thereafter extended credit to Lloyd & Co. in the sum of about \$13,000, between August 20 and December 11, 1889. The bill further alleged in substance that Lloyd & Co. failed on December 25, 1889, owing Walker & Co. at the time about \$13,000, no part of which has yet been paid; that prior to said failure Lloyd & Co. surrendered and returned to said Brown, without consideration, the Memphis bonds aforesaid; and that on the death of Brown, in the month of May, 1891, they passed into the custody of his administrators, as assets of his estate.

The answer of the defendants denied, among other things, that Tallmadge E. Brown, in his lifetime, was a stockholder of the Lloyd Mercantile Company, or that he had transferred the Memphis bonds in question to that corporation

in payment for stock, as was alleged in the bill, or that he was in any wise responsible for any of the debts of the mercantile company when it ceased to do business, and when the firm of Lloyd & Co. was formed. It averred in substance that prior to the 9th day of May, 1889, Brown loaned the bonds now in controversy to the Lloyd Mercantile Company to enable it to raise money, and that said company, prior to May 9, 1889, pledged said bonds to secure a debt which it then owed in the city of Chicago; that the bonds remained pledged to secure said indebtedness of the mercantile company on the 21st day of September, 1889, when the aforesaid letter was written by Brown to James H. Walker & Co.; that Lloyd & Co. failed to pay this indebtedness when they were called upon to pay it, and that Brown paid the same in the month of November, 1889, and received said bonds from the pledgee; and that he afterwards, before his death, made a valid gift and delivery of the bonds to his wife, Anna L. Brown, one of the appellees, who was the owner of the same in her own right when the bill was filed. On the filing of the answer, which disclosed the fact that Anna L. Brown had become the owner of the bonds by a gift made in the lifetime of her husband, the appellants amended their bill of complaint by making the said Anna L. Brown a defendant in her own right.

The circuit court appears to have dismissed the appellants' bill of complaint upon the ground that the aforesaid agreement of September 21, 1889, did not create an equitable lien upon the bonds, and that no other matters were stated in the bill or proven on the trial which rendered the case one of equitable cognizance. *Vide Walker v. Brown*, 58 Fed. 23.

Henry S. Robbins, for appellants.

N. T. Guernsey, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question presented for consideration by this court is whether the letter of T. E. Brown to James H. Walker & Co., of date September 21, 1889, had the effect of creating an equitable lien upon the Memphis bonds therein referred to, in favor of James H. Walker & Co., which lien a court of chancery will enforce. In his work on Equity Jurisprudence, Mr. Pomeroy says, and the authorities cited by him undoubtedly support the proposition—

"That every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt, or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers, with notice." Under like circumstances, a merely verbal agreement may create a similar lien upon personal property." 3 Pom. Eq. Jur. § 1235, and cases there cited.

The question arises, therefore, whether there is to be found in the letter in question, viewed in connection with the circumstances under which it was written, an expression of an intention on the part of T. E. Brown, now deceased, or a promise on his part, to make the particular bonds referred to in the letter a security for whatever credit the firm of James H. Walker & Co. might thereafter extend to Lloyd & Co. This letter appears to have been written by an agent of James H. Walker & Co. at the city of Chicago, and to have been sent to the deceased at his residence in the city of Des Moines, Iowa, where it was signed by him, and returned

through the mail to the appellants. The record shows in substance that Lloyd & Co. applied to the appellants to purchase certain merchandise on credit, and, at the time of such application, made a statement of the firm's assets and liabilities. At this interview the fact was disclosed to the appellants, and they appear to have been aware of the fact before the disclosure was made, that Lloyd & Co. were indebted to T. E. Brown in the sum of \$15,000 for bonds of the city of Memphis which he had loaned to the firm, and which were then hypothecated to the Union National Bank of Chicago to secure a loan for that amount, which the firm of Lloyd & Co. was obligated to pay. The appellants refused to extend credit to Lloyd & Co. unless T. E. Brown, the owner of the bonds, would sign an agreement with respect to the return and surrender of the same which was satisfactory to the appellants. Thereupon, at the suggestion of Lloyd & Co., Mr. William A. Mason, in behalf of the firm of J. H. Walker & Co., dictated the aforesaid letter, as containing such an agreement as would be satisfactory to his principals, and would induce them to extend credit to Lloyd & Co. With reference to his motive in formulating the letter which was subsequently signed by the deceased, Mr. Moore testified, in behalf of the appellants, as follows:

"We understood that Mr. Brown was a partner in the Lloyd Mercantile Company, or held stock in the Lloyd Mercantile Company, and that in making this change from the Lloyd Mercantile Company to Lloyd & Co. he had become a creditor, instead of a stockholder, and we insisted that he must take the same position that he had before, so far as we were concerned; that the capital of Lloyd & Co. must be fifty thousand dollars, or about that, the same as of the Lloyd Mercantile Company."

We think that the letter of September 21, 1889, when considered by itself, without the aid of parol testimony, is fairly susceptible of but one interpretation, which is well stated in the foregoing extract from the testimony of the person by whom the letter was drafted. The appellants were advised that Brown had loaned Lloyd & Co. the sum of \$15,000 in Memphis bonds, which was being used by the firm as a part of its capital. They were willing to extend credit to the firm to a certain amount, if Brown would agree that the money thus loaned should not be withdrawn until the indebtedness of Lloyd & Co. to the appellants was paid, and that until such time the loaned capital should remain at the risk of the business of Lloyd & Co. The only undertaking on the part of the defendants' intestate that can fairly be extracted from the letter is a promise on his part that the capital loaned to Lloyd & Co. should not be withdrawn until the appellants' debt was paid. It is manifest, however, that the decedent did not intend to give the appellants a lien upon the Memphis bonds for the payment of such indebtedness as they might allow Lloyd & Co. to contract, and that he did not even intend to obligate himself to leave said bonds in the possession of Lloyd & Co. until such indebtedness was paid and extinguished, for his promise was clearly in the alternative,—that said "bonds, or the value thereof, should be at the risk of the business of Lloyd & Company," so far as the appellants' claim was concerned. It will hardly admit of a doubt, we think, that within the contemplation of both

parties to the agreement of September 21, 1889, the deceased had the right at any time to withdraw the Memphis bonds from the custody of Lloyd & Co., provided he left other securities of equal value, either money or property, in the hands of that firm, subject to the vicissitudes of its business. Indeed, the bill of complaint appears to have been drawn upon the theory that the deceased had the right to withdraw said bonds on the condition last stated, and that he had no intention of creating a lien thereon, for the bill contains the following allegation:

"Your orators were also unwilling to extend any credit to said Lloyd & Co. after and so long as said fifteen thousand dollars of Memphis bonds were withdrawn from said assets, and redelivered to said Brown as and for his own property; and thereupon the said Brown, for the purpose of inducing your orators to permit the withdrawal by said Brown of said bonds, and to extend to Lloyd & Co. such further credit in the sale of merchandise as said Lloyd & Co. might desire, promised and agreed in a writing duly signed by said Brown with your orators on the 21st day of September, 1889, that, in consideration of your orators' extending further credit to said Lloyd & Co. as aforesaid, any indebtedness that said Lloyd & Co. should be owing to your orators at any time should be paid before there should be returned to him, said Brown, the said Memphis bonds so loaned to said Lloyd as aforesaid, or the value thereof."

We must accordingly concur in the view which appears to have been taken by the circuit court,—that the testimony failed to establish the existence of a lien, either legal or equitable, so far as the bonds now in controversy are concerned, and that at most it only tended to show that the deceased had violated his agreement not to withdraw the amount of capital which he had loaned to Lloyd & Co. until the debt of the appellants was paid. We must also concur in the further view of the circuit court that a court of law is competent to afford adequate relief for a breach of contract of that nature. The result is that the bill was properly dismissed, unless it be true that even in the absence of a lien the appellants had the right to go into a court of equity for an assessment of the damages which they had sustained.

This brings us to the consideration of the second proposition maintained by counsel for the appellants,—that even in the absence of a lien, as charged in the bill, the complainants below had the right to sue in equity for the enforcement of their demand. The contention in this respect goes to the extent of asserting that the holder of a purely legal demand against the estate of a deceased person may sue in equity in the United States circuit court for the proper district, for the establishment of his claim, if he happens to be a nonresident, and that in aid of such proceeding the court may take to itself the administration of the decedent's estate. The argument by which this conclusion is reached is very brief, and is to the following effect: It is said that the equity jurisdiction vested in the federal courts is such as was exercised by the high court of chancery in England at the adoption of the federal constitution, and that the English courts of chancery had jurisdiction of bills to enforce the due administration of the estates of deceased persons. The proposition, if tenable, is certainly startling,—that, notwithstanding the elaborate code of laws now in force in most of the states of this Union regulating the subject of administration, the federal courts, as

courts of equity, may nevertheless administer the estates of deceased persons at the instance of a nonresident creditor. While there are some expressions to be found in adjudged cases which perhaps give color to such an assertion, yet we think that it will be found on a careful view of the subject, and the circumstances under which such utterances have been made, that there is in fact no substantial ground on which to rest the exercise of the large jurisdiction above claimed. In the case of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, one of the earliest cases touching this subject which is to be found in the federal reports, Judge Story held that the courts of the United States, as courts of equity, "possess jurisdiction to maintain suits in favor of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be by local jurisprudence a remedy at law on the administration bond in favor of the party." The facts disclosed in this latter case made it one of equitable cognizance on the ground of fraud. The proceeding was in substance a bill in equity to avoid a final judgment of a probate court settling the accounts of an administrator, which judgment had been obtained through the fraud of the administrator. Suits of that nature may doubtless be maintained in the national courts. In the case of *Hagan v. Walker*, 14 How. 29, 33, the following statement is found: "That a single creditor may maintain a bill against an administrator of a deceased debtor for a discovery of assets, and the payment of his debt, there can be no doubt." But this was said with reference to a case of which a court of equity, state or federal, clearly had jurisdiction on well-established equitable grounds, it being a case in which a judgment creditor of the deceased sought to reach property in the hands of a third party that had been conveyed to him by the deceased, in his lifetime, with intent to defraud his creditors. The case of *Union Bank v. Jolly's Adm'rs*, 18 How. 503, is also referred to, and apparently with great confidence, in support of the appellants' contention. That was a case, however, in which the complainant had obtained a judgment against the administrators of Jolly in the federal court pending the administration. The administrators refused to recognize or pay any part of this judgment, although they had assets in their hands, and were about to distribute such assets among the heirs of the deceased, claiming, as it seems, that the federal judgment was barred because the demand on which it was founded had not been allowed as a debt of the intestate, by certain commissioners appointed by the probate court, pursuant to state laws, to audit claims against the decedent's estate. On a bill filed by the complainant to compel the administrators to recognize and pay the judgment obtained against them in the federal tribunal, it was held in effect that a law of the state limiting nonresident creditors of deceased persons to suits in the state courts for the purpose of establishing their demands would not be enforced, and that such nonresident creditors had the right to establish their claims by a suit in the appropriate federal tribunal, and that when so established they were entitled to recognition in the distribution of the assets of the deceased.

In the case of *Green's Adm'rs v. Creighton*, 23 How. 90, the principal question discussed was whether a nonresident creditor of a deceased person was entitled to sue in the federal court of the proper district for the establishment of his demand, notwithstanding the provisions of a state statute which required all demands against the estates of deceased persons to be allowed by the probate court. The court answered this inquiry in the affirmative, following its decisions in *Suydam v. Broadnax*, 11 Pet. 67, and *Union Bank v. Jolly's Adm'rs*, *supra*. It will be observed in this case that, when the court reached the decision of the question whether complainant's demand was one which entitled him to come into equity for its enforcement, it rested its decision upholding his right to sue in that forum upon the ground that a portion of the assets sought to be recovered were in the hands of the surety of the administrator of the deceased debtor, who had been joined as a defendant in the bill, and that as against such surety it was necessary to obtain a discovery in equity. The decision in question falls far short of establishing the proposition contended for in the case at bar,—that upon an ordinary legal demand against the estate of a deceased person a suit can be maintained in equity as well as at law against his administrator or executor. Since the decision in *Green's Adm'rs v. Creighton*, establishing the right of a nonresident creditor to sue in the courts of the United States for the establishment of his demand against the estate of a decedent, it has been ruled in *Yonley v. Lavender*, 21 Wall. 276, that the creditor so obtaining a judgment in the federal tribunal cannot on that account take out an execution against the property of the deceased and cause it to be sold, but must come into the probate court of the state, and take such a share of the assets of the deceased as the administration laws of the state allow to creditors of his class. It was held in this case, in substance, that the administration laws of a state are not merely rules of practice for the courts of the state, but that they are laws limiting the rights of the parties, and that they will be observed by the federal courts in the enforcement of individual rights against the estates of decedents. See, also, in this connection the case of *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, which decides that a proceeding against an administrator for the establishment of a demand against his decedent's estate is a suit which is removable to the federal courts when the creditor and the administrator are citizens of different states. Another case supposed to have an important bearing on the subject in hand, from which lengthy quotations have been made by counsel, is *Payne v. Hook*, 7 Wall. 425, 430. The general statement is found in this, as in some other cases, that "the equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses." But in that case it appeared that the administrator had grossly mismanaged the estate of the deceased; that he had made false settlements with the probate court,—filed a false inventory therein; and that by this and other fraudulent means he had induced a nonresident distributee, who was the complainant, to sell her interest in the estate to the administrator for a grossly

inadequate consideration. The main purpose of the bill appears to have been to cancel the alleged fraudulent purchase of the distributee's interest, and to obtain a decree against the administrator for its full value. There can be no doubt, we think, that the bill in this latter case contained allegations which entitled it to be entertained on that ground, and that it was so entertained, rather than upon the theory that the mere fact that an administrator was a party defendant rendered it a case of equitable cognizance. Probably the most elaborate as well as the latest expression of the views of the supreme court of the United States on this interesting subject is to be found in the case of *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. In that case it was held, in accordance with well-established principles, that a nonresident creditor of an estate may establish a demand against the same by a suit in the federal court; also, that a nonresident distributee may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or proceed in any way which does not disturb the actual possession of the property by the state court. But it was said in that connection that the federal courts have no original jurisdiction in respect to the administration of decedents' estates, and that they cannot, by entertaining a suit against an administrator, as they may do in some cases, invest themselves with authority to determine all claims against it. Looking at the circumstances which gave rise to the last-mentioned decision, we find the fact to be that the debts of the estate had been paid, and that the administration proceedings had reached that point when it was the duty of the administrator to make distribution of the estate among those entitled to it. At this juncture a controversy appears to have arisen between the administrator and a nonresident distributee as to the amount of the latter's share in the estate, the determination of which controversy depended in part upon the true construction of the laws of descent of the state of Pennsylvania, and in part upon the question whether a testamentary clause in the will of the decedent, which was inefficacious as a will, could be given effect as a valid declaration of a trust. It was held in substance that a nonresident distributee was entitled to have both of these questions decided by the appropriate federal tribunal. The court did not decide, however, as is now contended, that the holder of an ordinary legal demand against the estate of a decedent may go into a federal court sitting in equity to establish the same merely because his demand is against a dead man's estate. Moreover, it clearly appears in the case last cited that the cause of action was one of equitable cognizance, inasmuch as it involved the existence and enforcement of a trust.

The cases to which we have thus referred serve to illustrate the extent and the appropriate limits of the jurisdiction which the federal circuit courts now exercise in matters pertaining to the administration of the estates of decedents. They have an undoubted jurisdiction to establish demands exceeding \$2,000 against the estates of deceased persons, when that jurisdiction is invoked by a nonresident creditor; and, if the demand sought to be enforced in

the federal court by a nonresident creditor happens to be of an equitable nature, it may undoubtedly be enforced by a suit in equity, as distinguished from a suit at law. Speaking generally, we have no doubt that a nonresident may enforce any right or claim which he happens to have against the personal representative of a deceased person by a bill in equity in the appropriate federal tribunal, when such right or claim pertains to any of the recognized heads of equity jurisprudence, or when, for any reason, a court of law is unable to afford adequate relief. But the authorities in question do not support the contention that, in a suit to establish a purely legal demand against the estate of a decedent, the jurisdiction at law and in equity is concurrent so far as the federal courts are concerned. Nor do we perceive any reason why the equity powers of these courts should be invoked to establish a purely legal demand, since it is manifest that, as courts of law, they are able to afford the same measure of relief that can be obtained in equity. When a demand has been established in a federal court, whether at law or in equity, it cannot be enforced against the property of the decedent by execution in the ordinary form, but must await payment by the process of administration in the mode provided by state laws, which are binding alike upon the federal and state tribunals. *Yonley v. Lavender and Union Bank v. Jolly's Adm'rs*, supra. Moreover, the federal courts, on a bill filed to establish a demand against an estate, cannot take to themselves the full administration of the estate, when it is undergoing administration pursuant to local laws, as the English chancery courts might have done under a creditor's bill. *Byers v. McAuley*, supra. The power of the federal court ceases with the establishment of the demand, unless it becomes necessary to take further action for the purpose of compelling the administrator or executor to recognize the validity of the federal judgment and give it full force and effect as an adjudicated claim against the estate. In other words, the jurisdiction of these courts over the administration of estates is less extensive than that which was formerly exercised by the English chancery courts. Their jurisdiction at best is but a limited one, depending as it does in all cases either upon the existence of a federal question or diverse citizenship; and they are bound, like the state courts, to render a faithful obedience, within certain well-defined limits, to local administration laws that have now rendered it possible to administer estates fairly and equitably without invoking the extraordinary powers of a court of chancery. Furthermore, the authority of the federal courts, as courts of equity, is circumscribed by the positive mandate of the judiciary act that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." Rev. St. § 723. As we have before remarked, and as we now take occasion to repeat, a legal demand against a decedent's estate can now be as effectually enforced by a suit at law as by a bill in equity, and there is no necessity for resorting to the latter proceeding. No advantage is gained by suing in equity rather than at law, for the decree in that forum must stop short with the ascertainment and allowance

of the creditor's demand; and if, in any case, or for any reason, it becomes necessary to take further action against the administrator to enforce payment of the allowance, the power of the court, as a court of equity, may be invoked in aid of a judgment at law as well as in aid of a decree in chancery. We are of the opinion, therefore, that as the claim involved in the case at bar was an ordinary legal demand, which grew out of a breach of contract by the defendants' intestate, the complainants below should have sued at law to establish the demand, and that the bill was properly dismissed. The decree of the circuit court is therefore affirmed.

BOWDOIN COLLEGE et al. v. MERRITT.

(Circuit Court, N. D. California. July 23, 1894.)

1. LAW OF THE CASE.

A decision on demurrer that the allegations of the complaint, including one that defendant trustees refused to sue, gave plaintiff cestui que trust a right of action, is the law of the case on motion to dismiss.

2. UNITED STATES COURTS—JURISDICTION—COLLUSION.

Refusal of trustees to sue, thereby enabling the cestui que trust to bring the action in a federal court, as involving a controversy wholly between citizens of different states, will not be held collusive, thus subjecting the action to dismissal under Act March 3, 1875, § 5, though they were willing the cestui que trust should bring the action, and were friendly to it, where they would not have sued under any circumstances, for the reason that they would have had to sue in a state court, and thought that an effort would there be made to unduly influence the jury.

3. SAME—EFFECT OF ANSWER.

Where, on the refusal of trustees to bring an action against a citizen of the same state, the cestui que trust, a citizen of another state, brings the action in a federal court, joining the trustees as defendants, the answer of the trustees, admitting all the allegations of the bill, including one that they refuse to sue, does not show that they have changed their attitude, and are no longer antagonistic to the complainant, and thus deprive the federal court of jurisdiction of the action, as one no longer between citizens of different states.

Action by the president and trustees of the Bowdoin College, and others, against James P. Merritt, Frederick A. Merritt, and others, to remove a cloud from title. A demurrer to the bill was overruled (54 Fed. 55), and the cause was then heard on application to file a supplemental bill, and for an injunction. Leave was given and a preliminary injunction granted (59 Fed. 6), and defendant J. P. Merritt now moves to dismiss.

Blake, Williams & Harrison, E. S. Pillsbury, and Robert Y. Hayne, for complainants.

H. W. Philbrook, Arthur Rodgers, J. C. Martin, A. A. Moore, and Geo. R. B. Hayes, for respondents.

MCKENNA, Circuit Judge (orally). The nature of this action has been heretofore defined by Judge HAWLEY (54 Fed. 55), in passing on the demurrer, as one to quiet title, and the facts have been so often stated that it is unnecessary to state them again.

The action is brought by the college and certain persons as bene-

ficiaries of a trust deed made by one Catherine Garcelon to the defendants Stanley and Purington. The plaintiffs sue, for themselves and all others interested under the deed, to enjoin J. P. Merritt from asserting claim to the property described in the deed, contrary to a contract it is alleged he made with Mrs. Garcelon, and thereby embarrass or prevent the execution of the trust. Bowdoin College is a citizen of Maine, and Stanley and Purington and Merritt are citizens of California. The bill alleges that a demand had been made by the Bowdoin College, of Stanley and Purington, to sue, and that they had refused. The defendant Merritt demurred to the bill, and the demurrer was overruled by Judge HAWLEY, he holding complainants had a right of action. The defendant has since filed a plea in abatement, which, at some length and with emphasis, charges that the action was instituted by Stanley and Purington, and that they were made defendants by false pretense, and that the demand on them to sue, and their refusal, was not in good faith, but that suit might be fraudulently prosecuted in this court, and its jurisdiction imposed on. Hence, it is claimed that the suit is collusive, under section 5 of the act of March 3, 1875.

There is considerable controversy as to the proper interpretation of Judge HAWLEY'S opinion,—whether the right of action in Bowdoin College depended upon the refusal of Stanley and Purington to sue, or was independent of this, and was sustained by its interest in the execution of the trust; the defendant contending for the former, and the complainants for the latter, view. I shall assume that defendant is right, and consider the case from this standpoint. This narrows the controversy, and relieves me from the labor and embarrassment of deciding a number of points made and argued by counsel with learning and ability.

To support the jurisdiction of the court in this case, there must be a controversy between citizens of different states, and it must be conceded that the bill shows and the evidence establishes that the real interests of Bowdoin College and Stanley and Purington are identical; and defendant claims, therefore, that plaintiffs and Stanley and Purington should be arranged on one side as parties against the Merritts on the other, and when so arranged the suit is not wholly between citizens of different states. In *Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560, Dean, who was a citizen of New York, and a stockholder in the Mutual Gaslight Company, a Michigan corporation, sued its directors, citizens of Michigan, and the city of Detroit. The court ordered the bill dismissed, not because Dean and the directors had identical interests, but because the refusal of the latter to sue was collusive. Against the seemingly natural inference that, if the refusal had not been collusive, jurisdiction would have been entertained, the defendant urges that the point was not raised, and the case therefore is not authority. But I do not think it reasonable to assume that the point would have escaped the vigilance and ability of the court and counsel in a case where jurisdiction was contested. But this case does not stand alone. It cites *Hawes v. Oakland*, 104 U. S. 450; and this, again, cites *Dodge v. Woolsey*, 18 How. 331. See, also, *Davenport v. Dows*, 18 Wall.

626; *Memphis v. Dean*, 8 Wall. 73; *Taylor v. Holmes*, 14 Fed. 507; *Swope v. Villard*, 61 Fed. 419; *Greenwood v. Freight Co.*, 105 U. S. 16. These cases undoubtedly establish that a controversy may arise between a shareholder of a corporation and its directors, different from the controversy between the shareholder and the other defendants, which it is the object of the suit to settle, and in which the real and material interests of the stockholder and directors are the same. Or, if it may not be said that there are two controversies, it may be said, as was said by Justice Wayne in *Dodge v. Woolsey*, that the refusal of the directors to sue caused them and the shareholders "to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights." Their refusal was a hindrance to his rights. *Dodge v. Woolsey* was modified by *Hawes v. Oakland*, as to what circumstances would justify a suit by a shareholder if the directors should refuse to sue; but a question of that kind is not raised by defendants, and probably could not be. Judge HAWLEY decided that the facts stated in the bill, combined with the refusal of the trustees to sue, gave a cause of action to plaintiffs, and this must be observed as the law of the case.

Starting with this as the law, the inquiry is necessarily confined to the character of the refusal,—whether collusive or otherwise; that is, as the plaintiffs' right of action to sue depends upon the refusal of Stanley and Purington to sue, the question is, was it sincere,—expressing a real resolution,—or was it feigned to give a cause of action to plaintiffs? I cannot conceive of a more difficult proposition to prove or disprove against the declarations of the parties themselves, if they be credible. The evidence in this case is very voluminous, and has been cited and commented on at great length and ability by counsel. It is impossible to review it. It clearly establishes that Stanley and Purington were willing that plaintiffs should sue,—maybe, urged them to do so; that they are friendly to the action; secured the consent of the other parties to it; advanced trust money to plaintiffs after the suit was commenced, to purchase the interest of one of the Merritts. And a credible witness swears:

"I met the judge [meaning Judge Stanley] on Jackson street, and he walked up to the station,—up to the narrow-gauge station,—and we got to talking about this. In fact, I spoke to him about it. I said, 'I see, Judge, there is a suit brought by Bowdoin College;' and he said, 'Yes, I had that suit brought.' And I said, 'What object could you have in bringing that suit?' He said, 'I had the suit brought so as to prevent them from coming into Alameda, before a jury, to try this case.'"

But this is not inconsistent with the fact firmly sworn to by Stanley, that he and Purington would not have brought suit in the state court, which is made by Judge HAWLEY the condition of plaintiffs' right to sue, and of the jurisdiction of the court. Judge Stanley is a gentleman of high character, and it is not giving too much credence to his statement to believe it, against evidence which, though strong, is not inconsistent with it. Judge Stanley is supported by the testimony of Mr. Young, treasurer of the college. He testifies that at his first interview with Judge Stanley the latter told

him that the trustees would not sue, and repeated it at a second interview, and testifies further, in effect, that there was no collusion between the college and Stanley. If Judge Stanley believed what he says he did, his position is not unnatural,—if he believed, as he testifies he believed, that a syndicate had been formed to defeat the trust, which would have power to influence a jury in the state court, and that to sue in the state courts would be, as he forcibly put it, “like putting his head between a lion’s jaws,” and that, therefore, he would wait, and make the best defense to any attack that should be made. But defendant insists he had no ground for his belief, or, at any rate, none appears but his statement. An issue on this would be fruitless. It could not be so conclusively established as to disprove his belief. If so, it would seem to prove too much, and would leave him without motive, or that motive at least to collude for a suit in the federal court. The record shows no other motive, except his declaration that he would not assume the chance of paying the expense of the suit out of his own pocket, as he might have to do under a decision of the supreme court of the state to the effect that an executor could not spend any part of the estate to support his testator’s will. This also is denied by defendant, but, if the denial can be supported, Stanley then is left without motive to seek a federal court.

Defendant, however, contends that, if the plaintiff and Stanley and Purington were antagonistic when the suit was brought, the answer of the latter shows that there is now no controversy between them and plaintiffs. The answer admits the allegations of the bill, except as to the possession of one piece of land. In support of their contention, counsel cite *Railroad Co. v. Ketchum*, 101 U. S. 289. In this case the Pacific Railroad, a Missouri corporation, mortgaged its road and other property to Henry F. Vail and James D. Fish, trustees, citizens of New York, to secure a proposed issue of bonds amounting to about \$4,000,000. It was a third mortgage, the property being covered by other mortgages, and contained clauses providing for foreclosure if interest should not be paid. Default was made in the payment of one of the installments of interest, and Ketchum, a citizen of New York, commenced suit, claiming to be the owner and holder of many of the bonds, in behalf of himself and other bondholders. Vail and Fish and the holders of the prior mortgages were made defendants. The latter may be omitted from consideration. As to Vail and Fish the bill alleged that:

“Your orator further shows unto your honors that an application has been made by your orator, on behalf of himself and other holders of bonds secured by said mortgage, to the defendants Henry F. Vail and Henry D. Fish, to take proceedings to foreclose the aforesaid mortgage, and to protect the interest of your orator and such other holders, but that no such proceedings have been taken, and, as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the nonpayment of the interest due November 1, 1875, and for such reason prefer not to take such proceedings; and your orator, being apprehensive that his interest, and the interests of other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action in his own behalf,

and on behalf of all others similarly situated, and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein."

Vail and Fish answered, admitting the allegations of the bill, and concluded as follows:

"And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for the costs and expenses herein, as to your honorable court may seem meet."

It was objected that as Vail and Fish, and certain other defendants, were citizens of the same state with Ketchum, the suit was not between citizens of different states, and therefore not within the jurisdiction of the circuit court. Answering the objection, the court said:

"For the purposes of this appeal, we need not inquire when the circuit court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered."

Then, after considering the relation of other parties to the suit, the court further said:

"This leaves only to consider the position occupied by Vail and Fish. When the suit was begun, as well as when the decree was rendered, they were trustees of the mortgage under which Ketchum and his co-complainants claimed. No allegations were made against them. All that was said about them was that they doubted their right to proceed. There was no antagonism between them and Ketchum and his associates. He wanted them to proceed. They did not know that they had the legal right to do so. In the meantime he, thinking his own rights, as well as those of his associate bondholders, would be injuriously affected by delay, commenced the suit to get done just what the trustees, if they had been willing to proceed, might have done. Whatever he did was for the trustees, and in their behalf, and he really had no power to do more than they might have done if they had been so inclined. It is needless to inquire what might have been the result if they had seen fit to dispute the right of the complainant bondholders to go on. They did not do so, but, on the contrary, before the decree was rendered, came in, and substantially availed themselves of the suit which had been begun, so that in the end the suit, in legal effect, became their suit. Although nominally defendants, according to the pleadings, they voluntarily, in the course of the proceedings, arranged themselves on the same side of the subject-matter of the action with the complainants. This they had the legal right to do. After that, clearly, the controversy was between citizens of one or more states on one side, and citizens of other states on the other side; and when the decree was rendered the only thing to be done was to foreclose the mortgage sued on, as between the trustees of the mortgage, acting with their beneficiaries and the railroad. Of such a suit the circuit court had jurisdiction, and its decree is consequently binding on the parties until set aside in the regular course of judicial proceedings."

It will be observed that the court said there was no antagonism between Ketchum and his associates and Vail and Fish. They had not refused to sue. They had only doubted their right to proceed. The case, therefore, is not like the one at bar. In the case at bar the allegation of the bill is that Stanley and Purington refused to sue, and their answer admits it. The answer does not show that their attitude or resolution had or has changed. I do not think that the plea in abatement is sustained by the evidence, and it is therefore overruled, and the motion to dismiss is denied.

This case was considered by myself in conjunction with Judge HAWLEY, and I am authorized by him to say he concurs in this ruling.

BRISTOL et al. v. SCRANTON et al.

(Circuit Court of Appeals, Third Circuit. September 14, 1894.)

CORPORATIONS—CONSOLIDATION—PERSONAL AGREEMENT OF OFFICERS—LIABILITY TO STOCKHOLDERS.

Where the president of a corporation, in conducting a consolidation with another corporation, fully protects the interests of his corporation, the latter is not entitled to the consideration coming to him for his personal agreement with the other corporation that he would not, for a number of years, engage in the business conducted by such corporations,—this being insisted on by the other corporation as a condition precedent to consolidation,—his interests not being thereby rendered antagonistic to those of his corporation.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit by Louis H. Bristol and others against William W. Scranton and another, for an accounting. From a decree for defendants (57 Fed. 70), plaintiffs appeal. Affirmed.

Henry Stoddard, Samuel Dickson, and Richard C. Dale, for appellants.

D. T. Watson and John McClave, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

GREEN, District Judge. The bill of complaint in this cause was filed by Louis H. Bristol and others, stockholders of the Scranton Steel Company, a corporation organized under the laws of Pennsylvania, and doing business at Scranton in said state, against William Walker Scranton and his brother Walter Scranton, who were respectively the president and vice president of the said steel company, to compel them to transfer and assign to the Scranton Steel Company, for its benefit and behoof, certain bonds or money obligations made and executed by another Pennsylvania corporation, the Lackawanna Iron & Steel Company, and by it delivered to the said defendants under these circumstances, as appear from the proofs in the case: The Scranton Steel Company and the Lackawanna Iron & Coal Company were both engaged in the manufacture of steel rails at Scranton, Pa., and had been for years, and were at the date of this transaction, engaged in active, if not hostile, competition, possibly to the financial injury of both. Certain gentlemen interested in the Lackawanna Company determined, if possible, to harmonize these antagonistic interests, and conceived the plan to consolidate into a new corporation, to be known as the Lackawanna Iron & Steel Company, the rival corporations. Negotiations looking to this end were thereupon opened by them with the defendants, who were the representative officers of the Scranton Company, which were carried on with varying success for some time. At

last, however, in January, 1891, after careful consideration and thorough discussion of the scheme of consolidation by the parties interested, it was finally agreed to; and a formal agreement in writing, embracing in detail the terms of the merger and union, was lawfully executed by both of the contracting parties. By it the business interests and plant of the Scranton Steel Company and of the Lackawanna Iron & Coal Company were merged and consolidated, and transferred to a new corporation, styled the Lackawanna Iron & Steel Company, which became in fact the successor, in all things, of the two consolidating corporations. Simultaneously with the consummation and execution of this contract of consolidation, another agreement was entered into by the Lackawanna Iron & Coal Company and by these defendants, wherein it was covenanted and agreed as follows:

"Article of agreement made this ninth day of January, in the year one thousand eight hundred and ninety-one, between the Lackawanna Iron and Coal Company, a corporation of the state of Pennsylvania, party of the first part, and William W. Scranton, in said state, and Walter Scranton, of East Orange, in the county of Essex and state of New Jersey, parties of the second part. Whereas, with the approval and consent of the parties of the second part, the party of the first part has entered into a certain contract with the Scranton Steel Company for a consolidation of their manufacturing industries, bearing even date herewith: Now, therefore, in consideration of the making and execution of said contract, and of these presents and the covenants herein contained, the parties hereto have agreed to and with each other as follows: First. That, upon the complete execution of said contract between the Lackawanna Iron and Coal Company and the Scranton Steel Company, the party of the first part will assign, transfer, and deliver to the parties of the second part \$350,000 of the mortgage bonds of the Lackawanna Iron and Steel Company, described and provided for in said contract. Second. And in consideration thereof the said parties of the second part agree that they will not, nor will either of them, engage, directly or indirectly, in the manufacture of steel in any new competing works not now existing in any of the northern states of the United States, including Maryland, Virginia, and West Virginia, for the term of ten years from and after the complete execution of said contract; that they will at once procure and deliver to said iron company the assent of the Scranton Gas and Water Company to the assignment of the contracts with that company specified and described in said contract between the Lackawanna Iron and Coal Company and the Scranton Steel Company. Third. That this contract shall be binding upon, and inure to the benefit of, the successors, executors, administrators, and assigns of each of the parties hereto."

This agreement has been fully carried out in all its provisions by the contracting parties, and it is with these bonds, so delivered to the defendants for and upon the consideration in this agreement expressed, that this bill of complaint concerns itself. Quoting from it, its most material allegations, after setting forth the proposed scheme of consolidation, are as follows:

"And your orators further show that as part and parcel of the said arrangement by which the consolidation of the business interests and plants of said two corporations was to be effected, and the plant of said Scranton Steel Company was to be transferred to a new and single corporation, known as the Lackawanna Iron and Steel Company, said William Walker Scranton and Walter Scranton, while acting in said negotiations for and in behalf of said Scranton Steel Company, and as the directors and agents thereof, in violation of the duty which, as said directors and agents, they owed to said Scranton Steel Company and to the stockholders thereof, including your orators, conspiring and confederating together to receive for themselves large sums of

money on securities or bonds, through and by means of the sale, conveyance, and transfer of substantially all the plant and property of said Scranton Steel Company to said proposed new corporation, secretly, and without the knowledge, assent, or concurrence of the other stockholders of said Scranton Steel Company, or any of them, stipulated that the sum of three hundred and fifty thousand dollars in bonds of said new company, secured upon the property of said new company, should, upon the consummation of said consolidation, be paid to them personally and individually, and for their own personal use and benefit, by the Lackawanna Iron and Coal Company. And your orators allege that the obtaining and procurement of said bonds by the said William Walker Scranton and Walter Scranton, for their personal use, benefit, and behoof, was in fraud of the rights of said Scranton Steel Company and of your orators, as stockholders thereof, and that in truth and in fact said bonds were in substance part and parcel of the consideration paid by the Lackawanna Iron and Coal Company for the transfer to said new company of the manufacturing plant of said Scranton Steel Company, pursuant to the terms of said written agreement, and that said bonds belong, in equity and good conscience, not to said William Walker Scranton and Walter Scranton, but to the said Scranton Steel Company and to the stockholders thereof, ratably, in proportion to their several holdings of the stock of that company."

Then, after stating that the plaintiffs are informed that the Scrantons allege that the said securities were delivered to and received by them in consideration, upon their part, not to engage in business individually, or as officers of any other corporation, in competition with the purchaser, the bill declares:

"But your orators charge and aver that because and by virtue of the relation which the defendants then held to said Scranton Steel Company, of which they were then officers and agents, they were disqualified and prevented from taking or holding such personal benefit or advantage, and that the securities and bonds so received did in fact constitute a part of an entire consideration for the property and assets of said Scranton Steel Company conveyed as aforesaid, and it was the duty of the defendants to turn over and account for the same, and that in fact said securities were given and received by the defendants because they were officers and agents as aforesaid of said Scranton Steel Company."

The defendants, in their answer, while admitting the receipt of the bonds, deny in detail these allegations and charges, and thus is raised the issue in the case.

A mass of testimony has been taken. Fortunately, it is not contradictory in its material points, or, at least, if apparently contradictory, it is easily reconcilable without questioning the veracity of the witnesses. It was most thoroughly considered and weighed in the court below; and as we have reached, upon the same grounds and for the same reasons, the same conclusion as that learned court did, it would be useless repetition to cite the testimony at length. Suffice it to say we think the evidence shows conclusively that, in all things pertaining to the consolidation of these corporations, the defendants never once subordinated the interests of the corporation of which they were the representatives to their own personal interests, or for their own personal behoof. On the contrary, it is quite apparent that William Walker Scranton was, up to the very last, consistently and courageously asserting and insisting upon the rights of his corporation in the premises, and compelling their recognition and admission, although individually he was not especially in harmony with the proposed scheme of consolidation, not approving of its terms, and in very truth was striving his utmost to do away,

with what might have seemed the wisdom and necessity of the act, by attempts to insure otherwise the financial safety of his corporation, and by other proposed business connections, directly antagonistic to the idea of consolidation. In our opinion the transaction, as consummated, so far as the consolidation of these two companies is concerned, is not tainted by a scintilla of fraud on the part of the defendants. It was conducted openly and fairly; was brought in its earlier and later stages to the knowledge of a very large number, if not of all, the stockholders interested, who were represented by the defendants; and the terms of the consolidation, as finally agreed upon, when submitted to the stockholders of the Scranton Company, including the complainants, was approved, not only with entire unanimity, but, as well, as a great "triumph." On this point of the case, we accept and paraphrase the conclusion of the court below, that the contract of consolidation was conceived in integrity of purpose, was born of good faith, and was indelibly marked with the impress of honor and fair dealing.

But it is further contended on the part of the appellants that, admitting the transaction disclosed no actual fraud on the part of the defendants, yet the relation which they sustained to the Scranton Steel Company was of such a character that it forbade them to make a covenant, growing out of the main transaction, which would inure profitably to them personally, and that if such covenant were made, although made in good faith, the beneficial results must be given and appropriated to their principal, the Scranton Steel Company, for its sole benefit. It was ably argued on the part of the appellants that the policy of the law will not permit one party to a contract to agree to pay to the confidential agent of the other contracting party a personal compensation for effectuating the contract, and that the case at bar fell directly within the ban of this principle. Undoubtedly, it is a rule of the broadest application in equity that no one who has fiduciary duties to discharge shall be permitted to enter into contracts or engagements, in which he has a personal interest, which actually do conflict or may conflict with the interest which he represents, and which he is bound to protect. To uphold such proceedings,—to justify such conduct,—would be contrary to public policy. The law does not permit fiduciary agents to subject themselves to temptation to serve their own interests in preference to those of their principals. An agent's interest and an agent's duty must be coterminous and harmonious. These principles are perfectly well settled. If they ruled this case there would be—could be—no defense. But the answer to this contention of the appellants is to be found in the necessary lack of application of the principles stated to the facts of the case. The evidence makes it very clear that this personal contract of the defendants, so strenuously objected to by the appellants, was not based upon the successful accomplishment of the consolidation, nor did it spring from it. It did not come in the character of payment or a reward, or a consideration to the Scrantons for successfully effecting the consolidation. On the contrary, it was clearly a condition precedent to any consolidation at all. The representatives of the Lackawanna Company in

fact utterly refused to consider consolidation, except upon the terms that the time, the ability, the business qualifications of the Scrantons should, for a term of years, belong to it. As a matter of experience the Lackawanna Company knew the disastrous effect of rivalry engineered by the defendants. Such rivalry must be surely and absolutely barred for a term, or a consolidation would be futile to accomplish the desired results. Hence it was made by their representatives a prerequisite to consolidation that by the obligation of a solemn covenant the Scrantons must contract to refrain from such rivalry. If such covenant were made, then the consolidation might follow. If not, then continued and bitter war. The principle of equity which is relied upon justifies itself on the ground that the agent's interest must in no wise or manner conflict with or antagonize, or at least be diverse from, the interest of his principal. His fidelity in the discharge of the duty cast upon him by the relationship assumed must not be weakened by the demand of a personal interest. But in the case at bar the interests of the Scranton Company were not only strongly asserted and fully protected by its chosen agents, these defendants, in the consolidation, but, as well, the assertion and protection were made possible, and only so, by the consent of the Scrantons to accept the bonds in question as compensation for their retirement from all rivalry with the proposed new corporation to be born of the consolidation. Had they refused to sell their time, their experience, their knowledge, their ability, the stockholders of the Scranton Company never would have had the opportunity to wire their congratulations to William Walker Scranton upon the successful achievement of the consolidation, and upon the great "triumph" which he had won for them. To quote from the exhaustive opinion of Judge Acheson in the court below:

"In no proper sense were the bonds in controversy a profit made out of the agency or fiduciary relationship which here existed. They were not a gratuity, nor were they paid to the Scrantons because of their fiduciary position. * * * The two contracts were distinct in parties, subject-matter, and consideration."

These conclusions, so tersely expressed, answer completely the contention of the appellants. We unhesitatingly concur in them. The result is that the judgment below is affirmed.

ROBINSON v. HALL et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

NATIONAL BANKS—INSOLVENCY—NEGLIGENCE OF DIRECTORS—PERSONAL LIABILITY.

Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They also failed to record mortgages given to secure large debts due the bank, even after they were aware of its insolvency, and erroneously advised an examiner who had taken charge of the bank that it was not necessary to record them. *Held*, that the directors were personally

liable for the losses caused by such neglect and mismanagement, and the fraud and defalcations of the cashier. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 141 U. S. 132, distinguished. 59 Fed. 648, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

This was a bill by W. S. O'B. Robinson, receiver of the First National Bank of Wilmington, N. C., against B. F. Hall, James Sprunt, D. G. Worth, G. Herbert Smith, and James H. Chadbourn, directors of said bank, to charge them with personal liability for certain losses caused by their negligence. A demurrer to the bill was sustained. Complainant appeals. Reversed.

This is a suit by a receiver of a national bank against its five directors to subject them personally to losses sustained by the bank as the result of gross negligence in office on their part. The case was tried below on demurrer to the bill of complaint and amendments. The demurrer was sustained, and the question here is whether the defendant directors were liable on the facts set out in the bill and amendments, which are to be taken to be true. Among the averments of the bill were the following: The bank was organized and went into business in 1866, and continued in operation until November 24, 1891, when it suspended. Up to the time of suspension it was in good credit, and believed to be safe and solvent by its creditors and stockholders. It was so held out to the public to be by the defendants, although the contrary was known to all of them for more than two months before its suspension. This insolvency was carefully concealed from all creditors of the bank except such as the defendants, from interest or favoritism, desired to protect. For some time before the failure most of the old and valuable customers of the bank, who habitually had considerable amounts on deposit, were left in ignorance of the bank's condition, while the defendants themselves, who were engaged in large commercial operations, were carefully reducing the balances to their credit to protect themselves from loss. How successful they were in this action will appear in the sequel.

Defendant Worth, through a firm of which he was head, and whose balance had been more than \$12,000 a year before, had reduced the balance to \$1,324. Defendant Sprunt, although engaged in extensive operations which required the use of heavy sums of money and a large bank deposit, had no balance in the bank on the day of failure, but had overchecked to the amount of \$327. Defendant Smith, who, through a firm of which he was head, had had large dealings with the bank, indicated by a deposit of \$33,569 twelve months before the failure, had reduced the balance to \$665 on the day of that event. Defendant Chadbourn did not keep an account with this bank, and had no funds to his credit at its failure. Defendant Hall, who was president of the bank, and was the head of a mercantile firm which had had on deposit a year before as large a sum as \$14,700, had no balance in bank to the credit of the firm on the day of the bank's failure, and its account was overdrawn for more than \$150. The bill alleges that the assessment of 100 per cent. required by law to be made upon the shares of the stockholders on the failure of a national bank, together with its assets, will not meet the liabilities of the bank, and that a heavy loss will fall upon depositors and creditors. Defendant Hall, the president of the bank, was paid a salary deemed adequate to compensate him for a close, watchful, and faithful superintendence of the affairs of the bank, a fact which constituted him trustee, with compensation, as well as director.

The defendants, each and all, in disregard of their official duties and trust, permitted the affairs of the bank to be conducted mainly by its cashier, Bowden, leaving all the moneys of the bank under his control, and its employees under his direction. The bonds, stocks, cash, special deposits, and all other personal property of the bank were left as much under the control of this cashier, Bowden, as if they had been his private property; yet no bond was required of him for the faithful performance of his duties, either by the president, Hall, or by the defendant directors. His bond should have been in the penal sum of not less than \$15,000. This cashier, Bowden, was largely

indebted to the bank, though he was not possessed of any considerable property. His paper had been carried by the bank for years, and his indebtedness to it had been increased from year to year; all of which had been known to the defendants, who had not required from him a bond at any time. In truth this cashier, Bowden, was a hopeless insolvent, and immediately upon the suspension of the bank fled the country, and became and remains a fugitive from justice, and no judgment which could be recovered against him would be of any value. The amount of the moneys which this cashier, Bowden, took from the bank, and fraudulently converted to his own use, was \$9,783. He was cashier from 28th January, 1887, to November 24, 1891,—nearly five years.

The bill gives in detail the methods by which this cashier defrauded the bank of several sums of money which were parts of the aggregate default above stated; the fraudulent transactions beginning in February, 1888, and extending through 1889, 1890, and 1891. One of these transactions is described: He took from the bank, and applied to his own use, \$1,312.79, effecting the scheme in the following manner: Smith & Gilchrist being the firm of which defendant Smith was the head, Bowden received this firm's check on the bank for \$15,719.79, and charged its account with it. He received the check with the understanding that it should be applied to the payment of a judgment held by the bank against a manufacturing corporation for \$14,000, and the remaining sum of \$1,312.79 was to pay an overdraft of the company for the latter amount. Instead of applying the whole amount of Smith & Gilchrist's check to the credit of the manufacturing company, Bowden applied only \$14,000 to the payment of the judgment against that company, drew out of bank the amount remaining due on the check, applied this to his own use, and left the company still overchecked to the amount he had appropriated to himself, to wit, \$1,312.79. This was in May, 1891, six months before the failure of the bank. The defendant directors had in their official possession a mortgage, executed by one Mitchell, a debtor of the bank, which had not been recorded at the time of its failure on the 24th November, 1891. The mortgage was given by Mitchell to secure a debt he owed the bank, with an understanding with defendants that it should not be registered so long as the interest on the debt should be paid as it accrued, and as nothing extraordinary should occur to make its registration necessary for the protection of the bank. This mortgage was never registered by the defendants, even after the failure, and Mitchell made away with the property it covered by putting a second mortgage on it, and his debt to the bank was lost. So, also, the defendants had in possession on the day of the bank's suspension a chattel mortgage which had been given by a certain firm of Northrops as security for a large indebtedness to the bank, pledging property to the value of \$15,000. The defendants, instead of registering this chattel mortgage on or after the day of the bank's failure, omitted and neglected to do so, and left the Northrops in full possession of the property covered by it, who did sell and dispose of the property to such an extent that the receiver was not able to realize from the security more than the sum of \$6,000; the loss of the bank from the failure of defendants to register being \$9,000. The defendants were guilty of similar negligence in regard to a mortgage held by them of one Boatwright, executed to secure a debt originally of \$1,000 due to the bank, but which had been reduced to \$600. The defendants failed to record this mortgage when the bank suspended, and thereby enabled Boatwright to dispose of property covered by it to purchasers for value to such an extent that the bank realized only \$300 from the debt, and lost the rest. Not only did the defendants fail themselves to record the Mitchell, Northrop, and Boatwright mortgages at or after the failure of the bank, but defendant Hall, who was its president, advised the examiner who first took charge of its affairs under the orders of the comptroller of the currency that it was unnecessary to do so, and thereby caused such delay in the registration that heavy losses resulted to the assets of the bank.

Although this bank, in respect to the amount of its capital stock, was prohibited by law from lending more than \$25,000 to any one individual or firm, yet these defendants, contrary to law, did lend of the funds of the bank to the Northrops, who have been mentioned, to the amount of \$45,000, and to one Kerchner an amount of not less than \$40,000, from which excess of loans the

bank sustained heavy losses in consequence of the insolvency of these debtors, and the insufficiency of the securities held for their indebtedness; these losses being not less than \$40,000. The defendants, in pursuance of their duty, of which they were fully aware, did exact bonds of two of the officers of the bank who had custody of and access to its funds, and whose names were Burruss and Ford; but failed and neglected to perform this recognized duty in respect to the cashier, Bowden, from whom they required and obtained no bond whatever during his service of nearly five years. The bank was declared to be insolvent, and was put into the hands of an examiner by the comptroller of the currency, on the 26th of November, 1891, the 25th having been Thanksgiving day, and dies non, and the suspension having occurred on the 24th.

D. L. Russell, for appellant.

Sol. C. Weill and E. S. Martin, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge (after stating the facts). The foregoing were the principal averments of the bill of the receiver of the bank. To this bill the defendants demurred, and the court below sustained the demurrers. The original bill was defective for lack of precision in several of its clauses charging negligence; but this defect seems to have been cured by two amended bills, filed by leave, and does not seem to have been made by the court below the ground on which the demurrers were sustained. The appeal to this court is from the decree below sustaining the demurrers. The case is here, therefore, on the question whether the president and directors of this bank were liable, and should be held responsible, for the losses sustained by the bank through their negligence in the particulars set out in the bill of complaint and its amendments.

Counsel for the defendants rely, in their contention that the directors of the bank should be exonerated from blame and exempted from liability, chiefly on the decision of the supreme court of the United States in the case of *Briggs v. Spaulding*, 141 U. S. 132-174, 11 Sup. Ct. 924. That decision is a valuable contribution to the law of the perplexing question, how far, in what cases, and under what circumstances directors of national banks should be held liable for losses sustained by these banks as the result of neglect of duty on their part. These officers receive no compensation. They are under no compulsion to give regular attendance to directors' meetings, and to their official duties. They are chosen for their exceptional character and standing in the community, and for their supposed knowledge of its business, and of the pecuniary responsibility of those who borrow from the bank. The most valuable directors are those who are indifferent to any advantage or prestige which the position may give them, and who serve the bank from motives which could not be compensated by money. The courts, therefore, in dealing with instances of gross and glaring negligence on the part of directors of banks, are under perplexing restraint lest they should, by severity in their rulings, make directorships repulsive to the class of men whose services are most needed; or, by laxity in dealing with glaring negligences, render worthless the supervision of directors over national banks, and leave these institutions a prey to dishonest

executive officers. The decision in the case of *Briggs v. Spaulding* is chiefly valuable as furnishing examples of directors whom the courts should not hold to account for neglect of duty. That case went in the court below beyond the demurrer, and was heard on the merits and on full proofs. It was one of the allegations of the bill that the bank was entirely solvent and in sound condition on the 3d October, 1881. It failed on the 14th April, 1882. Other facts in the case were as follows: On the 10th January, 1882, a board of directors was elected, composed of Spaulding, Johnson, Francis Coit, Lee, and Vought; Spaulding and Johnson for the first time. Lee was elected president, and thereupon ceased to be cashier, an office he had held for many years. The cause of the bank's suspension April 14th was recklessness of management by Lee while cashier, and after he became president. It was not contended that the defendants had knowingly violated, or permitted to be violated, any of the provisions of the national banking act, or that they were guilty of any personal dishonesty in administering the affairs of the bank; but it was charged that they were lacking in diligence in the performance of duties enjoined upon them by the act. The suit was against Lee, Francis Coit, Spaulding, Johnson, Cushing, the executrix of Vought, and the administrators of Charles Coit. The last named had been president and director for several years until his death, in December, 1881. Except this Charles Coit and Cushing, the men sued were those who had been elected directors on the 10th January, 1882. Two of the defendants—Spaulding and Johnson—were elected then for the first time. The bank had lost its capital of \$250,000 and also a surplus of \$74,000, and had incurred liabilities in excess of assets to the amount of \$535,000. All this had occurred between October 3, 1881, and April 14, 1882, when the bank suspended; all directly through the wrongful conduct of Lee, and indirectly, as charged, through the negligence of the directors. The bill was taken for confessed as to Lee and as to the executrix of Vought. As to Cushing, it was proved that he had resigned as director, and sold all his stock in the bank, on the 24th September, 1881, and was never a qualified director afterwards, or capable of negligence. Charles Coit had obtained leave of absence on the 3d October, 1881, on account of severe illness, of which he died December 11, 1881. Johnson was newly elected in January, 1882; very soon after which time his wife became severely ill, and he himself, in consequence, fell into such mental and physical infirmity as to be incapacitated for business. Spaulding was 72 years of age, had retired from business, was elected for the first time on the 10th January, 1882, was wholly unacquainted with the business of the bank, and was not expected, when elected, to give close attention to its affairs. He had been author of the national banking act as a member of congress, and was put on the board of this bank on account of his high character and wide popularity. In his answer he stated numerous circumstances tending to exonerate him from blame for inattention to the active duties of a director, which need not be detailed here. He and Johnson had been directors for the period of only three months; and in regard to the mental and

physical condition of Johnson, and the age and other circumstances of Spaulding, it was a question whether they could reasonably be expected to have familiarized themselves with the affairs of the bank within that time. As to Francis Coit, he had been elected to replace another director on May 20, 1881, when in very feeble health, and unable to transact any business. He was re-elected in January, 1882. Under the affliction of rheumatism, finding himself unable to give attention to his duties, he had sold all his stock in the bank on the 11th April, 1882, three days before its suspension, in ignorance of its unsound condition. The supreme court decided that Cushing, the two Coits, Spaulding, and Johnson could not reasonably be held liable in their personal estates for the losses the bank sustained during their tenures of office as directors. It held that the degree of care to which those directors were bound was that "which ordinarily prudent and diligent men would exercise under similar circumstances; and in determining *that*, the restrictions of statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances" of each case. To this decision of the supreme court exonerating Cushing, Coit's estate, Spaulding, Johnson, and Francis Coit there was a strong and imposing dissent. The justices were Harlan, Gray, Brewer, and Brown, whose objections are stated in an extended and very cogent opinion written by Mr. Justice Harlan. Such a dissent admonishes the federal courts which, in the course of duty, have to deal with this question, very strongly against exceeding the limits of leniency exhibited by the supreme court towards the directors with whom it dealt in the case of *Briggs v. Spaulding*.

In the case at bar we have an essentially different state of facts to consider. The frauds and irregularities which resulted in the ruin of the bank went on through a period of more than three years, during all of which time the defendant directors were in office. Many of these irregularities were not things of secret occurrence and sudden development. They were such as must have been known to the defendants, if they gave even the most casual attention to the affairs of the bank. The embezzlement of Bowden, the \$45,000 loans to the Northrops and to Kerchner, and the losses resulting, were facts that could not have eluded the most cursory attention of the directors to their duties. In respect to their omission to register the mortgages, it is a mistake to suppose that the directors of national banks cease to be such, and that their duty to the bank lapses, when an examiner is put in charge of its funds, properties, and books by the comptroller of the currency. It is incumbent upon them to give attention to these affairs even more specially after the examiner takes charge than before. In the case at bar it was especially their duty to register the mortgages held by the bank from Mitchell, Boatwright, and the Northrops. Their duty was the more special and urgent in respect to these securities in consequence of the fact that the management of the affairs of the bank had been taken from its own executive officers and committed to a temporary

officer appointed by the comptroller, who in all probability was unfamiliar with the registration laws of North Carolina. They were still as much the advisers of the bank examiner as they had been of the cashier, notwithstanding they were not invested by law with the control over him, which they were empowered to exercise over the cashier. It was especially the duty of the defendant directors, acquainted as they were with the local laws of registration, to see to and make certain the prompt registration of the three mortgages. Their duties as directors did not cease in these respects until after the appointment of the receiver of this bank.

In respect to the action of the defendants, or some of them, in checking out their deposits two months before the suspension, in full knowledge that such an event must occur, there could be no adjudication except after plenary proofs. That depositors generally are at liberty to check out the entire funds at their credit before suspension is clear; but even they, after suspension, are entitled only to such percentage of their deposits as the assets of the bank will liquidate. If directors are depositors, and know two months or more before suspension that that event is inevitable, and that the bank can pay only a percentage of its deposits, and yet check for the whole of their own balances, thereby diminishing the percentage to which other creditors would be entitled, they certainly defraud, to the extent of the diminution, the creditors whose interest they are relied upon to protect, and should be held to strict accountability. In the present stage of this case the incident is of importance only in showing that the defendant directors were not prevented by any special circumstances from giving close attention to the affairs of the bank when their own personal interests were seriously involved.

On the whole case as shown by the record, we are of opinion that the court below erred in sustaining the demurrers to the bill as finally amended, on the grounds stated in the opinion of the learned judge below, and that the decree must be reversed. The case must go back to the court from which it came, the demurrers there filed must be overruled, and the case proceeded in on plenary proofs to a decree on the merits.

RICHMOND & D. R. CO. v. FINLEY.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 80.

1. MASTER AND SERVANT—RAILROAD COMPANY—RULES—WAIVER BY ENGINEER OR CONDUCTOR.

An engineer in temporary charge of a train, in the absence of any conductor, cannot waive a rule, well known to a brakeman, absolutely prohibiting brakemen from coupling and uncoupling cars except with a stick, by ordering such brakeman to go between cars, and place in position, by hand, a bent coupling link, which cannot be controlled with coupling sticks. 59 Fed. 420, reversed.

2. SAME—ASSUMPTION OF RISK.

Where a brakeman goes between the cars to couple or uncouple them by hand, in obedience to an order of an engineer or conductor, but in viola-

tion of well-known rule absolutely prohibiting brakemen from coupling or uncoupling cars except with a coupling stick, he performs an act outside the scope of his employment, and assumes the risk.

Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action by J. S. Finley against the Richmond & Danville Railroad Company to recover damages for personal injuries. There was a verdict and judgment for plaintiff, and defendant brings error. Reversed.

This case comes up by writ of error to the circuit court of the United States for the western district of North Carolina. The action is for damages against a railroad corporation for injuries sustained by its employé from one of its trains. The plaintiff was a brakeman on the train which injured him. Upon entering his employment as brakeman, he signed the following statement and contract, in the presence of a witness:

"Richmond and Danville Railroad Co., W. N. C. Division.

"October 26th, 1889.

"I fully understand that the rules of the Richmond and Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by the said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above carefully, and fully understand it."

A paper to this effect must be signed by every one entering the service of this company as brakeman, fireman, switchman, or flagman, before he is allowed to enter on his service. On 14th May, 1890, the train to which plaintiff was attached was employed at Asheville, N. C., in taking out cars loaded with coal from the yard, and putting them on a coal shute. The regular conductor of the train was absent. He had appointed another, however, in his stead. At the time of the accident, this substitute was at the coal shute, about one-fourth of a mile from the train, which was in the yard. With the train were the engineer and two train hands, the plaintiff and one Lyerly, and the fireman. The work on which they were engaged was this: The engine and tender would take the loaded cars one by one up the shute, discharge cargo, and come back for another load. From the testimony in the record there is some doubt who was in charge of the train when it would return to the yard for a loaded car. The learned judge who tried the case below left that question to the jury, and, as they found for the plaintiff, we will assume that the engineer was in charge of the train during the temporary absence of the conductor's substitute. The brake of the driving wheel of the locomotive was not in order; but the locomotive was supplied with other brakes. The brake on the driving wheel is not in universal use. The train having been returned to the yard for another loaded car, the plaintiff told the engineer that the link of the car was bent down so much that he could not get it up with a stick. He told him to raise it with his hand, and turn the link over. While he was doing this, the cars came together, and mashed his fingers, making amputation necessary. For this he brought his action.

George F. Bason, for plaintiff in error.

J. P. Morphew, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge (after stating the facts). The question in this case is, was the plaintiff below guilty of contributory

negligence in attempting to couple the cars by going between them? On this point the judge charged the jury as follows:

"If you believe that the engineer had charge of the movements and management of the cars with the assent or knowledge of the temporary conductor, the conductor being absent, then he had the authority of a conductor in giving directions to subordinate employes, and could waive the general rules and contracts of the company; and if you are satisfied from the evidence that the engineer directed plaintiff to go between the cars, and to place a bent link in position for coupling, which could not be done with the coupling stick, and he exercised ordinary care in doing as he was directed, then he is entitled to recover compensatory damage for the injuries sustained."

We are of the opinion that this was error. There is too great a tendency to clothe subordinate employes with the power and duty of vice principals, and then to conclude that they represent the master in every respect, and as fully as if he were present. We have alluded to this in *Thom v. Pittard* (decided at our last term) 62 Fed. 232. Be this as it may, whatever may be the authority of a person, himself an employe on a train, over other coemployes on the same train, he and they are bound to respect and obey the general rules and regulations of their common master, whose orders press equally upon each of them, coming with the highest sanction, and each of them must know that the other cannot rescind them. The learned judge has invested the substitute of a substituted conductor with all the powers held by the highest officer of the railroad system. If this engineer, accidentally and temporarily in charge of a train, could rescind or waive or suspend a fixed rule of the company, a rule impressed in the most formal way upon a very large class of employes,—the class engaged, or likely to be called upon to engage, in coupling cars,—as a part of the contract and a condition precedent to their employment, he could revoke all rules, and govern himself and control his train at his own will, and at the risk and responsibility of his employers. Granting that within the scope of his agency he represents his employer, it can scarcely be supposed that it is within the scope of the agency of an engineer, or even of a conductor, to rescind the standing rules of the company, or to cancel a contract made by his employer with one of his servants antecedent to and as a condition for his employment. When the plaintiff in the action below followed the suggestion of the engineer, he knew the risk he was taking, knew that he had contracted not to take it under any circumstances, knew that the engineer could not make him take it, and he assumed the risk himself. He was injured 14th May, 1890. He had been in this same service from 12th October, 1889. When he entered it, he fully understood that the rules of the company positively forbade brakemen, and him among them, from coupling and uncoupling cars except with a stick; that not only brakemen, but all other persons, must not go between cars under any circumstances for the purpose of coupling, uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train. In consideration that the company would employ and would continue to employ him, he bound himself to obey this rule, and assumed all results, not only of disobedience, but also of the

infraction of the rule. When, therefore, the engineer on the engine attached to the train suggested to him to go between the cars to couple, he knew that under no circumstances, not even by an order from a superior, could this be done without an assumption of risk by himself; and he knew, also, that he had waived in advance any liability of the company for this infraction of the rule. He had dealt with his master immediately, and had from him his instructions in writing. He had no right to permit the suggestion of a subordinate to reverse or annul his master's express direction,—a direction for the government of his conduct under all circumstances. See *Railroad Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 377. In a very able note to the report of the case at bar (59 Fed. 422) the judge who tried it, among other reasons for adopting the suggestion of the engineer by the plaintiff, says: "If the plaintiff had refused or failed to obey, he could at least have been reported for disobedience, which would probably have caused a discharge." We need not discuss the improbability of such action upon the part of the common superior,—the discharge of a train hand, because he obeyed the order of his master, and not the order of a coemployé contradicting it. There is no evidence whatever in the record that the engineer selected the train hands, or employed them, or had any authority to dismiss them, or that they got their wages through him,—reasons which influenced the court in *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698. The plaintiff was a man of full age, perfectly competent to take care of himself. This takes the case out of *Fort's Case*, 17 Wall. 553. The engineer made no peremptory order; certainly used no threats. When the plaintiff carried out his suggestion, he took all the risk. *Hogan v. Railroad Co.*, 53 Fed. 522.

There is another view of this matter. Construing the terms of plaintiff's employment with the defendant railroad company by the paper quoted above, he was engaged as a brakeman, with the distinct agreement that he was not to couple cars except with a stick, and was under no circumstances to go between the cars of a part of a train with an engine attached. This, then, comes within that class of cases in which an employé is directed to assume a risk not in his regular employment. See cases collected in 14 Am. & Eng. Enc. Law, p. 859, note 1. A railroad employé of mature years and experience, who is injured while coupling cars in obedience to the orders of his immediate superior, cannot recover merely because that duty is outside the scope of his employment, when he makes no objection to performing it, and there is no threat of dismissal in case of refusal. *Hogan v. Railroad Co.*, 53 Fed. 519. In *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115:

"If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from fear of losing his employment, and he is injured, he cannot maintain an action for the injury."

If the duty was not within his original employment, he could refuse it; and, if discharged, could recover on his contract of service. If, instead of refusing, he concludes to obey, he accepts the risk.

The judgment of the circuit court is reversed, with costs, and the cause remanded to that court, with instructions to dismiss the complaint.

BECKWITH et al. v. THOMPSON et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 65.

1. PLEADING AND PROOF—VARIANCE.

In an action for breach of contract, the introduction of evidence by defendant, which plaintiff denies, that the contract was made with reference to another contract, by which there would be no breach, does not constitute a variance, but merely a conflict of evidence.

2. INSTRUCTIONS—NOTICE—ACQUIESCENCE.

An instruction that if, at the time plaintiff contracted with defendant to do work which defendant had contracted to do for R., plaintiff had no notice of a provision in the contract between defendant and R. giving R. power to limit the amount of work which should be done within a certain time, plaintiff could recover damages for the enforcement by R. of the restrictive power, is not erroneous, as excluding the question of plaintiff's acquiescence in the provision, as he could not have acquiesced at the time, if ignorant of it, and subsequent acquiescence, being enforced, would not prevent his recovery.

3. EVIDENCE—EXPLAINING ENTRIES IN BOOKS.

Where plaintiff claimed that he, as subcontractor, was to have all that defendant, as contractor, was to receive for doing certain work, and defendant claimed that plaintiff was to receive only 90 per cent. of the amount, and the defendant's books, which were in evidence, showed that plaintiff was first credited with 90 per cent., and then with the remaining 10 per cent., defendant's bookkeeper may testify that he made the extra credit of 10 per cent. on the statement of plaintiff, not in defendant's presence, that he was entitled to it.

4. ASSUMPSIT—COMMON COUNTS.

Under the common counts in assumpsit, recovery may be had for necessary expenditures in obtaining possession of property bought of defendant, failure to give possession without such expenditure being a breach of defendant's contract.

In Error to the Circuit Court of the United States for the District of West Virginia.

Action by Thompson Bros. against Beckwith & Quackenbush for work done and breach of contract. Judgment for plaintiffs. Defendants bring error. Affirmed.

Beckwith & Quackenbush were under contract with the Norfolk & Western Railroad Company for doing the grading and masonry on 30 miles of the Ohio extension of said company's railroad. About the 1st of January, 1891, a contract was made between Beckwith & Quackenbush and Thompson Bros., under which Thompson Bros., as subcontractors, agreed, among other things, to do the grading on about 13 sections or miles of this contract, for which Thompson Bros. were to be paid the same price as that received by Beckwith & Quackenbush from the railroad company, less 10 per cent. The contract required that the work on the 13 sections should be completed by the 1st October following, the value of work each month amounting to about \$10,000. At the time this contract was made, Beckwith & Quackenbush had already done a part of the grading and masonry on six of the sections; and for the purpose of prosecuting their work a certain camp and outfit, known as "Camp Simpson," was placed at the upper end of their work, and at its lower end another camp and outfit, known as "Big Creek,"—both of said

camp and outfits consisting of buildings, merchandise, and supplies. By the terms of their contract with Beckwith & Quackenbush, Thompson Bros. were to receive credit for all the grading previously done on said sections by Beckwith & Quackenbush, and agreed to purchase from Beckwith & Quackenbush the said camps and outfits at the price of \$5,030.80, of which the amount paid for the buildings at Camp Simpson was \$1,068, and for the buildings at Big Creek \$234.72. Under the contract between the railroad company and Beckwith & Quackenbush, there was a restrictive clause giving to the railroad company the right to restrict from time to time the amount of work to be done by the contractors. Points of difference soon arose between Thompson Bros. and Beckwith & Quackenbush as to the terms of their contract. Thompson Bros. claimed that they were not to be charged with the cost of the grading already done upon said sections by Beckwith & Quackenbush, if the work showed a loss; that they did not know of the said restrictive clause contained in the railroad contract, and never agreed to be bound by its provisions; that they were to have immediate possession of all the buildings at said camps; and that for all work done outside of the regular work, and known as "extra work," they were to receive the full amount paid by the railroad company to Beckwith & Quackenbush, without deduction. Beckwith & Quackenbush claimed that, under the terms of the contract, Thompson Bros. agreed to be bound by all the provisions of the railroad contract, including the restrictive clause, and that Thompson Bros. had examined the railroad contract before making their own; that Thompson Bros. were informed that one of the buildings at Camp Simpson was in possession of a man named Simpson, who was occupying the same under a previous contract, and agreed to pay whatever Simpson required, to give up possession; that Thompson Bros. were to be paid for extra work the same percentage as for regular work, namely, 90 per cent. of the amount paid by the railroad company to Beckwith & Quackenbush; and that Thompson Bros. were to be charged with the actual cost of the grading already done on the 13 sections by Beckwith & Quackenbush, whether the work showed a loss or not. These points of difference were submitted to the jury which passed upon the facts of the case in the court below. Thompson Bros. arrived with their forces upon the ground, to commence work, about the 1st day of February, 1891, and, in order to get possession of the building occupied by Simpson, paid him the sum of \$500. About the 10th day of March, 1891, and after Thompson Bros. had been doing the work of grading about one month, the railroad company, under the restrictive clause in its contract, notified Beckwith & Quackenbush not to do work on said 30 miles exceeding in value in each month the sum of \$6,000, which covered both grading and masonry. This is a reduction by four-fifths of the work that had been done on the whole 30 miles of contract, and reduced the third of Thompson Bros. from about \$10,000 a month to about \$2,000. This restriction was continued by the railroad company until about the 1st day of October, 1891, when the contract between Beckwith & Quackenbush and the railroad company was terminated by mutual consent, thereby also terminating the contract between Thompson Bros. and Beckwith & Quackenbush. During all this time, Thompson Bros. continued their work of grading upon the said sections embraced in their contract with Beckwith & Quackenbush.

On the 7th day of April, 1892, Thompson Bros. instituted this action of assumpsit against Beckwith & Quackenbush in the circuit court of Wayne county, W. Va., from which court the case was removed by Beckwith & Quackenbush to the circuit court of the United States for the district of West Virginia on the 31st day of May, 1892, and duly docketed therein on the 11th day of November, 1892. After the case was removed to the federal court the plaintiffs, on the 7th day of December, 1892, filed a new declaration in lieu of their former one; and on this new declaration, upon the issues of nonassumpsit, payment, and set-offs, the case was finally tried before a jury. The declaration contained the five common counts, and also five special counts. The first special count was for the amount due for work actually done under the contract, set out in detail in a bill of particulars, the balance shown by the bill being \$9,171.71. The second special count was for profits which it was claimed would have been realized by plaintiffs below if the reduction of the amount of work from \$10,000 to \$2,000 per month had not

been made. But this claim for estimated profits was abandoned before the case went to the jury. The third special count was for losses or damages sustained generally by the restriction of work. The fourth count was for losses resulting from having a large quantity of materials and large numbers of live stock on hand in an inaccessible region, which were a cost on their hands. The fifth count was similar in the character of its claim for damages to the fourth, drawn in different form. With the declaration were filed several bills of particulars; one showing the balance due on work actually done, and the others showing the losses and damages, by items, which the plaintiffs contended they had sustained. One of the questions at issue between the parties to the trial was as to the liability of the defendants below for the \$500 paid by plaintiffs to Simpson for the possession of a building at Camp Simpson. This payment was not made the subject of a special count in the declaration, but was put before the jury in two or more of plaintiffs' bills of particulars filed with the declaration. The case went to the jury on the 7th December, 1891, and was under trial for eight days, until the 16th, when the jury rendered a verdict in favor of plaintiffs below, awarding them damages to the amount of \$9,782.26, and stating that this sum was due after deducting all credits and offsets to which the defendants were entitled. Motion was at once made by the defendants below to set aside the verdict, and for a new trial, which was denied, and judgment in due course entered for the amount of the verdict.

In the course of the trial three several bills of exceptions were taken to rulings of the court. The first recited at length the evidence which the plaintiffs had introduced before the jury in support of their suit, including, besides the more important items of this claim, the payment of the \$500 for the Camp Simpson building. It then recited that the plaintiffs were allowed by the court to give evidence tending to prove that the defendants had broken their contract by restricting the monthly amount of work allowed to be done, as heretofore described; had also terminated the contract about the 1st of October, 1891, although at the time of making the contract the plaintiffs had no knowledge of the restrictive and terminative clauses in the contract which had already been made between defendants and the Norfolk & Western Railroad Company. It further recited that, after the plaintiffs rested their case, defendants moved the court to exclude from the jury the plaintiffs' evidence, so far as it related to the special counts, on the ground, as alleged, that the contract proved by the plaintiffs' evidence was substantially variant and different from the contract set out in the special counts of the declaration, which motion the court had overruled. In their second bill of exceptions the defendants recited that they introduced evidence tending to prove that, by the terms of the contract between the parties to the suit, the plaintiffs had agreed to be bound by all the provisions of the contract then existing between defendants and the Norfolk & Western Railroad Company, and that when this contract was finally terminated by the parties to it the plaintiffs advised, approved, and consented to this action, and that, thereupon, on plaintiffs' motion, the court instructed the jury as follows: Instruction No. 1: "The court instructs the jury that if they find from the evidence in this cause that the plaintiffs, Thompson Bros., contracted with Beckwith & Quackenbush to construct certain portions of the Ohio Extension of the Norfolk & Western Railroad, embraced by sections 91 to 95, inclusive, and 71 to 77, inclusive; that Beckwith & Quackenbush did not at the time communicate to them the existence of the restrictive clause in their contract, or they did not have notice otherwise of its existence,—then Thompson Bros. would be entitled to recover all such damages, other than speculative or remote, that grew out of the enforcement of the restrictive clause and the suspension of the work by the railroad company." To this instruction the defendants excepted on the alleged ground that it withdrew from the jury the question whether or not the plaintiffs had accepted and acquiesced in the restriction of the work, and subsequent termination of the contract complained of. It also recited that the court gave the following two instructions to the jury: No. 2: "The court further instructs the jury, that if they find from the evidence in this cause that, at the time the plaintiffs contracted with the defendants to do the work referred to in the first instruction given by this court, they knew the terms and conditions of the contract between the railroad com-

pany and Beckwith & Quackenbush, and they contracted with knowledge of these terms and conditions, they then are bound by the terms and conditions of that contract, and they cannot maintain their action to recover any damages that might ensue by reason of the enforcement of restrictive clauses in the contract." No. 3: "The court instructs the jury that if the plaintiffs made their contract with the defendants for doing the work hereinbefore referred to, and agreed with the defendants to be bound by the provisions of the contract between the defendants and the railroad company, then the plaintiffs would be bound by such provisions, whether they ever read the contract or saw it. But if the jury find from the evidence that only a portion of the provisions of the contract were agreed to, and not the entire contract, then the plaintiffs would only be bound by such provisions as were agreed to." The third bill of exceptions related to the admission of the testimony at the trial before the jury of the defendants' bookkeeper, Glenn. The contention of plaintiffs was that the extra work done by them was to be paid for without deduction of 10 per cent., as agreed to on regular work, while the defendants insisted to the contrary. Glenn testified, in substance, that he had first entered certain extra work to the credit of plaintiffs, reduced by the 10 per cent., and that afterwards the 10 per cent. was entered to the credit of plaintiffs, on a statement by one of them to him of the reason and propriety of this correction, which statement was made not in the presence of either of the defendants. The bill of exceptions recited that the court overruled the motion of defendants to strike out this testimony, and that defendants excepted to the ruling.

Malcolm Jackson and George E. Price, for plaintiffs in error.

F. B. Enslow, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge (after stating the facts). This case is here on a writ of error issued upon a petition imputing three several errors in the trial below. The first one assigned was the denial by the court below of defendants' motion to strike out plaintiffs' evidence because of variance. The second error assigned was in giving instruction No. 1 (recited in bill of exceptions No. 2), wherein the court charged the jury that if they believed from the evidence that the defendants below had not made known to plaintiffs, when contracting with them, the restricting provisions contained in defendants' contract with the railroad company, and that plaintiffs had not otherwise had notice of these provisions, the plaintiffs would be entitled to recover actual damages resulting from enforcing the restrictions. Defendants assign as their objection to this instruction that the court, in giving it, virtually instructed the jury that the questions whether or not the plaintiffs below had accepted and acquiesced in the restrictions, and whether or not the plaintiffs had approved of the final canceling of the contract with the railroad company, could not affect the damages claimed by the plaintiffs. The third error assigned was the court's allowing to go to the jury the testimony of Bookkeeper Glenn, stating what a plaintiff below had said to him, not in the presence of defendant, as the reason for directing him to change an entry in his books.

As to the objection of variance, it nowhere appears, either in the record or in the briefs of counsel, whether or not the contract which is the subject of this litigation was oral or in writing. The

inference is strong that it was merely oral, however improbable such a fact may seem. It is also to be observed that plaintiffs in error nowhere, either in their pleadings or brief, give a distinctive statement of the points of difference which they claim to exist between the plaintiffs' declaration and proofs. The differences relied on are left to the conjecture of the appellate court. As to the alleged variance, and what it consisted in, the facts seem to be as follows: (1) The plaintiffs below declared upon their own contract with the defendants; their theory being that it was not amenable to the provisions of defendants' contract with the railroad company, authorizing a restriction of monthly work and a termination of all work, at the will of the company, and that it allowed them full pay on extra work. (2) They introduced evidence to prove their ignorance when they made their own contract of the restrictive and terminative provisions of the previous contract, and of the contention as to the extra work. (3) The defendants below, per contra, introduced evidence to prove these provisions, and that the plaintiffs were aware of their existence at the time they contracted, and acquiesced in and consented to them when they were enforced during the progress of work under the contract. They also produced evidence as to the extra work. We do not think such a state of facts constitutes a variance. The plaintiffs declared, in their special counts, on those provisions of their own contract on which they claimed the damages they sustained from not being allowed to do the full amount of work contemplated by the contract, for which they had made expensive preparations. They were not bound to set out provisions of another contract, to which they were not parties, not necessary to making out their own case. They did state enough to make a case, independently of those provisions. They alleged that the defendants were cognizant of the expensive preparations which they were making for executing the work in the time required, and yet gave them no warning against making these heavy expenditures for that purpose. This itself might, in the opinion of a jury, have entitled them to recover the damages resulting for the restriction and final stoppage of the work, and justified the court below in refusing to strike out the evidence. But, be this as it may, if the defendants below gave evidence to set up at the trial provisions of another contract, tending to defeat, in the opinion of a jury, the plaintiffs' claim for damages, such evidence did not establish a variance between declaration and proofs. Take a case for illustration. A plaintiff declares upon one or more provisions of a contract. The defendant, in reply, proves additional provisions, which the plaintiff denies. This does not constitute a variance. The establishment of the additional provisions may defeat the plaintiff's action, in the opinion of a jury. It may convict the plaintiff of false clamor. But this is a matter of weight of evidence, is a matter for the jury, and is not a matter for which a court may dismiss the suit for variance between *allegata* and *probatum*. In the case at bar the plaintiffs did not declare, even upon their own contract, in *ipsissimis verbis*. They did not recite its language. And the defendants did not prove a dif-

ferent contract, expressed in different language, importing different meaning. There was no pleading on either side precise enough in language to establish a technical or real variance. The constituents of a variance must be more distinct and tangible, and less vague and indefinite, than any differences appearing between the declaration and proofs in the case at bar. We think, therefore, that the objection of variance must be overruled.

The second assignment of error seems to us untenable. The plaintiffs deny their knowledge of the existence of the restricting provisions of the contract of defendants below with the railroad company, when they made their own contract with defendants. Instruction No. 1, which is complained of, relates especially to the time when the latter contract was made. It is therefore difficult to conceive how a person who has no knowledge of an alleged provision in a contract to which he is not a party can be deemed to have acquiesced in and approved of it. The inquiry directed by the instruction necessarily embraced the two questions claimed to have been suppressed. The objection assigned to instruction No. 1 is that it withdrew from the jury the question whether or not plaintiffs acquiesced in and approved the provisions of the contract with the railroad company. If plaintiffs did not know of, they could not have approved them. But the objection is untenable whether the alleged acquiescence and approval by the plaintiffs were at the time when they made their contract, or afterwards. By the negligence of the manager a plaintiff is injured by machinery so seriously that, to save his life, one of his legs must be amputated, and he acquiesces, and consents to the operation. This acquiescence and consent do not affect his right to damages resulting from the injuries received, even from the amputation itself, in which he acquiesced. If the plaintiffs below were ignorant of the restricting and terminating provisions of the contract with the railroad company when they made their own, and, not being forewarned of their existence, went on to make expensive preparations for executing the work, before they obtained knowledge of them, they were entitled to recover the damages resulting, whether they afterwards submitted to these provisions or not. What they subsequently approved of or acquiesced in, either positively or impliedly, did not affect in any way their right to recover. They may have done many things to reduce their losses to a minimum without prejudice to their right to damages. They did do much. But, whether successful or not in this direction, they were entitled to the actual damages sustained, whatever they may have done to reduce their loss. The court below properly left this matter to the jury, contenting itself with charging that plaintiffs were entitled to recover only actual losses.

The third assignment of error is that the court below allowed Bookkeeper Glenn to give in evidence what one of the plaintiffs told him,—not in the presence of either of the defendants,—as the reason for directing him to change one of the entries he had made in his books. This testimony was given by Glenn in explanation of an entry in books which were themselves in evidence before the

jury. Witness was asked why this entry was made. He answered, stating his reason for making it. This he could not do fully, except by stating what one of the plaintiffs had said to him. It is settled law that when books of account are introduced collaterally, and become evidence in a cause, the reason why this and that entry is made in them can be explained by parol testimony, and such evidence is valid whenever and to the extent that it is necessary to the development of the whole truth of the matter. In the case at bar it was not only competent for the bookkeeper to state what he did, but it would have been error if the court had excluded the statement. His statement went only to explaining the making of the entry. It did not go to establishing the truth of the plaintiffs' contention in respect to the propriety of the entry. The objection of plaintiffs in error to this testimony is therefore overruled.

A further ground of error set out in one of the bills of exceptions, though not assigned in the petition for the writ, relates to the \$500 which was paid by plaintiffs below for immediate possession of the building at Camp Simpson. Defendants below object to the ruling of the court below in allowing this item to go before the jury. Their reason for the objection is that the item was not recoverable under the common counts of the declaration, and that there was no special count claiming this sum of money. This payment to Simpson was necessary to obtaining prompt possession of the principal building at Camp Simpson. As such it was a necessary expenditure in preparing for the performance of the contract. Failure on the part of defendants below to give possession without this preliminary expenditure by plaintiffs was a breach of contract on their part, and an implied promise of the defendants arose to repay this necessary preliminary expenditure of the plaintiffs, and the item was recoverable in one of the common counts in *assumpsit*. In two of the bills of particulars filed with the declaration this item was included, and there was no surprise put upon the defendants below in respect to the claim. We think the contention of the defendants below in respect to this \$500 is untenable, and it is accordingly overruled. On the whole case, we see no error in the rulings of the court below, and we affirm the judgment there rendered

PRESS PUB. CO. v. McDONALD.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

No. 152.

1. LIBEL.—WHEAT CONSTITUTES—QUESTION FOR JURY.

Defendant published a dispatch reading: "Missing Millionaire [plaintiff] Located. * * * [Plaintiff], Southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury" in Canada. Held that, since some of our countrymen who reside in Canada are fugitives from justice, of which courts may take judicial notice, whether the dispatch was libelous was a question for the jury. *McDonald v. Press Pub. Co.*, 55 Fed. 264, affirmed.

2. SAME—EVIDENCE—PLAINTIFF'S SOCIAL STANDING.

In a civil action for libel, plaintiff's general social standing may be shown in the evidence in chief, as bearing on the question of damages.

3. SAME—PUNITORY DAMAGES.

Where defendant published an out of town dispatch, which was rendered libelous by an error in transmission, without having the same repeated to insure accuracy, punitive damages are justified on the ground of a wanton disregard of the rights of others, though repeating the dispatch would have involved extra expense and loss of time.

4. SAME—TRIAL—READING TO JURY OPINION OF ANOTHER JUDGE.

In an action for libel, where the question as to whether the article was libelous is for the jury, permitting counsel to read to the jury from the decision of another judge in overruling a demurrer to the complaint, wherein the opinion is expressed that "the first impression on reading a paragraph like this would be that the person referred to had been guilty of some breach of trust," is error.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Alexander McDonald against the Press Publishing Company for libel. Plaintiff had judgment, and defendant brings error.

Writ of error to review a judgment of the United States circuit court, southern district of New York, entered upon the verdict of a jury giving the defendant in error the sum of \$5,000 as damages for the publication of a libel upon him in the New York World, a newspaper published by plaintiff in error. A demurrer to the complaint was interposed by defendant and overruled by Judge Wallace. 55 Fed. 264. Thereafter the cause came on for trial before Judge Shipman and a jury, with the result above indicated.

John M. Bowers, for plaintiff in error.

Horace E. Deming, for defendant in error.

Before LACOMBE, Circuit Judge, and WHEELER and TOWNSEND, District Judges.

LACOMBE, Circuit Judge. The libel complained of was published under the following circumstances: One Tarbell was a regular correspondent of the World newspaper in Cincinnati, Ohio. The rules of the paper required him, when leaving his locality for a day or more, to have some one authorized to receive dispatches for him, and do his work. It was left to him to select the subordinate or substitute thus employed. Tarbell's newspaper work having become too heavy for him to handle by himself, he engaged a young man of twenty, named Gosdorfer, to look after the New York World correspondence, instructing him to send all "good news" to that paper. On August 17, 1892, the Cincinnati Evening Post, a reputable paper, published in that city, contained an article touching one Evan Smith. Believing that the substance of such article would be acceptable to the World, Gosdorfer condensed it into the following dispatch, which, on the same day, he sent over Tarbell's name by the Postal Telegraph Company. As delivered to the telegraph company at its Cincinnati office, it read:

"The World, New York. Two o'clock. * * * Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire

Southern Ohio manager of the Standard Oil Co. until six months ago, when he strangely disappeared, has been located, living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane, and will be brought to a sanitarium here. D. S. Tarbell."

To facilitate the receipt of its dispatches, the plaintiff in error had an arrangement with the telegraph company whereby loops were put in between the latter's main office and the World office, and, instead of dispatches from other cities to the telegraph office being transmitted by messenger, they were switched onto these loop wires, and came direct into the World office, where the telegraph company had employes who took down the messages, which were then delivered to boys, who carried them to the telegraph desk, whence they were distributed to the telegraph editors. The function of the telegraph editor is to read over carefully any dispatch received by him, to correct the English, to eliminate anything which he thinks does any injustice to anybody or anything, or which causes a doubt in the mind of the reader as to the accuracy of the dispatch, and to put headlines on. Thereupon the dispatch is sent to the composing room, and in due course is printed in the paper. The "publisher" of the World testified that the authorized custom in its office is that, unless a dispatch from a distant city "per se raises in the mind of the telegraph editor a suspicion of its accuracy, then he cannot change the facts; and it is optional with him then to judge of the importance of the dispatch, and withhold it from the composing room or have it set up." Where there is nothing on the face of the dispatch which raises a natural doubt as to its accuracy, it goes to the composing room, with its statement of facts substantially unchanged. The dispatch as published in the World of August 18, 1892, was substantially different from the one sent by Gosdorfer. It reads as follows:

"Cincinnati, O. August 17. McDonald, Southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

To this there was prefixed the head-line, "Missing Millionaire McDonald Located." When the case came on for trial the dispatch as written out by the telegraph employe in the World office could not be found, nor was the plaintiff in error able to show which one of its 10 telegraph editors had received it. There was some evidence tending to show that, as thus written out, it was phrased as subsequently published, not as sent from Cincinnati; and it was the theory of the defense that, there being nothing on its face to raise a suspicion of its accuracy, it was sent to the composing room, in accordance with the authorized custom of the paper. That custom required no effort to be made to verify the accuracy of such dispatches, and no such effort was made in this instance.

It was contended by the plaintiff, and evidence in support of that contention was introduced, that the statements touching Evan Smith in Gosdorfer's original dispatch were themselves untrue, a matter which need not be discussed here, since the falsity of the assertions touching McDonald in the dispatch as published is not disputed.

The plaintiff in error contends:

1. That the court erred in denying the motion to direct a verdict for the defendant, and in leaving it to the jury to find whether the publication was a libel. It is insisted that the words of the alleged libel were not ambiguous, and that the court, as matter of law, should have determined that the article was not actionable. Undoubtedly, when the words used are unambiguous, and admit of but one sense, the question whether or not they are libelous is one of law, which the court must decide. Equally true is it that when the words used are "ambiguous in their import, or may permit, in their construction, connection, or application, a doubtful or more than one interpretation, and in some sense be defamatory, the question whether they are such is for the jury." *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354. And the question here presented is the single one: Was the publication so phrased that, taken as a whole, it would fairly permit an interpretation in some sense defamatory, although its separate statements, taken by themselves, contained no improper suggestions? To this, in our opinion, there can be but one answer. It was not necessary for the plaintiff to aver and prove as a matter of fact that there are many American embezzlers in Canada. Nor was it necessary to aver or prove extrinsic facts in order to show that the words were susceptible of a defamatory construction, as it was in *Caldwell v. Raymond*, 2 Abb. Pr. 193, where the publication was of a simple marriage notice, which could be shown to be defamatory only by proving that the woman named therein was a prostitute. Nor is this a case, as counsel for appellant contends, where the doctrine of judicial notice has been extended beyond its well-recognized boundaries. The meaning of words of common speech, of terms which from continuous use have acquired a definite signification, generally, if not universally, known, has always been judicially recognized by the courts. The meaning or signification thus generally accepted may be one which the word or phrase ought not to be saddled with, but, if such word has acquired that meaning in the community, it is the duty of a court to recognize it. Mr. Beecher may not have been a clerical adulterer, but when the Kalamazoo Publishing Company printed of a clergyman, "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake," it was left to the jury to say whether or not it involved a charge of adultery, for "courts have no right to be ignorant of the meaning of current phrases which everybody else understands." *Bailey v. Publishing Co.*, 40 Mich. 256. So here, although it be the fact (as counsel contends) that no more than ten defaulters ever fled to Canada, and although it is no longer a safe refuge for them, yet the statement that a man of great wealth had strangely disappeared, had secreted himself for six months, and was finally found living in luxury at some small Canadian town, was calculated to suggest to the community in which the libel in this case was published the impression that he had been guilty of some offense against the civil or criminal laws, or of immoral or discreditable conduct.

Tested by the rule for which plaintiff in error contends, viz. that words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed, the publication was plainly susceptible of a defamatory interpretation. The jury had no difficulty in reaching that conclusion, nor do we see any error in the statement contained in the opinion on the demurrer, that such would be the first impression upon reading a paragraph like this. That the publication is calculated to produce precisely that impression was quite curiously made manifest by defendant's own proof. The original dispatch, prepared by the World's correspondent in Cincinnati, contains precisely the same statements of strange disappearance, six months' seclusion, discovery living in luxury in Canada,—all made as to Evan Smith, confidential man for McDonald; and then adds, "McDonald claims that Smith's accounts are straight." Manifestly the writer of this dispatch understood perfectly well that the first part of it would convey the impression that "Smith's accounts were not straight." Inasmuch, therefore, as the publication did permit of an interpretation in some sense defamatory as well as of one entirely harmless, as it admitted of such interpretation without proof of any extrinsic facts, but solely because the language in which it was phrased was calculated to convey such an impression to the community where the libel was published and the court sat, and as the plaintiff by innuendo pointed out the former as being the meaning which defendant intended to convey to its readers, it was properly left to the jury to decide whether or not such publication was libelous.

2. Plaintiff in error insists that the court erred in admitting proof of the plaintiff's social standing, the evidence being, as it contends, introduced "for the purpose of bolstering up the case before the jury [in order that] if the jury should be informed that defendant in error was a man of very high position in the world they could only pay him for his wounded feelings by a verdict out of all proportion to that which would be given to an ordinary citizen." The authorities bearing upon this point are conflicting. The text writers are not in accord. In Massachusetts it was held, as far back as 1807, that the plaintiff in actions for defamation of character may give in evidence, to aggravate the damages, his own rank and condition of life, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society. *Larned v. Buffington*, 3 Mass. 546. In *Harding v. Brooks*, 5 Pick. 247, Chief Justice Parker says:

"The rank and condition of the plaintiff are proper to be made known to a jury by evidence, because the damages may be lawfully affected thereby; but general character has not been the subject of inquiry, unless made necessary by the defense to the action, or to the claim of damages."

In Pennsylvania it was held by Judge Sharswood in *Klumph v. Dunn*, 66 Pa. St. 147, that:

"The position in life, and the family of the plaintiff, are always important circumstances bearing upon the question of damages, and have always been held admissible for that purpose."

See, also, *McAlmont v. McClelland*, 14 Serg. & R. 359, where it is said that juries in libel suits always take into view the condition in life of the parties. The point is discussed at considerable length, and the court expressly lays down the proposition that the plaintiff in such actions may give evidence of his own condition in life to aggravate the damages. A similar rule is applied in Connecticut (*Bennett v. Hyde*, 6 Conn. 24), in Illinois (*Peltier v. Mict*, 50 Ill. 511), in Virginia (*Adams v. Lawson*, 17 Grat. 250), and Kentucky (*Eastland v. Caldwell*, 4 Am. Dec. 668). See, also, *Shroyer v. Miller*, 3 W. Va. 161; *Fowler v. Chichester*, 26 Ohio St. 9. A decision in Indiana, where the question raised was as to the admissibility of a question calling for the defendant's position in society, seems to indicate that a similar rule would control there touching such testimony when offered on behalf of the plaintiff. A contrary rule prevails in Alabama. *Gandy v. Humphries*, 35 Ala. 617. The point does not seem to have been presented either to the supreme court of the United States or to any of the circuit courts of appeal. In *Romayne v. Duane*, 3 Wash. C. C. 246, Fed. Cas. No. 12,028, the court decided in a libel suit that, character being put in issue, the plaintiff might give evidence of his character before the defendants had attacked him. In *Wright v. Schroeder*, 2 Curt. 548, Fed. Cas. No. 18,091, Judge Curtis held that, while the defendant may offer evidence of the plaintiff's bad reputation to reduce the damages, the plaintiff may not introduce evidence of his previous good character, in chief, before any attack upon his character; although the learned judge admits that there are authorities to the contrary. The two cases last cited, it will be observed, deal not with standing in society, but rather with general good character and reputation morally. The plaintiff in error cites the case of *Prescott v. Tousey*, decided in 1884, by the general term of the New York superior court, Judge Sedgwick dissenting (50 N. Y. Super. Ct. 12). The prevailing opinion in that case does undoubtedly hold that it was error to receive evidence of the plaintiff's social position and standing in society. The learned judge who wrote the opinion, however, seems to have reached his conclusion through a misconception of some of the earlier decisions in this state. He cites *Hatfield v. Lasher*, 81 N. Y. 246, as authority for the proposition that evidence of the plaintiff's bad reputation is not admissible for the purpose of showing that his reputation was so bad that defendant's libel could not injure him, and proceeds with perfectly sound logic:

"If defendant cannot prove plaintiff's bad reputation to decrease damages, why should plaintiff be allowed to show his good reputation for the purpose of increasing them? And, if plaintiff cannot show his good reputation, why should he be allowed to show his standing in society, especially since the laws of this state do not recognize different ranks in society?"

Turning to *Hatfield v. Lasher*, 81 N. Y. 246, we find that the precise point was not involved, although a dictum of Chief Justice Folger, who writes the opinion, apparently goes to the full extent of the doctrine enunciated in the superior court. The chief justice says of the proposition that "a person of disparaged fame is not entitled to the same measure of damages as one whose character is

unblemished, [a fact which] it is competent to show by proof," "such is not the rule in this state." In support of this proposition he cites *Root v. King*, 7 Cow. 629, and *Gilman v. Lowell*, 8 Wend. 579. Neither of these cases at all supports the proposition for which it is cited. In the earlier of them, Chief Justice Savage, writing the opinion, cites *Larned v. Buffington*, 3 Mass. 546; refers to the English rule that the defendant may give evidence of plaintiff's general bad character in mitigation of damages; states that the same rule prevails here, upon the ground that a person of disparaged fame is not entitled to the same measure of damages as another whose character is unblemished; and adds that under any circumstances defendant may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose. In the other case cited by Chief Justice Folger, namely, *Gilman v. Lowell*, 8 Wend. 573, the court says:

"Whether the plaintiff's rank and condition in life may be shown either to enhance or diminish the damages, it is unnecessary now to decide; and it is not perceived that this principle has any connection with malice [which was the precise point before the court]. It is proper under the head of inquiry into general character. Persons in different stations would be differently damnified by the same slanders."

In *Foot v. Tracy*, 1 Johns. 52, Kent, C. J., says:

"In assessing damages the jury must take into consideration the general character, the standing, and estimation of plaintiff in society; for it will not be pretended that every plaintiff is entitled to an equal sum for the worth of character. The jury have, and must inevitably have, a very large and liberal discretion in apportioning damages to the rank, condition, and character of the plaintiff; and they must have evidence touching that condition and character, so as to have some guide to their discretion."

In *Palmer v. Haskins*, 28 Barb. 95, Marvin, J., says:

"That the general standing in society of either of the parties may be proved I have no doubt."

Other cases in the same state which may be referred to are *Fry v. Bennett*, 4 Duer, 262; *Hamer v. McFarlin*, 4 Denio, 509; *Inman v. Foster*, 8 Wend. 602.

We are of opinion that the weight of authority is clearly in support of the proposition that the condition in life of the plaintiff may properly be given in evidence in chief to aggravate damages. Of course, if some peculiar and special damage is claimed, it should be specially pleaded. While it is true that plaintiff's character and reputation morally are presumed to be good, and therefore need not be proved by him to be such unless attacked, there seems no sound reason for holding that he may not prove his station in society as part of his testimony in chief, in view of the statement in *Gilman v. Lowell*, which (despite the decision in *Prescott v. Tousey*) is still the law of this state, that "persons in different stations would be differently damnified by the same slander." In some respects, the evidence on this branch of the case at bar, went more into detail than in any of the cases above cited. Whether this was error, and, if so, whether it was harmful error, we need not discuss at length, in view of the disposition to be made of the case. It is sufficient to say that, when a plaintiff offers to prove his social standing to increase dam-

ages, the testimony admitted should be confined to his general social standing, and not extended to minute details of his life.

3. The plaintiff in error further contends that the instructions of the court as to the question of express malice were erroneous, and that the charge to the jury should have been corrected in accordance with his requests. Upon this branch of the case the court, after defining punitive damages, charged the jury that:

"In this case it is not shown that the defendant had any knowledge of, or animosity against, the plaintiff. It did not publish the libel for the purpose of injuring him, and therefore there is no claim that express malice can be shown by any direct intention to injure the plaintiff. But it is claimed, and it is true, that express malice may also be shown by a reckless and wanton carelessness, * * * a wanton neglect to ascertain the truth [of the publication], when means of accurate knowledge are readily attainable. A reckless lack of knowledge or care to know whether a grave imputation of crime or criminal conduct is true or false, and the absence of precautions taken to obtain knowledge of the truth of a charge of criminality against a person in regard to whom accuracy was obviously easily attainable, may be adduced to show what the law terms 'express malice.'"

The court next reviewed the theories of plaintiff and defendant upon the question whether the facts in proof did or did not show such reckless carelessness or wanton neglect, and further charged:

"The question whether any punitive damages are to be given depends upon your conclusion whether the publication was made with recklessness, and with a wanton disregard of the question of its truth or falsity. Upon this question the plaintiff takes the burden of proof. If you find in the affirmative, you are not compelled, but are permitted, to give such reasonable and just damages as you think it wise to give to deter like conduct in the future. The amount of vindictive damages is within your discretion, but it is my duty to caution you against excessiveness. You are to be reasonable and just. * * * If you think that sufficient caution was exercised, or if the alleged mistake was a sufficient excuse for the publication, you will not find vindictive damages, or any damages in excess of just compensation to the plaintiff. * * * The real and important question, as it occurs to my mind, is whether the dispatch as published, and upon the theory that it was a mistake, and admitting that it was a mistake, was published with such recklessness and indifference to the truth as justly to charge the defendant with express malice. The defendant is a corporation, and cannot be visited with exemplary damages, although its employes were guilty of express malice in the publication, unless the corporation has authorized the system or conduct, which is the only system relied upon as indicative of express malice in the case, or has subsequently ratified the publication."

This is an accurate presentation of the law as to punitive damages in libel suits. *Association v. Rutherford*, 2 C. C. A. 354, 51 Fed. 513. They may be awarded not only when the libel has been "conceived in the spirit of mischief," but when it has been published with "criminal indifference to civil obligations." For injuries inflicted "wantonly," as well as for those inflicted "maliciously," exemplary damages may be awarded. *Railroad Co. v. Quigley*, 21 How. 202. The counsel for plaintiff in error took no exception to the charge as above set forth, but only to the court's refusal to charge two requests of his own, as follows:

"Fifth. There is no evidence in this case that the defendant was influenced by actual or express malice towards the plaintiff in making the publication complained of. Sixth. Express malice is when one with a deliberate mind and formed design commits the act complained of."

In refusing to charge this last proposition the court stated that it "would not limit express malice to that precise language." This was not error. The court had already charged that there was not, in this case, any direct intention to injure the plaintiff, and the request as phrased took no account of that form of malice, well-recognized in cases such as these, where, without "deliberate mind" or "formed design," the offender has been so grossly and recklessly negligent, so wantonly indifferent to another's rights, that he should be required to pay damages in excess of mere compensation as a punishment and example. The refusal to charge the fifth request challenges the right to give exemplary damages upon all the facts of the case. The plaintiff in error cites *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261; *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488; and *Daily Post Co. v. McArthur*, 16 Mich. 447. The first of these is not authority for the proposition that exemplary damages can in no case be recovered against a corporation for the reckless, willful, and malicious act of its agent, the opinion of the supreme court expressly pointing out that in the case before it there was no proof that "the conductor was known to the defendant to be an unsuitable person in any respect." If the injury done to the plaintiff is the result of a rule, custom, or system which is prescribed or maintained by the corporation itself as a part of its regular course of business, and which, with inexcusable recklessness, and in wanton disregard of others' rights, itself promotes the circulation of libels, the corporation may be held responsible, although it was at the time not otherwise a participant in the personal express malice or criminal carelessness of its employé. In *Haines v. Schultz*, 50 N. J. Law, 484, 14 Atl. 488, the error of the trial judge was held to be "relieving the plaintiff of the burden of proof and transferring it to the defendant," the charge of the trial judge practically leaving it to the jury to assess exemplary damage, unless the defendant adduced proof of his disapproval of the libelous article. And the New Jersey supreme court add: "Had there been any proof of such approval, any testimony of general instructions, of which this libel was the outgrowth, * * * the jury might have been warranted in inferring a wrongful motive to fit the wrongful act." The discussion of the subject in *Daily Post Co. v. McArthur*, 16 Mich. 447, is an exhaustive and able one. The Michigan court holds, as did this court in *Association v. Rutherford*, *supra*, that the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to public scrutiny. It reversed the court below, because the charge of the court left it in the power of the jury to hold the defendant corporation "in all respects identified with the faults of its agents;" but it also expressly recognized the principle that, when there is proof tending to show, on the part of the defendant itself, a want of solicitude for the proper conduct of its paper, a recklessness of consequences which dispensed with such precautions as would reasonably prevent an abuse of the columns of the paper, exemplary damages may properly be given. In the case at bar, in addition to the evidence already referred to touching the

authorized system or custom of the paper in publishing statements as to the doings of private persons, it appears that it was perfectly well known to the defendant from actual experience that in the dispatches received over the loop connections from distant cities "errors occur quite frequently," not only from the carelessness of some telegraph operator, but also from grounding or crossing of wires or other natural causes. Telegrams may be repeated, as the defendant's witness expresses it, "to insure safety." This would cost more, and the dispatches received by the World during a single afternoon and evening are so voluminous that, if all were repeated, there would not be time to have them all thus "insured" and still ready to go to press in time for publication on the ensuing morning. It appears further that no dispatches such as the one complained of are repeated, and that the system and rules of the office do not allow that to be done, nor provide any means for the detection or prevention of such errors, except perhaps in those cases where the dispatch is contradictory on its face. The plaintiff thus showed by affirmative proof that (presumably either to save money or to save time) the defendant itself devised and maintained a system of general instructions under which any dispatch from its out of town correspondents, although containing aspersions on the character of private persons, would be published without any effort whatever to ascertain its accuracy, even by the exercise of the ordinary and reasonable degree of care which persons not in the newspaper business are accustomed to employ with dispatches which they esteem important. See, in this connection, *Primrose v. Telegraph Co.* (May 26, 1894) 14 Sup. Ct. 1098. And it is proved in this case to a demonstration that, had the rules of the World office provided for a repetition of its dispatches, this particular libel on the plaintiff, McDonald, would not have been published; the statements of its correspondent referring not to McDonald, but to Smith. It certainly seems to us that the jury were entitled, upon the evidence, to find in the defendant itself the reckless carelessness and wanton disregard of the rights of others which is required to sustain a verdict for punitive damages. There was no error, therefore, in the court's refusal to charge defendant's two requests.

4. It has seemed desirable to express an opinion upon the points already discussed, although we have reached the conclusion that the judgment must be reversed for error in allowing counsel for defendant in error to read to the jury in extenso the opinion of Judge Wallace overruling the demurrer to the complaint. The rule and the reason for it are alike well expressed in *Baker v. City of Madison*, 62 Wis. 137, 22 N. W. 141, 583. "The jury must find the facts in any given case from the evidence given to them on the trial, and that alone, and must take the law of the case from the judge who presides at the trial." See, also, *Crawford v. Morris*, 5 Grat. 103; *Bell v. McMaster*, 29 Hun, 272; *Good v. Mylin*, 13 Pa. St. 538; *Warren v. Wallis*, 42 Tex. 472; *Butler v. Slam*, 50 Pa. St. 459; and the opinion of the United States court of appeals for the first circuit, *Arey v. De Loria*, 5 C. C. A. 116, 55 Fed. 323. Even if it were within the sound discretion of the trial judge to allow counsel to

read opinions of the court to the jury,—as seems to be held in *Dempsey v. State*, 3 Tex. App. 429; *Legg v. Drake*, 1 Ohio St. 286,—it was error to allow the reading of the opinion in this particular case, for we cannot say that it may not have influenced the jury in deciding the very question which was submitted to them. Judge Wallace's opinion concludes with the statement that "whether a libelous sense or an innocent sense is to be attributed to the publication [in this case] must be determined by the jury under proper instructions." This part of the opinion was a correct statement of the law, and harmless. The trial judge charged to the same effect. But, although thus stating that the question was one which the jury must decide as a question of fact, Judge Wallace unmistakably indicated that in his opinion "the first impression upon reading a paragraph like this would be that the person referred to had been guilty of some breach of trust," etc. Under the federal system of jurisprudence it is not error for the trial judge to express his opinion upon the facts if he makes it plain to the jury that they must decide all questions of fact independent of his opinion, but neither in principle nor authority is there any sanction for permitting any other person's opinion to be stated or shown to the jury upon such a question, with or without—and especially without—instructions that they were not to be guided by it. Certainly we cannot say that the strong expression of Judge Wallace's opinion as to the sense in which the words of the publication were used (a question of fact) did not operate upon the jury's mind to persuade them to reach the same conclusion.

The judgment of the circuit court is therefore reversed, and the case remanded, with instructions to award a new trial.

ERIE WRINGER MANUF'G CO. v. NATIONAL WRINGER CO. et al.

(Circuit Court, W. D. Pennsylvania. August 29, 1894.)

No. 12.

EXECUTION—PROPERTY SUBJECT TO LEVY—PATENTS—INSOLVENT CORPORATION.

Under the special execution process (*fiel facias*) against an insolvent corporation authorized by the Pennsylvania act of April 7, 1870, the sheriff can make a valid sale of a patent right belonging to the corporation.

J. W. Kinnear, for complainant.
Shiras & Dickey, for defendants.

ACHESON, Circuit Judge. That a patent right may be subjected by suitable judicial proceedings to the payment of the judgment debt of the owner of the patent is now settled. But, because of the intangible nature of the property, such right could not be seized and sold upon an ordinary writ of *fiel facias* at common law, and hence the judgment creditor had to seek the aid of a court of equity. *Ager v. Murray*, 105 U. S. 126. I see no good reason, however, to de-

ny the power of the legislature to authorize the taking in execution and sale of a patent right by process at law. In *Bank v. Robinson*, 57 Cal. 520, it was held that a patent right might be reached by proceedings supplementary to execution, which were a substitute for a creditor's bill. Now, in lieu of the remedy by sequestration against an insolvent corporation agreeably to the 73d, 74th, and 75th sections of the act of 16th of June, 1836 (P. L. 774), the act of 7th of April, 1870 (P. L. 58), gives a remedy by a special *feri facias*, whereby the corporate franchises, and all the property and rights of the insolvent corporation, are taken in execution, and sold out and out. *Philadelphia & B. C. R. Co.'s Appeal*, 70 Pa. St. 355. In case of *Flagg v. Farnsworth* (Com. Pl. Phila.) 12 Wkly. Notes Cas. 500, Judge Mitchell, now of the state supreme court, expressed the opinion that a valid sale of a patent right belonging to an insolvent corporation can be made under the act of 1870. In this I concur. True, patent rights are not specially mentioned in the act, but the words, "any personal, mixed or real property, franchises and rights," are certainly broad enough to cover patent rights; and to hold otherwise would defeat the legislative intention, which, I think, clearly was thus to subject all the property and rights of every description, belonging to an insolvent corporation, to the discharge of its debts. Nothing to the contrary of this view is to be inferred from the provisions of the later act of 9th May, 1889 (P. L. 172), which gives to the courts of Pennsylvania (what, it seems, they did not theretofore have) complete equity jurisdiction to charge patent rights with the payment of the owner's debts. Upon this bill and answer the plaintiff fails to show a case for relief, as the defendant company is invested with the title of the sheriff's vendee under the special *feri facias*.

Ex parte HART.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 76.

1. INTERSTATE EXTRADITION—INFORMATION AS INDICTMENT.

An information is not an equivalent of an indictment within Rev. St. § 5278, requiring the surrender of a fugitive from justice on demand from another state and production of an indictment or affidavit, made before a magistrate, charging the person demanded with a crime. 59 Fed. 894, reversed.

2. SAME—VERIFICATION OF INFORMATION AS AFFIDAVIT.

Nor is the verification on belief of an information the equivalent of such an affidavit.

3. SAME—AUTHENTICATION OF AFFIDAVITS.

Under the provision of Rev. St. § 5278, that the indictment or affidavit on which extradition is demanded shall be certified as authentic by the governor of the state making the demand, affidavits filed with the governor, requesting him to make a requisition, though made a part of the requisition papers, are not sufficient where the governor only certifies to the authenticity of an information, and makes his demand on this. 59 Fed. 894, reversed.

4. **SAME—AFFIDAVIT RECITALS IN REQUISITION.**

The mere recital in requisition papers that an indictment, duly authenticated, is annexed, is of no avail, there being no indictment attached.

5. **SAME—WARRANT OF REMOVAL—ATTACK ON HABEAS CORPUS.**

A warrant of removal issued by a governor is not supported by a conclusive presumption that the governor had before him all the necessary papers to act on, but it may be shown on habeas corpus that it is invalid by reason of the insufficiency of the requisition papers on which it was issued.

Appeal from the Circuit Court of the United States for the District of Maryland.

Application of Samuel H. Hart for discharge under writ of habeas corpus. Writ denied (59 Fed. 894), and petitioner appeals. Reversed.

William Pinkney Whyte, for appellant.

John P. Poe, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

GOFF, Circuit Judge. On the 8th day of January, 1894, Samuel H. Hart filed his petition in the circuit court of the United States for the district of Maryland, alleging that he was unjustly deprived of his liberty, and illegally confined in the Baltimore city jail, charged with the crime of embezzlement, and praying that the writ of habeas corpus issue. On the same day the court directed that the writ issue, which was done, and duly served. It appears from the return thereto that the petitioner was held in custody under a warrant issued by the governor of the state of Maryland, directed to Alexander G. Matthews, agent of the state of Washington, by virtue of a requisition from the governor of the latter-named state, demanding the extradition of the petitioner as a fugitive from justice. With the return are filed copies of the requisition papers, and of the governor's warrant of removal. It appears that the governor of Washington, on the 23d day of December, 1893, caused to be issued the following:

The State of Washington. Executive Department.

The Governor of the State of Washington, to His Excellency, the Governor of the State of Maryland: Whereas, it appears by a copy of information, which is hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement, which I certify to be a crime under the laws of this state, committed in the county of Pierce, in this state, and it having been represented to me that he has fled from the justice of this state, and is now to be found in the state of Maryland: Now, therefore, pursuant to the provisions of the constitution and the laws of the United States in such case made and provided, I do hereby require that the said Samuel H. Hart be apprehended and delivered to A. G. Matthews, who is authorized to receive and convey him to the state of Washington, there to be dealt with according to law.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of the state of Washington, at Olympia, this 23d day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal.]

J. H. McGraw.

By the Governor: J. H. Price, Secretary of State.

The copies referred to are as follows, viz.:

To the Governor of the State of Washington: You are respectfully requested to issue a requisition upon the governor of Maryland for the apprehension and rendition of Samuel H. Hart, who stands charged by information pending in the superior court of the state of Washington in and for the county of Pierce with the crime of larceny by embezzlement, committed in Pierce county, state of Washington, but who has, since the commission of said offense, and before an arrest could be made upon process issued by said court, fled from the justice of the state of Washington, and into the state of Maryland, where I believe he may now be found. The time and circumstances of his flight, and the reasons for my belief as to where he may be found, are as follows: The said Samuel H. Hart and Frank A. Dinsmore were, on or about the 18th day of November, 1893, at the town of Buckley, county of Pierce, and state of Washington, conducting a certain banking business, the said Hart styling himself as president and the said Dinsmore styling himself as cashier, under the assumed name of the Buckley State Bank; but said banking institution was unincorporated, and the said Hart and the said Dinsmore were doing business only on their own account. That Alexander McNicol deposited with said Samuel H. Hart and the said Frank A. Dinsmore, and left with them for safe-keeping, to be returned to him upon demand and his check therefor, the sum of \$502.75. That on or about the said 18th day of November, 1893, the said Samuel H. Hart and Frank A. Dinsmore left said town of Buckley for parts unknown, taking with them the money belonging to said Alexander McNicol, and the money of a large number of other depositors, to-wit, about the sum of \$6,000. That after diligent search, and through the aid of the detective agency, the said Samuel H. Hart has been found and arrested in the city of Baltimore, in the state of Maryland, where he is now held, as affiant is informed, awaiting an order from the governor of this state for his return upon extradition to answer for the crime committed as aforesaid. In my opinion, the ends of justice require that he be brought back to this state for trial; that the facts stated in the information are true, and that the prosecution of said Samuel H. Hart would in all probability result in his conviction of the crime charged. I herewith present a duly-certified copy of the original information now on file in the office of the clerk of the superior court of said Pierce county. The requisition asked for said fugitive is not sought for the purpose of collecting a debt or enforcing a civil remedy, or to answer any other private end whatever, nor shall the criminal proceedings, when such offender is arrested, be used for any of said purposes.

Dated at Tacoma, Washington, December 23rd, 1893.

Alexander McNicol.

State of Washington, County of Pierce—ss.: I, Alexander McNicol, being first duly sworn, say that the facts set out in the foregoing application are true, as I verily believe.

Alexander McNicol.

Subscribed and sworn to before me this 23rd day of December, 1893.

[Seal.]

W. A. Ryan,

Clerk of Superior Court of Pierce County, Washington.

To the Governor: Having carefully examined the foregoing application and accompanying papers, I hereby approve the same, and in my opinion it would be proper for you to issue the requisition asked for. I nominate Alexander G. Matthews, sheriff of Pierce, Washington, as a proper person to be appointed and commissioned by you as the agent of the state of Washington to receive the said fugitive when he shall be apprehended, and bring him to this state, and deliver him into the custody of the sheriff of said county.

W. H. Snell, Prosecuting Attorney.

Copy of Act.

Larceny by Embezzlement. If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, and on

conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year.

In the Superior Court of the State of Washington, in and for the County of Pierce.

The State of Washington vs. Samuel H. Hart, Frank A. Dinsmore.

Information.

Samuel H. Hart and Frank A. Dinsmore are accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of larceny by embezzlement, committed as follows: The said Samuel H. Hart and Frank A. Dinsmore, on or about the eighteenth day of November, eighteen hundred and ninety-three, at the county of Pierce, and state of Washington, and within one year prior to the filing of this information, then and there being persons to whom was intrusted by one Alexander McNicol, in said county of Pierce, and state of Washington, with certain lawful money of the United States, to wit, the sum of five hundred and two dollars, of the value of five hundred and two dollars, and the said Samuel H. Hart and Frank A. Dinsmore then and there having possession of said money, the property of said Alexander McNicol, by reason of said money being so intrusted to them by the said Alexander McNicol, did unlawfully, wrongfully, and feloniously and fraudulently convert the said money, to wit, the said sum of five hundred and two dollars, to their own use, and did unlawfully, fraudulently, and feloniously fail to account to the said Alexander McNicol therefor, with the intent then and there to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.

W. H. Snell, Prosecuting Attorney.

State of Washington, County of Pierce—ss.: W. H. Snell, prosecuting attorney, being duly sworn, upon oath says that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

W. H. Snell.

Subscribed and sworn before me, the 22d day of December, A. D. 1893.

[Seal.]

Chas. Bedford, Notary Public.

Residence: Tacoma, Washington.

Indorsed:

No. 7,858.

In the Superior Court of the State of Washington, in and for Pierce County.

The State of Washington vs. Samuel H. Hart and Frank A. Dinsmore.

Information. Crime Charged: Larceny by Embezzlement.

Names of witnesses examined and known at the time of filing the foregoing information: Alexander McNicol, James McNeeley, Forest France, James Gallagher, Wm. Fettig, W. D. Jones, John McKinnell, Thomas McNeeley, Wm. Campinskey.

Filed Dec. 23, 1893.

W. A. Ryan, Clerk,

By H. Johnston, Deputy.

State of Washington, Plaintiff, vs. Samuel H. Hart and Frank A. Dinsmore, Defendants. Certificate.

State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington, for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the information in the above-entitled action, now on file in this office.

Witness my hand and the seal of the said superior court this 23rd day of December, 1893.

[Seal]

W. A. Ryan, County Clerk.

In the Superior Court, State of Washington, in and for the County of Pierce.

State of Washington vs. Samuel H. Hart and Frank A. Dinsmore. Order.

Now, on this 23rd day of December, 1893, it appearing to the court that William H. Snell, Esq., prosecuting attorney in and for said county of Pierce,

has filed an information in said court, charging the said Samuel H. Hart and Frank A. Dinsmore with the crime of larceny by embezzlement: It is hereby ordered that a warrant issue by the clerk of this court for the arrest of the said Samuel H. Hart and Frank A. Dinsmore.

Emmett N. Parker, Judge.
W. A. Ryan, Clerk.

Filed Dec. 23, 1893.

State of Washington vs. Samuel H. Hart and Frank A. Dinsmore. Certificate.

State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the original order for a warrant to issue for the arrest of the above-named defendants in the above-entitled action now on record in this office.

Witness my hand and the seal of the said superior court this 23rd day of December, 1893.

[Seal.]

W. A. Ryan, County Clerk.

No. 7,858.

In the Superior Court of the State of Washington, for the County of Pierce, Holding Terms at Tacoma.

State of Washington, County of Pierce—ss.

The State of Washington vs. Samuel H. Hart and Frank A. Dinsmore.

Warrant.

The State of Washington, to the Sheriff of Pierce County, State of Washington, Greeting: Whereas Samuel H. Hart and Frank A. Dinsmore, having been duly informed against by W. H. Snell, prosecuting attorney of Pierce county, Washington, in the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, charging the said Samuel H. Hart and Frank A. Dinsmore with the crime of larceny by embezzlement, all of which appears to us of record: Now, this is to command you, the said sheriff, to take the said Samuel H. Hart and Frank A. Dinsmore, and them, the said Samuel H. Hart and Frank A. Dinsmore, safely keep and have him forthwith in this court, there to answer the said charge, and abide such further order as the court may make in the premises. Herein fail not.

Witness the Honorable Emmett N. Parker, judge of the said superior court, and the seal of said court, this 23d day of December, A. D. 1893.

[Official Seal.]

W. A. Ryan,

County Clerk and Clerk of the Superior Court.

State of Washington, County of Pierce—ss.: I, Alexander Matthews, do hereby return this warrant not served, for the reason that the within named Samuel H. Hart and Frank A. Dinsmore are not found within the state of Washington.

Witness my hand this 23d day of December, 1893.

A. G. Matthews, Sheriff Pierce County, State of Washington.

No. 7,858.

State of Washington, Plaintiff, vs. Samuel H. Hart and Frank A. Dinsmore, Defendants. Certificate.

State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the warrant for the arrest of above-named defendants and return of sheriff thereon in the above-entitled action, now on file in this office.

Witness my hand and the seal of the said superior court this 23d day of December, 1893.

[Seal.]

W. A. Ryan, County Clerk.

It also appears that the governor of the state of Washington, on the 27th day of December, 1893, issued his second requisition, as follows, viz.:

The State of Washington. Executive Department.

The Governor of the State of Washington to His Excellency the Governor of the State of Maryland: Whereas, it appears by a copy of indictment which is hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement, which I certify to be a crime under the laws of this state, committed in the county of Pierce, in this state, and it having been represented to me that he has fled from the justice of this state, and is now to be found in the state of Maryland: Now, therefore, pursuant to the provisions of the constitution and the laws of the United States in such case made and provided, I do hereby require that the said Samuel H. Hart be apprehended and delivered to Alexander G. Matthews, who is authorized to receive and convey to the state of Washington, there to be dealt with according to law.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the state of Washington, at Olympia, this 27 day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal.]

J. H. McGraw.

By the Governor: J. H. Price, Secretary of State.

This requisition was founded on the following papers, copies of which accompanied it, as follows:

To the Governor of the State of Washington: You are respectfully requested to issue a requisition upon the Governor of Maryland for the apprehension and rendition of Samuel H. Hart, who stands charged by information pending in the superior court of the state of Washington in and for the county of Pierce with the crime of larceny by embezzlement, committed in Pierce county, state of Washington, but who, since the commission of said offense, and before an arrest could be made upon process issued by the court, fled from the justice of the state of Washington, and into the state of Maryland, where I believe he may now be found. The time and circumstances of his flight, and the reasons for my belief as to where he may be found, are as follows: That the said Samuel H. Hart and one Frank A. Dinsmore were, on or about the 31st day of October, 1893, at the town of Buckley, county of Pierce, and state of Washington, conducting a certain banking business, the said Hart styling himself as president and the said Dinsmore styling himself as cashier under the assumed name of the Buckley State Bank, but said banking institution was unincorporated, and the said Hart and the said Dinsmore were doing business only on their own account. That Reese, Crandall & Redman, a corporation duly organized and doing business under and by virtue of the laws of the state of Washington, deposited with the said Samuel H. Hart and Frank A. Dinsmore, and left with them for collection, a one-day sight draft upon W. L. Barker & Company, a copartnership doing business in said town of Buckley, for the sum of eighty-nine dollars and twenty-eight cents (\$89.28). That the said draft was collected by the said Samuel H. Hart on or about the 31st day of October, 1893, but was never accounted for by said Hart to said Reese, Crandall & Redman. That on or about the 18th day of November, 1893, the said Samuel H. Hart left said town of Buckley for parts unknown, taking with him the money belonging to said Reese, Crandall & Redman, collected by him as above set forth, and taking with him also the money of a large number of others who had intrusted him with funds, to wit, the sum in excess of six thousand dollars. That after diligent search, and through the aid of a detective agency, the said Samuel H. Hart has been found and arrested in the city of Baltimore, in the state of Maryland, where he is now held, as affiant is informed, awaiting an order from the governor of this state for his return upon extradition to answer for the crime committed as aforesaid. In my opinion, the ends of justice require that he be brought back to this state for trial; that the facts stated in the information are true; and that the prosecution of said Samuel H. Hart would in all probability result in his conviction of the crime charged. I herewith present a duly-certified copy of the original information now on file in the office of the

clerk of the superior court of said Pierce county. The requisition asked for said fugitive is not sought for the purpose of collecting a debt, or enforcing a civil remedy, or to answer any other private end whatever, nor shall the criminal proceedings, when such offender is arrested, be used for any of said purposes.

Dated at Tacoma, Washington, December 27th, 1893.

Clem T. Reese.

State of Washington, County of Pierce—ss.: I, Clem T. Reese, being first duly sworn, say that the facts set out in the foregoing application are true, as I verily believe.

Clem T. Reese.

Subscribed and sworn to before me this 27th day of December, 1893.

W. A. Ryan, Clerk of Superior Court of Pierce County, Washington.

To the Governor: Having carefully examined the foregoing application and accompanying papers, I hereby approve the same, and in my opinion it would be proper for you to issue the requisition asked for. I nominate Alexander G. Matthews, sheriff of Pierce county, Washington, as a proper person to be appointed and commissioned by you as the agent of state of Washington to receive the said fugitive when he shall be apprehended, and bring him to this state, and deliver him into the custody of the sheriff of said county.

W. H. Snell, Prosecuting Attorney.

Copy of Act.

If any agent, clerk, officer, servant or person to whom any money or other property shall be entrusted, with or without hire, shall fraudulently convert to his own use or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so entrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year.

In the Superior Court of the State of Washington, in and for the County of Pierce.

The State of Washington vs. Samuel H. Hart. Information.

Samuel H. Hart is accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of larceny by embezzlement, committed as follows: The said Samuel H. Hart, on or about the eighteenth day of November, eighteen hundred and ninety-three, at the county of Pierce, and state of Washington, and within one year prior to the filing of this information, being then and there the agent and servant for hire of Reese, Crandall & Redman, a corporation organized and doing business under and by virtue of the laws of the state of Washington, and as such agent and servant was then and there intrusted by the said Reese, Crandall & Redman with the care and safe-keeping of certain moneys and funds of the said Reese, Crandall & Redman, to wit, the sum of eighty-nine dollars and twenty-eight cents, lawful money of the United States, of the value of eighty-nine dollars and twenty-eight cents, and did then and there unlawfully, wrongfully, fraudulently, and feloniously abstract, misapply, and convert the said money to his own use, and did fail to account to the said Reese, Crandall & Redman therefor, with intent to defraud, which said money was then and there in the possession of the said Samuel H. Hart, and had been received by the said Samuel H. Hart by virtue of his said relations as agent and servant for hire of the said Reese, Crandall & Redman, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.

W. H. Snell, Prosecuting Attorney.

State of Washington, County of Pierce—ss.: W. H. Snell, prosecuting attorney, being duly sworn, upon oath says that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

W. H. Snell.

Subscribed and sworn before me, this 27th day of December, A. D. 1893.
 [Official Seal.] W. A. Ryan,
 County Clerk, and Clerk of the Superior Court for Pierce County, State of
 Washington.
 Filed Dec. 27, 1893. W. A. Ryan, Clerk.

State of Washington vs. Samuel H. Hart. Certificate.

State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the information in the above-entitled action, now on file and record in this office.

Witness my hand and the seal of the said superior court this 27th day of December, 1893.

[Seal.] W. A. Ryan,
 County Clerk, and Clerk of the Superior Court for Pierce County, State of
 Washington.

In the Superior Court of Pierce County, State of Washington.

State of Washington vs. Samuel H. Hart, Defendant. Order.

Now, on this 27th day of December, 1893, information having been filed in said court charging said Samuel H. Hart, defendant herein, with the crime of larceny by embezzlement, it is hereby ordered that warrant issue for the arrest of said Samuel H. Hart, that he may be brought into court to answer said charge.

John C. Stallcup, Judge.

State of Washington vs. Samuel H. Hart. Certificate.

State of Washington, County of Pierce—ss.: I, W. A. Ryan, county clerk, and clerk of the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, in said county, do hereby certify that the annexed is a full, true, and correct copy of the order to issue warrant in the above-entitled action, now on record in this office.

Witness my hand and the seal of the said superior court, this 27th day of December, 1893.

[Seal.] W. A. Ryan,
 County Clerk, and Clerk of the Superior Court for Pierce County, State of
 Washington.

No. 7,859.

In the Superior Court of the State of Washington, for the County of Pierce.
 Holding Terms at Tacoma.

State of Washington, County of Pierce—ss.

The State of Washington vs. Samuel H. Hart. Warrant.

The State of Washington to the Sheriff of Pierce County, State of Washington, Greeting: Whereas Samuel H. Hart, having been duly informed against by Wm. H. Snell, prosecuting attorney of Pierce county, Washington, in the superior court of the state of Washington for the county of Pierce, holding terms at Tacoma, charging the said Samuel H. Hart with the crime of larceny by embezzlement, all of which appears to us of record: Now this is to command you, the said sheriff, to take the said Samuel H. Hart, and him, the said Samuel H. Hart, safely keep, and have him forthwith in this court, there to answer the said charge, and abide such further order as the court may make in the premises. Herein fail not.

Witness the Honorable John C. Stallcup, judge of the said superior court, and the seal of said court, this 27th day of December, A. D. 1893.

[Seal.]

W. A. Ryan,
 County Clerk, and Clerk of the Superior Court.

Indorsed:

No. 7,859.

In the Superior Court of the State of Washington for Pierce County.

State of Washington vs. Samuel H. Hart. Warrant.

State of Washington, County of Pierce—ss.: I, A. G. Matthews, sheriff of Pierce county, state of Washington, do hereby certify that the within war-

rant came into my hands on the 27th day of December, 1893, and after due and diligent search I have been unable to find the said Samuel H. Hart in Pierce county, state of Washington, and I am informed he has fled to the state of Maryland.

A. G. Matthews, Sheriff.

By A. P. Patterson, Deputy.

Dated at Tacoma this 27th day of December, 1893.

The governor of the state of Maryland, after due consideration of said papers, issued the warrant of removal, of which the following is a copy, viz.:

State of Maryland. Executive Department.

To Alexander G. Matthews, Agent of the State of Washington: Whereas, demand has been made upon the governor of the state of Maryland by his excellency, John H. McGraw, governor of the state of Washington, for the apprehension and delivery of Samuel H. Hart, now alleged to be within the jurisdiction of this state as a fugitive from the justice of the said state of Washington, as defined by the constitution and laws of the United States; and whereas, such demand is accompanied by a copy of information and affidavits, charging such alleged fugitive with larceny by embezzlement, a crime under the laws of the said state of Washington, and the accompanying papers being certified as authentic by the governor of the said state: Now, therefore, I, Frank Brown, governor of the state of Maryland, do, by this, my warrant, authorize and empower you, if such fugitive be not held in custody or under bail to answer any offense against the laws of the United States or of this state, forthwith to take and transport the said Samuel H. Hart to the line of this state, at your own expense. And I do hereby require all peace officers to whom this warrant may be shown to afford you all needful assistance in the execution hereof at your own cost and charge.

Given under my hand and the great seal of the state of Maryland. Done at the city of Annapolis, on this eighth day of January, in the year of our Lord one thousand eight hundred and ninety-four.

[Great Seal.]

Frank Brown.

By the Governor: Wm. T. Brantly, Secretary of State.

The circuit court of the United States for the district of Maryland, having considered petitioner's application for discharge under the writ of habeas corpus, entered the following order, viz.:

The court having heard Hon. Wm. Pinkney Whyte, counsel for the petitioner, and Hon. John P. Poe, attorney general of the state of Maryland, against the discharge of the petitioner, it is ordered this 15th day of January, 1894, that the petitioner be remanded to the custody of the warden of the Baltimore city jail, to be delivered by him to A. G. Matthews, the agent of the state of Washington, in pursuance of the warrant of the governor of the state of Maryland; and, the petitioner having given notice of an appeal from the foregoing order of court, it is now further ordered that the warden of the Baltimore city jail hold the petitioner in custody until the further order of this court.

On the 16th day of January, 1894, said Hart filed his petition for appeal, with assignment of errors, when the following order was entered, viz.:

The judge of the circuit court of the United States for the district aforesaid having rendered a final decision in said case dismissing said writ and remanding said petitioner, and said petitioner having prayed that an appeal be taken in his behalf to the next United States circuit court of appeals for the fourth circuit, in which said cause may be heard in accordance with the statute in that behalf enacted, after argument had, it is considered and ordered that an appeal be, and the same is hereby, allowed upon the following terms, and under the following regulations: That the said Samuel H. Hart be taken into the custody of the United States marshal for the district of Maryland, to be by him safely kept, and that the said Samuel H. Hart do execute and deliver a good and sufficient bond in the sum of five thousand

dollars, with security to be approved by the judge of the circuit court aforesaid, which said bond, when approved, shall be filed with the clerk of the said circuit court; and shall be conditioned as follows: That the said Samuel H. Hart do deliver himself up to the said marshal, and do appear before the said United States circuit court of appeals, whenever and wherever ordered by this court or by the said United States circuit court of appeals, and do then and there abide by and perform the judgment of the United States circuit court of appeals, in the premises; and that the said Samuel H. Hart do cause to be sent to the said appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and all other proceedings and documents and affidavits in said cause immediately; and that upon the execution and approval of said bond, as aforesaid, and the tender of the same, the said Samuel H. Hart be discharged from the custody of the marshal aforesaid, and allowed to go free, subject to the terms of this order or the final decision of the said appellate court.

The amount of the bond was afterwards, on motion of petitioner, reduced by this court to \$3,000. The bond, with approved security, was then given, and the petitioner discharged from arrest, subject to the terms of said order. The governor of the state of Washington, in making the demands upon the governor of the state of Maryland, before mentioned and described, acted under the authority of sections 5278 and 5279 of the Revised Statutes of the United States, which provide:

Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.

Sec. 5279. Any agent, so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled, and every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.

By virtue of this legislation it was the duty of the governor of the state of Maryland to cause the arrest of Hart, and his delivery to the agent designated to receive him, provided it appeared from the papers transmitted by the governor of the state of Washington that the demand made for the surrender of the fugitive was accompanied by a copy of an indictment found, or affidavit made before a magistrate, charging him with having committed treason, felony, or other crime within said state of Washington; the same being certified as authentic, and it also being shown that the party so charged was a fugitive from justice, and within the jurisdiction of the state of Maryland. Were these essential provisions of the law complied with? The removal of a citizen from one state to another as a fugitive from justice is a matter of great importance,

and worthy of serious consideration, yet always to be ordered when a proper case is made. Such action is based upon article 4, § 2, of the constitution of the United States, and the laws enacted to enable the same to be executed. The provision referred to will be strictly construed, and all the requirements of the statute must be respected. In this case, does it appear that the papers transmitted and certified to by the governor of the state of Washington were of the character required for the purpose of securing the warrant of arrest and extradition? The first requisition, dated December 23, 1893, recites that it appears by a copy of an "information," which is annexed, and certified to be authentic, that the petitioner stands charged with the crime of larceny by embezzlement. We do not consider this a compliance with the act of congress, which we think requires the copy of an indictment found by a grand jury, and not the copy of an information filed by the attorney for the state. An information cannot be regarded as a substitute for an indictment where the latter is required in the legislation now under consideration. While it is in the power of the states to provide for the prosecution and punishment of all manner of crime by information, and without indictment by a grand jury (as was held by the supreme court of the United States in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292), still, if they wish to rely upon the provisions of the constitution and laws of the United States relating to fugitives from justice, they must strictly observe and respect the conditions of the same. The indictment had in mind by those who framed the constitution and enacted the statute referred to was "a written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury." 4 Bl. Comm. 299-302. The supreme court of the United States has recently described an indictment, as that word is used in the constitution, as "the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished." *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781. In this first requisition the copy of the information is all that is certified to be authentic. Holding, as we do, that the information cannot be considered as the equivalent of an indictment, we will now examine the argument of counsel for the state of Washington that the verification of the information will be regarded as such an affidavit as is required by the law. The information is verified by the prosecuting attorney, who swears that he believes the contents thereof to be true, not that they are true. This is not such charging of the commission of a crime before a magistrate of the state as is contemplated by the statute. For the purposes of an affidavit to be used for the arrest and removal of fugitive from justice, this is not sufficient. The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them, whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the mere verification of a court paper by a public official, who makes no claim to personal information as

to the subject-matter of the same. *Ex parte Smith*, 3 McLean, 121, Fed. Case No. 12,968; *In re Doo Woon*, 18 Fed. 898; *Ex parte Morgan*, 20 Fed. 298. By requiring such an affidavit, the liberty of the citizen is, to a great extent, protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has been committed. To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact. It will be observed in this connection that the affidavits of Alexander McNicol, dated December 23, 1893, and of Clem T. Reese, dated December 27, 1893, filed with the governor of the state of Washington, and by him sent to the governor of the state of Maryland, are not considered, because, among other reasons, they are not recited in nor used to obtain the warrants for extradition, and are not certified to be authentic, in either of the warrants so issued. They cannot, therefore, be regarded as affidavits, under the section authorizing the warrant of removal; and, in the view that we take of this case, it will not be necessary for us to examine the questions whether an offense has in fact been committed, and, if the petitioner is a fugitive from justice, on which points it is insisted that said affidavits can be considered.

The governor of the state of Washington evidently reached the conclusion that the requisition made by him on the 23d of December, 1893, was defective, for we find that he caused another to be issued on the 27th day of December, 1893, in which it is recited that "it appears by a copy of indictment, which is herewith annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state, that Samuel H. Hart stands charged with the crime of larceny by embezzlement," etc. On examination of the papers annexed, we find that no such copy of indictment is attached, but that the copy of an information filed by the prosecuting attorney on the 27th day of December, 1893, against said Hart, is filed with and made part of the papers with the requisition. The absence of the copy of the indictment is fatal to the validity of the warrant, which does not pretend to be founded on the copy of information nor of affidavit, but of the indictment alone. The copy of the information does not support the requisition, and, if it did, for the reasons heretofore given, would not be sufficient.

The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to. The act of the governor can be

reviewed, and, if he has not followed the directions and observed the conditions of the constitution and laws of the United States, pertinent to such matters, can be set aside as void. The highest as well as the most obscure official must respect the requirements of the constitution and the laws made thereunder. The acts of the executive are subject to review by the courts by means of the writ of habeas corpus. It is not now necessary to cite authorities on this question, nor to recall incidents in English history, showing that this writ will issue, no matter how obscure the prisoner, nor how great the power of the official who detains him. We find that the requisitions issued by the governor of the state of Washington did not comply with the law, and that the governor of the state of Maryland was not furnished with a copy of either an indictment or affidavit, made as required by section 5278 of the Revised Statutes of the United States, and consequently we hold that the warrant of removal is void.

The judgment of the circuit court will be reversed, and the petitioner will be discharged from arrest.

Ex parte DINSMORE.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 77.

Appeal from the Circuit Court of the United States for the District of Maryland.

Application of Frank A. Dinsmore for discharge under writ of habeas corpus. Writ denied, and petitioner appeals.

William Pinkney Whyte, for appellant.

John P. Poe, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

GOFF, Circuit Judge. This case is similar to the Case of Hart (decided at the present term) 63 Fed. 249. The requisitions, and the papers accompanying them, are, in substance, the same. The information filed in the superior court of the state of Washington for Pierce county, attached to the requisition issued in the Case of Hart, was against Hart and this petitioner. In fact the transactions are the same, and the proceedings to secure the arrest and removal of the parties are based on the same character of papers. The demand made by the governor of the state of Washington recites that he acts upon the copy of an information (which appears in full in the Hart Case), and the governor of the state of Maryland issued his warrant for removal based upon said copy. We do not deem it necessary to set forth the papers found in the record in full, nor to repeat the reasons assigned in said Hart Case for holding the warrants defective and void. We refer to that case for the facts and the conclusions we reached. For the reasons there set forth, the judgment of the circuit court will be reversed, and the petitioner will be discharged from arrest.

UNITED STATES v. CHUNG FUNG SUN et al.

(District Court, N. D. New York. October 3, 1894.)

CHINAMEN—DEPORTATION.

Act U. S. May 5, 1892, as amended November 3, 1893, provides that a Chinaman must establish by affirmative proof to the satisfaction of the

commissioner his lawful right to remain in the United States. *Held*, that the finding of a commissioner that a Chinaman is not lawfully in the United States will not be disturbed on appeal, unless clearly against the weight of evidence.

A judgment was rendered by a United States commissioner for the deportation of Chung Fung Sun and Chin Kong Pock to the empire of China, and they appeal. Affirmed.

W. W. Cahtwell, for appellants.

W. A. Poucher, U. S. Atty., for respondent.

COXE, District Judge. Under the rigorous provisions of the act of May 5, 1892, as amended November 3, 1893, the burden was on the appellants to establish "by affirmative proof to the satisfaction of the commissioner," their "lawful right to remain in the United States." (27 Stat. 25, § 3 Laws 1893, c. 14, p. 7). The term "merchant" is defined to mean "a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant." Laws 1893, c. 14, p. 8, § 2.

The contention in the case of Chung Fung Sun is that he was born in California twenty years ago; that his father when he was five or six years old returned to China with his wife and child, remained there a year and a half and then came back to this country leaving his wife and the appellant in China where his wife has lived ever since and where the appellant lived until the present year. This is sworn to by the alleged father, but the inherent improbability of the story must be apparent to all. On the other hand there is presumptive evidence that the appellant, and five other Chinamen, came here from Canada, having been smuggled at night across the border at an unfrequented spot near Plattsburgh, N. Y. There is also proof of the appellant's admissions that he never had been in the United States before and that the theory of his having a father in this country was an afterthought invented to fit the exigencies of the situation. To state the matter as strongly as possible for the appellant the case presented a doubtful question of fact, which was clearly within the province of the commissioner to determine. His finding upon disputed testimony should not be disturbed on appeal.

In the case of Chin Kong Pock an effort was made to prove that he was a returning merchant. Two witnesses, of Russian extraction, testify to having seen the appellant prior to the summer of 1893, selling soap, washboards, etc., at No. 13 Pell street, New York City. This is supplemented by the testimony of a Chinaman to the effect that appellant is a member of the firm of Qwong Mow Wo Company and has been for five years. It further appears that fifteen persons are interested in the business at 13 Pell street, the stock being worth about \$10,000. Two criticisms are made of this testimony. First, that it is insufficient in law, and, second, that it is untrue in fact. There is evidence of the appellant's admissions

that he was a farmer in China, that he had never been here before and that he was smuggled across the Canadian border from Montreal. In view of this testimony and the circumstantial evidence tending to substantiate it the commissioner saw fit to reject the theory that the appellant was a Chinese merchant. He did not believe the appellant's testimony. It was a question of fact and the finding of the commissioner was not so clearly against the weight of evidence as to justify the court in disturbing it on appeal. There is, to say the least, doubt whether the testimony on behalf of the appellant, if true, brings him within the statutory definition of "merchant." Did he buy and sell merchandise? Was the business conducted in his name? It is unnecessary to answer these questions, but the mere statement of them suggests the defect in the appellant's proof. The judgments must be affirmed.

In re HOWARD.

(Circuit Court, S. D. New York. October 19, 1894.)

1. IMMIGRATION—CONTRACT LABORER—"PERSONAL OR DOMESTIC SERVANT"—WHAT CONSTITUTES—UNDERCOACHMAN.

An "undercoachman," whose duties are, partly, to assist in keeping stables, horses, and carriages in good order, but principally to drive the horses when his employer or any of his family go out in carriages, and to accompany on horseback the younger members of the family when they go out on horseback, and who boards with his employer's coachman, and sleeps in a room over the coach house, is a "personal or domestic servant," within the meaning of St. 1885, c. 164, prohibiting the immigration of aliens under contracts for labor, and providing that the provisions of the act shall not apply to "persons employed strictly as personal or domestic servants."

2. SAME—PROHIBITED PERSON—DECISION OF SECRETARY OF THE TREASURY—WHEN CONCLUSIVE.

Under St. 1888, c. 1210 (amending St. 1885, c. 164, as amended by St. 1887, c. 220), which authorizes the secretary of the treasury, "in case he shall be satisfied" that an immigrant "has" landed contrary to the prohibition of St. 1885, c. 164, as amended, to cause him, within a year after landing, to be taken into custody and deported, the determination of the secretary of the treasury as to whether or not the immigrant is a prohibited person is conclusive, and will not be reviewed by the courts.

Petition by John James Howard for a writ of habeas corpus to obtain his release from custody into which he was taken by order of the secretary of the treasury, to be returned to England, from which country it was claimed he came in violation of the contract-labor law. Writ dismissed, and petitioner remanded.

Wallace Macfarlane and Wm. H. Cochrane, U. S. Atty., for commissioners.

Benj. F. Tracey and Frank Platt, for relator.

LACOMBE, Circuit Judge. The federal statute of 1885 (chapter 164) and the amendments thereto (chapter 220 of 1887 and chapter 1210 of 1888), with some additional provisions contained in chapter 551 of 1891, make up what is generally referred to as the "Contract-Labor Law." That law undertakes to protect per-

sons performing labor or service here against competition from abroad by prohibiting the importation or migration of aliens or foreigners under contract or agreement to perform labor or service made prior to such importation or migration. All kinds of labor or service, however, are not within the prohibiting clauses of the statute. The first section of the act of 1885 does, it is true, use the phrase "labor or service of any kind;" but congress, by a specific enumeration, has declared that certain classes of persons performing labor or service shall not be affected by the provisions of the statute; and it has been held that, by unexpressed intention, congress also excepted other classes, not thus enumerated. *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511. The act of 1885 expressly declares that the provisions of that act shall not "apply to * * * persons employed strictly as personal or domestic servants." No subsequent act has in any wise qualified or repealed this provision, and persons thus employed have therefore not been forbidden by congress to enter. These contract-labor statutes have provided summary methods for preventing the entry into this country of persons within the prohibited class, and for the arrest and deportation of such persons who may have succeeded in effecting an entrance contrary to the prohibition. Thus, the act of 1888 authorizes "the secretary of the treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came," etc. The relator is held under a warrant issued in accordance with this last-quoted section, and the return to the writ of habeas corpus avers that the secretary of the treasury, from proofs submitted to him, became satisfied that the relator came into the country from England, contrary to the prohibition of the contract-labor laws. The relator insists that the secretary of the treasury had no jurisdiction to issue such a warrant in his case, because, although an alien immigrant, he was not, as he contends, within the prohibited class; and that the provisions of the statute touching arrest and deportation do not apply to those who belong to the excepted class of "persons employed strictly as personal or domestic servants." Courts, upon habeas corpus, will always look into the question of jurisdiction, and relator, therefore, has offered evidence in support of his answer to the return.

Whatever may have been the case made before the secretary, it appears from the evidence taken in this court that relator is in the employ of Mr. L. P. Morton, a resident of Rhinecliff, in this state, a contract for his employment having been made before entry into this country; that he is employed as "undercoachman;" that his duties consist partly in assisting to keep the stables, horses, and carriages in good order, and principally in driving the horses when his employer or any of his employer's family go out in one of the carriages. When the younger members of the family go out on horseback, he accompanies them, also on horseback. Apparently he has no other duties. He produces nothing. He does no work

on the farm, or in the garden, or in the dairy, as in *Case of Cummings*, 32 Fed. 75. Under the sole direction of Mr. Morton and of Mr. Morton's family, he performs services which minister exclusively to their personal comfort and enjoyment. He lives at his employer's residence, in Rhinecliff, boarding with the coachman in a small cottage of Mr. Morton's, immediately adjoining his coach house, and sleeps in a room over the coach house, where two of Mr. Morton's cooks also have their rooms. Upon such proof as this,—and there being no dispute here as to the facts,—it seems entirely clear that relator is employed "strictly as a personal or domestic servant."

But it does not follow that he should be discharged from custody. The language of the statute above quoted from (chapter 1210 of 1888) is peculiar. It provides for a return, not of the immigrant who has landed contrary to the prohibition, but of an immigrant as to whom the secretary of the treasury shall be satisfied that he has so landed. In other words, the language of the act is such as to relegate to the secretary the final determination of the question whether or not the immigrant is a prohibited person. Where congress intrusts such final determination to an executive officer, the courts cannot interfere with or overrule his decision. The supreme court has recently discussed this subject generally, and thus expresses its conclusions:

"An alien immigrant, prevented from landing by any such officer, claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful; and congress may, if it sees fit, * * * authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor ever been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers acting within powers expressly conferred by congress are due process of law." *Nishimura Ekiu v. U. S.*, 142 U. S. 660, 12 Sup. Ct. 336.

Power thus summarily to determine the status of an individual, without any review by a court or other tribunal, when such determination will expose him to arrest and deportation, is certainly very comprehensive. Courts, as a rule, are jealous of their prerogatives, and unwilling to find in any statute so broad a grant of power, unless it is expressed in no uncertain terms. In the statute now under consideration, however, the language used is not uncertain. It directs the return of the immigrant when the secretary of the treasury shall be satisfied that he belongs to a prohibited class. Undoubtedly, the language used does not expressly provide that the decisions of the secretary upon an immigrant's status shall be final, and not subject to review in the courts; but it is a reason-

able and necessary implication from the language which congress has used. Were there nothing before the court except the act of 1888, it might be urged that congress did not intend to confer such extensive judicial power upon an executive officer, although the language of the act would justify such a conclusion. As already seen, congress, in another section of this contract-labor law, has used language which unambiguously expressed more than was intended (*Church of Holy Trinity v. U. S.*, supra); and it would not be surprising to find elsewhere in the law a similar instance of the incautious use of words. But the provisions of the supplementary immigration act of 1891 (chapter 551) seem to preclude a restricted interpretation of the section now under discussion, on any such theory of intent. In the eighth section of this act of 1891 it is expressly provided that:

"All decisions made by the inspecting officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the secretary of the treasury."

This language was held in *Nishimura Ekiu's Case*, supra, to confer upon the executive officers named in the act a judicial discretion, not reviewable by the courts. Since congress, in 1891, conferred such power upon subordinate executive officers, it is difficult to see why it should be held that congress did not intend in 1888 to confer like power upon the secretary of the treasury. By selecting an officer of such exalted rank as the final arbiter of the question of an immigrant's status, congress placed the power where it would be exercised with care, wisdom, and discretion; and, having the right thus to legislate upon the subject (*Nishimura Ekiu's Case*, supra; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016), its grant of power should be construed as it is expressed. Where it is shown that the person proceeded against under the contract-labor law is not an immigrant, the secretary has no jurisdiction to pass upon the question. *In re Panzara*, 51 Fed. 275; *In re Martorelli* (U. S. Cir. Ct. S. D. N. Y.; Oct., 1894) 63 Fed. 437. But where it appears that such person is an immigrant, who has not been here more than one year, the secretary of the treasury has been selected by congress as the sole tribunal to determine whether he is or is not within the prohibited class.

The writ must be dismissed, and the relator remanded.

THE CARIB PRINCE.

WUPPERMAN v. THE CARIB PRINCE. MIDDLETON et al. v. SAME. CADENAS et al. v. SAME. GILLESPIE et al. v. SAME.

(District Court, E. D. New York, October 4, 1894.)

1. CONFLICT OF LAWS—CONSTRUCTION OF BILL OF LADING.

A bill of lading of goods to be carried in an English ship, signed in an English port, must be construed according to the law of England.

2. BILL OF LADING—EXEMPTIONS FROM LIABILITY—ENGLISH LAW.

Under the law of England, a provision in a bill of lading exempting the shipowner from liability for damage caused by a latent defect covers

damages from a defective rivet in the bulkhead side of a water tank, where, the ship being a new one, the tank had been tested by hammer and water pressure, and the defect was where no external examination would have discovered it.

Actions by Josephine W. Wupperman, Clifford E. Middleton and others, Manuel Cadenas and another, and William Gillespie and others against the steamship Carib Prince for damages to merchandise. The several libels were dismissed.

George A. Black, for libelants.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. These actions are brought to recover of the steamship Carib Prince for damage done to merchandise forming part of the cargo of that vessel on a voyage from Grenada to New York. The vessel was constructed with a water tank of iron in her peak, one side of which was formed by a bulkhead. This tank, when she sailed from Grenada, was empty, but during the voyage from Grenada to New York it was filled with water one afternoon, in order to trim the vessel; and the next morning, much of the water having gone from the tank, an investigation showed that the head had come off from one of the rivets riveting the bulkhead side of the tank, leaving a hole through which water had poured upon the libelants' merchandise, stowed near the bulkhead. The evidence in respect to the rivet has led me to the conclusion that the cause of the accident was a defect in the rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the time it was annealing, so that it became brittle and weak. This defect could not be seen. The broken rivet was found on one of the bags of cargo, and showed that it had broken off in the countersunk part of the rivet, below the head, so that, while the rivet remained in place, no external examination would have discovered the defect. This defective rivet was, in my opinion, the cause of the accident. The condition of the rivet rendered it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, and the vessel consequently was unseaworthy in that respect. The evidence shows that the vessel was a new vessel, built by builders of the highest class, and all reasonable effort was made to secure a proper riveting of the tank. After construction the tank was tested by a hammer and by water pressure, and it was found to be tight and strong enough to sustain the weight of water when not in motion. When the tank was filled with water while the ship was in motion, the rivet in question proved insufficient, owing, as already stated, to the fact that the iron had lost its strength in the process of being hammered while it was annealing, and it gave way, causing the damage sued for.

If diligence on the part of the shipowner to provide a seaworthy ship, and a justifiable belief on his part that his ship was seaworthy, could avail to relieve him from his warranty of seaworthiness, he could be relieved upon the proofs in the case; but the rule has been declared that if the unseaworthy condition arose from a defective

construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage.

The question then arises whether this obligation on the part of the shipowner has been qualified by the clause in the bill of lading which exempts the shipowner from damage caused by a latent defect, which is this case. This was an English ship. The contract was signed in a port governed by English law, and it has been held in this circuit that such a case is to be governed by the law of the place where the contract was made. It was a British vessel, governed by the laws of England. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *The Majestic*, 9 C. C. A. 161, 60 Fed. 624; *Bank of Edgefield v. Farmers' Co-op. Manufg Co.*, 2 U. S. App. 282, 295, 2 C. C. A. 637, 52 Fed. 98. The law of England, as declared in the case of *The Laertes*, 12 Prob. Div. 187, is to the effect that by the laws of England such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits, the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the shipowner. Applying that law to this case, it follows, from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelants' cargo, because the danger arose from a latent defect in the rivet which gave way, within the exception in the bill of lading under which the merchandise was carried. Upon this ground the libels are dismissed, and with costs.

THE HERCULES.

GENTHUR v. THE HERCULES.

(District Court, E. D. New York. September 28, 1894.)

1. WITNESSES.—IMPROPER INFLUENCES.—THREATS OF CRIMINAL PROSECUTION.

The conduct of claimant's agent, in causing it to be made known to a witness who had given damaging testimony that he was in danger of prosecution for a criminal offense, whereby the witness was moved to offer himself as a witness for claimant, and thereupon gave a deposition contradicting many of his previous statements, strongly disapproved by the court, and considered to cast a doubt upon the testimony of another witness produced from the same source.

2. TOWAGE.—LOSS OF TOW IN STORM.

Tug *held* in fault for taking barges out of the protection of the Delaware breakwater, and starting on a voyage to Boston, in the face of strong indications of an approaching storm, contrary to the judgment of other tug-boat captains in the breakwater at the time, and for refusing to turn back until it became impossible to proceed, and until one of the barges had sprung a leak, from which she sank.

This was a libel by Philip C. Genthuer against the steam tug *Hercules* to recover for the loss of the *Saugerties* while in tow of the tug.

Benedict & Benedict, for libellant.

Robinson, Biddle & Ward, for claimants.

BENEDICT, District Judge. On the 2d day of March, 1893, the steam tug Hercules took in tow in the Delaware river the barge Saugerties and the barge Moonbeam, under a contract to tow them, one to Boston, Mass., and the other to Providence, R. I. In the afternoon of the 2d of March the tug left the Delaware breakwater and put to sea with these two barges, in the face of evident signs of approaching storm. The heavy weather indicated was encountered outside. On the 4th of March, while in a heavy sea, the Saugerties sprung a leak, and shortly afterwards sank in about 17 fathoms of water, and became a total loss. Thereafter the tug turned back with the Moonbeam, which was disabled in the storm by the breaking of her tiller, and with her arrived in safety at the breakwater. The owners of the Saugerties now sue the tug to recover for the loss of their barge, charging the tug with negligence in putting out from the refuge of the breakwater into the storm then threatened, and also in failing to turn back after the storm was encountered. The claimants contend that the sinking of the Saugerties arose from her being unseaworthy, and that there was no negligence on the part of the tug.

Upon these issues a mass of evidence has been presented, in which there is to be found testimony supporting either contention. I have examined all this testimony, but I do not feel it incumbent on me to comment on its particular features, further than to say that the conduct of Harry Hull, assistant superintendent of the line to which the Hercules belongs, in connection with the testimony of the witness William Kendrick, cannot be passed over without notice. The witness Kendrick was the master of the Hercules. He was examined in behalf of the libelant by deposition, and gave testimony favorable to the libelant's contention. At the taking of this first deposition the information was conveyed to the witness that it was known to the claimants that there was foundation for a criminal charge against him, arising out of his naturalization papers obtained by him in Boston. Thereafter the witness was made to understand that he was in danger of prosecution for that offense, and was brought in connection with the superintendent, Hull, by means of his brother-in-law. Thereafter, acting under the idea that he would thereby avoid a criminal prosecution in connection with his naturalization, he offered to be examined in behalf of the claimant. At this last examination he contradicted many of the statements he had made in his first deposition. After that both he and his brother-in-law were given employment by the claimants. This method of dealing with a witness who gives damaging testimony is strongly disapproved of, and tends to raise a doubt in regard to the testimony of the witness Johnston, produced from the same source, to support the statements of Kendrick.

The testimony in the case, taken together, seems to me to require the conclusion that the master of the Hercules, contrary to the judgment of other tugboat captains in the breakwater at the time, put out with his heavy tow from the protection of the breakwater, in the face of strong indications of the approach of a storm; that the storm was encountered outside the capes, and was dangerous, not-

withstanding which the tug proceeded on her way, until finally it became impossible to make any noticeable progress with the tow. Instead of turning back, as she could have done, and as she afterwards did with the Moonbeam, the tug subjected the Saugerties to the force of a severe storm for many hours. The result was that the Saugerties sprung a leak, and her pump became disabled by the storm, so that she filled with water and sank. Upon these conclusions of fact I find that the tug was guilty of continuing to face a dangerous storm after she experienced its force, when common prudence required the master to turn back, and seek the shelter of the breakwater. The failure to exercise this measure of prudence was, in my opinion, negligence, and rendered the tug liable for the loss of the libellant's barge. There must be a decree for the libellant, with a reference to ascertain the amount of the loss.

THE ALFRED J. MURRAY.

THE ALFRED J. MURRAY v. AMERICAN TOWING & LIGHTERING CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 85.

MARITIME LIENS—INNOCENT PURCHASER—TAKING VESSEL FOR DEBT.

One who takes a barge in payment of a debt is not an innocent purchaser, so as to release him from claims against the vessel contracted by the vendor. 60 Fed. 926, affirmed.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by the American Towing & Lightering Company against the barge Alfred J. Murray, in which Edward Tunison and Richard Roser, material men, intervened, and claimed liens. There was a judgment for libellants and interveners, and Engle & Co., claimants of the barge, appeal. Affirmed.

Richard M. McSherry, for appellants.

Robert H. Smith, for the towing company.

Thomas C. Butler and D. E. Monroe, for interveners.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. The barge Alfred J. Murray was engaged in trade between New York and Chesapeake bay. She had no means in herself of locomotion, and the American Towing & Lightering Company was under contract with one of her owners to do all necessary towage between Chesapeake City, in the state of Maryland, to a port or ports on Chesapeake bay, usually Piankatank, in Virginia. While this towage service was being performed, in 1892, to April, 1893, the barge was owned by J. A. and G. Griffin, and was covered by a mortgage to Alfred J. Murray in the sum of \$6,000. The barge cost, about two years before 1893,

\$11,000. J. A. and C. Griffin were engaged in business, and for some cause became greatly embarrassed, in fact insolvent, in the early part of 1893. They had had friendly relations with M. Engle & Co., and these two firms used between them accommodation notes. Engle & Co. would give the Griffins their note, to be used by the Griffins, but to be met at maturity by Engle & Co., and the Griffins would give Engle & Co. their note, to be used by the latter, but to be met by the former at maturity. On 9th May, 1893, there were outstanding, running to maturity, one of these notes given by Engle & Co. to J. A. and C. Griffin in the sum of \$2,560, and another of the same amount given by the Griffins to Engle & Co. These were discounted by each firm with a banker. On that day Engle & Co. purchased from the Griffins the barge A. J. Murray, on the terms \$2,560 cash and \$6,146.32 in notes, maturing at different dates. The sum paid as cash was really the money due on the accommodation note of J. A. and C. Griffin, given to and used by Engle & Co., and held by Eppinger & Russell; and the notes were given to J. A. Murray, the mortgagee of the barge, to whom a new mortgage, presumably upon the satisfaction of the old mortgage, was executed for \$5,761. At the date of this transaction the Griffins owned no other property than this barge, then under mortgage, and some logs and timber, and were wholly unable to meet the note given by them to Engle & Co. for their accommodation and, as we have seen, discounted by them. When the barge, under the terms of sale, was about to be conveyed to Engle & Co., they made some inquiry at Perth Amboy, where her title deed was recorded, and perhaps at Chesapeake City, as to any outstanding claims against her, and were informed that none existed, except claims for supplies, amounting to about \$100. In fact she at that time owed the towage company a large bill for towage, and she also owed Tunison and Roser, two material men at Brunswick, N. J., for supplies. Under the law of New Jersey, the state to which the barge belonged, material men have a lien on vessels for such supplies. The American Towing & Lightering Company filed the libel in this cause for towage services from June 12, 1892, to December 21, 1892. The material men intervened for open accounts, one beginning 18th July, 1892, and ending December 15, 1892; the other beginning April 9, 1892, and ending December 15, 1892. Much testimony was taken in the case, and it was heard with the libel, interventions, and answers. The district court entered a decree against the barge. The court was of the opinion that Engle & Co., the present owners, were not bona fide purchasers in such a sense as to release them from claims against the vessel contracted by the Griffins, under whom they held; and that, even if they were, there was not such laches on the part of the libellant and of the intervening material men as would deprive them of their lien. In these conclusions we see no error. Engle & Co. took the barge at a certain price. They paid the purchase money by meeting a note of the Griffins, indorsed, it is true, for their accommodation, but held by a bona fide holder before maturity. The Griffins were wholly unable to pay this note either to the holder, or to Engle & Co., if they met it. The re-

mainder of the purchase money went to an existing mortgage on the barge. It is very clear that this transaction was fully expressed by Moses Engle himself, in his testimony, when asked, "But the note which they [J. A. and C. Griffin] passed to you was not paid, but you took the barge instead?" and he answered, "I took the barge in place of the note, considering that so much money." The consideration for the transfer of title in the barge was to secure protection from an antecedent liability incurred by the vendee for the vendor. These are not circumstances which make one a bona fide purchaser. A bona fide purchaser is one who at the time of the purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase be set aside. *Alden v. Trubee*, 44 Conn. 455.

The liability of Engle & Co. on the note of the Griffins, discounted by and held by Eppinger & Russell, was fixed. The Griffins were in insolvent circumstances. Engle & Co. were responsible for the note, and when they paid it they paid their own debt. They gave up no security. They divested themselves of no right. They placed themselves in no worse position than they were in before. In fact, incurring a liability and suffering a loss in their dealings with the Griffins, and having no lien, they acquired almost the only property the Griffins had, to secure themselves against loss. In *Dickerson v. Tillinghast*, 4 Paige, 215, Chancellor Walworth held that the transfer of an estate, upon which there was a prior unrecorded mortgage, in payment of a pre-existing debt, without the transferee giving up any security or divesting himself of any right or placing himself in a worse position than he was before, did not make the transferee, who had no notice of the mortgage, a purchaser for value, and so entitled to protection. In the notes to *Vadikin v. Soper*, 2 Hare & W. Lead. Cas. 233, this rule is stated. Whatever may be the rule in the case of negotiable instruments, it is well settled that the conveyance of lands and chattels as security for an antecedent debt will not operate as a purchase for value or defeat existing equities. To similar effect is *Johnson v. Peck*, 1 Woodb. & M. 334, Fed. Cas. No. 7,404.

Nor do we see any want of diligence in the enforcement of their liens on the part either of the libellant or of the interveners, such as to amount to waiver of or to work a forfeiture of their liens. On this point nothing can be added to the reasons set out in the opinion of the district court. The decree below is affirmed in all respects; the costs of this court to be paid by appellants.

THE ENCHANTRESS.

HARD et al. v. THE ENCHANTRESS.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

SHIPPING—SHORT DELIVERY OF CARGO—SALE OF UNCLAIMED CARGO—APPLICATION OF PROCEEDS.

Where a consignee, having a claim against a chartered ship for short delivery of coffee, knowingly purchases of the charterers unclaimed coffee

brought by the ship on the same voyage, he is equitably bound to apply the purchase price to the payment of such shortage claim, so as to relieve the ship from liability in rem, rather than apply it to other claims against the charterer for previous shortages in cargo brought by other vessels, and still hold the ship liable for its own shortage. 58 Fed. 910, affirmed.

This was a libel by Anson W. Hard and George C. Rand against the steamer Enchantress to recover for short delivery of coffee. The district court dismissed the libel (58 Fed. 910), and libelants appealed.

Willard Parker Butler, for libelants.

J. Parker Kirlin, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelants, composing the firm of Hard & Rand, as indorsees of certain bills of lading, filed in the district court for the southern district of New York their libel in rem, to recover from the steamer Enchantress the value of 35 bags of coffee shipped on board said steamer at Victoria, Brazil, on or about September 29, 1892, and not delivered to the libelants upon the arrival of the vessel in New York, on November 4, 1892. At the time of the shipment, the Enchantress had been chartered to the United States & Brazil Mail Steamship Company by a demise charter, and was regularly running in its line of steamers between New York and Brazil. The district court dismissed the libel. We think that the decree of the court was correct, although we do not adopt all its suggestions of fact. The claimant stipulated that the firm of Hard, Rand & Co. shipped at the time and place just named the number of 5,947 bags of coffee mentioned in the bills of lading annexed to the stipulation, and which were thereupon delivered by said shippers to said steamship company. The bills of lading specified certain marks as appertaining to the bags of this shipment. Upon arrival in New York, the vessel contained one more bag than was called for by her manifest, but fifty-seven bags did not have the marks stated therein. Thirty-five bags containing the marks on the bills of lading and manifest were not found or delivered to the libelants, and it is contended that the stipulation was limited to the number of bags, and that there is no adequate evidence that the number which was shipped on board the vessel at Victoria contained the specified marks. The manifest, which was signed by the claimant, specifies the marks belonging to the libelants' 5,947 bags, and the whole conduct of the charterers at the time when the coffee should have been delivered, and when demand of payment was being pressed upon it, shows that the question of the shipment of these marked bags was not in dispute. After the extent of the nondelivery had been ascertained, and after the libelants had presented their claim for the loss to the steamship company, the latter tendered to the libelants the unmarked 57 bags, which they refused to receive, because the bags did not have their marks, and presumably did not contain their coffee. A similar tender was made to other consignees who had claims for "shortage"

by the Enchantress, and was refused. Thereupon the steamship company sent the 57 bags and 7 other bags, with their contents, to a coffee-cleaning establishment, to be cleaned; and on December 14, 1892, sold the 64 bags to the libelants, at 15 cents per pound, which amounted to about \$1,200. They must have known that a large portion of this coffee was the same which had been previously tendered to them in the bags which came by the Enchantress. Not to infer that they knew this is to attribute to them a lack of intellect. In fact, the salesman told them that they were buying their own coffee. The libelants' bill for the 35 missing bags was \$793.17. The steamship company was at the time in a very weak financial condition, and the object of the sale was to obtain cash with which to pay the various claims against the company for nondelivery. When, in a day or two thereafter, the steamship company presented its bill against the libelants, they refused to pay. At this time they had other claims against the company, which had previously arisen, principally for slack bags of coffee, amounting to \$2,358.25. On December 16, 1892, the libelants sent the following letter to the steamship company:

"Dear Sirs: Returning herewith our claim against the S. S. Enchantress for 35 bags of coffee short, we have to say your proposal of adjustment of this loss, at the cost of the merchandise, does not appear to us as an equitable one; for, if we are entitled to any recovery whatever, it should be for the whole of the loss sustained by us, which is the market value at port of destination. Please favor us with your check for amount of this and other claims, as per inclosed memorandum, the payment of which you have promised from time to time."

The letter also inclosed a memorandum of the other and earlier claims against the company, which they state is a memorandum "of our unpaid claims against you." The steamship company replied, denying that the value of coffee not delivered by the Enchantress should be computed according to the value at the port of destination, and returned the bill for correction. Further correspondence ensued, and on February 13, 1893, the steamship company wrote to the libelants reiterating its objections to their estimate of the amount of all their various claims. After this time, the steamship company apparently became entirely unable to pay its debts; and in April, 1893, the libel was filed against the vessel, upon the ground that the amount which the libelants owed for the 64 bags of coffee was to be or had been applied upon their earlier and more unsecured claims against the company. The owners of the vessel insist that this amount was intended by the libelants, at or about the time of the purchase, to be applied upon the bill for the 35 bags. No such intention was manifested at the time of the purchase; there is no evidence which satisfies us that they subsequently entertained such an intention; and it seems to be negatived by the correspondence. They asked for a check in payment of the Enchantress' claim and of their other claims; and the fact that in the inclosed memorandum of their other claims they speak of them as unpaid does not, in view of their affirmative declaration that the Enchantress claim was not paid, make it probable that they meant to admit by the memorandum that it had been paid.

But, whatever was the intention of the respective parties to the purchase and sale of the 64 bags of coffee as to the application of the amount of money due upon the purchase, we agree with the district court that the facts do not bring the case within the doctrine of the application of payments. The price of the coffee was a debt due from the libelants to the steamship company, and against its payment they had a counterclaim for damages for breach of contract, to a larger amount. The "account," if it can be so called, between the parties, was not a running account, like that of a tradesman with his customer, where goods are furnished by each to the other. The question whether the libelants can recover against the vessel the amount of loss upon the 35 bags of coffee, when they purchased from the owner *pro hac vice* (who was liable to them for those bags) a larger amount of coffee, which, within their knowledge, came by the same vessel, and which debt has never been paid in money, is a question to be settled upon the equitable principles, or according to the rules of justice by which courts of admiralty aim to be controlled. When the loss was discovered, the libelants had a claim for reimbursement against the steamship company and against the vessel. The vessel had an equitable right to insist that the cargo which it safely brought should be so applied as to relieve it, if practicable, from the loss upon the cargo which it failed to bring; and the libelants, with knowledge that they were receiving and not paying for coffee brought by the vessel, were also under an equitable obligation to give the vessel the benefit of that portion which it brought, which they received, and the purchase price of which is unpaid. We agree with the district court that this equitable right of the ship was superior to any right of the libelants to have the proceeds of this cargo applied upon prior claims against other vessels, to the exclusion of the *Enchantress*. The decree of the district court is affirmed, with costs.

THE JOHN M. NICOL.

LOVELAND TRANSP. CO. v. CRESCENT TRANSP. CO.

(Circuit Court of Appeals, Sixth Circuit. July 3, 1894.)

No. 160.

1. TOWAGE—TAKING LEAKING TOW INTO PORT OF SAFETY.

A propeller, towing a barge on Lake Erie in heavy weather at the request of the barge, which was leaking badly, changed her course to Cleveland,—the nearest port. On arriving at the breakwater, finding no tug to take the barge, as was customary, the propeller signaled for a tug, and stood out into the lake until one came. If she had carried her tow inside, the length and draught of the propeller would have compelled her to keep the narrow channel. Nothing in the contract of towage required her to take the barge to a dock, and there was no apparent peril in waiting for a tug. *Held*, that the propeller was not in fault for failing to tow the barge inside the breakwater on their arrival.

2. SAME.

A tug having come alongside the barge, it was agreed between them that the propeller should tow the barge in, the tug to follow and help as far as necessary or possible, and to take the barge as soon as she was

towed inside the breakwater. The propeller headed for the entrance, but the barge, after getting substantially in line behind her, took a sudden, heavy sheer towards the east breakwater. The propeller pulled strongly towards the west breakwater, until she was about a boat's length from it, without breaking the sheer of the barge, and then let go the towline to avoid pulling her on the east breakwater. The barge put down her anchor, and the tug made ineffectual efforts to get a line to her, but she drifted across the entrance, and went to pieces on the west breakwater. *Held*, that the propeller was not in fault for casting off the line, in the emergency then existing.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This was a libel against the propeller John M. Nicol for the loss of the barge Wahnapiatae while in tow of the propeller. The district court dismissed the libel. Libellant appealed.

The barge Wahnapiatae, laden with a cargo of lumber, was taken in tow at Washburn, Wis., a port on Lake Superior, by the propeller John M. Nicol, to be towed to Fairport, Ohio, a port on Lake Erie. After the propeller and her consort reached Lake Erie the wind increased so as to make a heavy sea. The barge, in consequence, sprang a leak, which so increased as to make it dangerous to proceed. The master of the Wahnapiatae therefore signaled the steamer to take the barge to a port of safety. At the time this signal was given the vessels were within about 24 miles of Fairport. Cleveland was the nearest port, being about 18 miles S. by W. In obedience to this request the course of the propeller was changed so as to steer direct for Cleveland. The steamer, with her tow, arrived off the port of Cleveland at about 8 p. m. There being no tug either off the port or inside the breakwater, the Nicol blew the usual signal for a tug, and headed around under a port helm, and again stood out in the lake, to wait for a tug. After getting out something over a mile, and having headed out in the lake, the tug Alva B came out from the port, and went alongside the barge, and arranged to aid in taking her inside the harbor. The plan agreed upon between the barge and the tug was that the Nicol should tow the barge in, the tug following and helping as far as necessary or possible, and then to take the barge as soon as she was towed inside the breakwater. This plan was communicated to the master of the Nicol, who, after the tug left him, ported his wheel to come around for the entrance to the harbor. The breakwater in front of the harbor runs nearly east and west. The entrance to the harbor was through an opening in this breakwater 500 feet wide. The direction of the wind was N. N. E., blowing nearly into the entrance between the breakwaters. There was a good deal of sea running in the direction of the wind. Near the breakwater the sea was choppy, made so by the backset of the breakwater. Under a port wheel the Nicol went around, and headed for the entrance.

The contention of the libellant is that the circle made by the Nicol in coming around was too small, and that the barge, being at the end of a 600-foot towline, had a much larger circle to make, and did not get straightened out behind the steamer; that the steamer, regardless of this fact, headed for the entrance, though the barge was not in her wake, and was headed two or more points east of the opening, and directly onto the east breakwater. The libel then alleges that while the barge was slowly coming around after her, with her helm hard a-port, but before she could get into line behind the propeller so as to head for the opening, and when about one-quarter of a mile away from the opening, the propeller cast off the towline and set the barge adrift; that the barge immediately let go her starboard anchor, but this did not fetch her up, as she continued to drag her anchor until she drifted across the opening, and onto the breakwater at a point west of the opening, and was there broken to pieces, one of her crew being drowned while attempting to escape from the sinking vessel.

The faults relied upon here by the libellant are:

(1) That the propeller should have towed the barge in when she first arrived off the port; that she could have done so without difficulty, as both were then heading into the opening of the breakwater.

(2) That the propeller was in fault in hauling said barge around in too small a circle, "and in too close proximity to the breakwater, making it difficult for the barge to follow the propeller."

(3) That the said propeller was at fault in casting off the towline of said barge at the time it was cast off.

(4) That the propeller was at fault in not coming to the assistance and rescue of said barge after the line was cast off, and when it was observed that she was dragging towards the breakwater.

The district court, upon all the evidence, was of opinion that no fault had been proven against the Nicol, and accordingly dismissed the libel, with costs.

Schuyler & Kremer, for appellant.

F. H. Canfield, Geo. L. Canfield, and Harvey D. Goulder, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge (after stating the facts). 1. We think that the Nicol was not in fault for failing to tow the barge inside the breakwater when the vessels first arrived off the port. The Nicol was not bound for the port of Cleveland, and had no business in that port. Her contract was to tow the barge to Fairport. She had diverged from her course in compliance with the request of the barge, and on account of its unseaworthy condition. The distance from the breakwater to the harbor piers was some 1,200 feet. The deep-water channel was straight in from the entrance to the piers. The water on each side of the channel was shallow, being between 14 and 15 feet on one side, and from 13 to 14 feet on the other side. The Nicol was heavily loaded, and drew between 14 and 15 feet. In view of her length and draught, it is clear that the propeller could not have maneuvered in the basin, and would have been obliged to keep the narrow, deep-water channel, if she had carried her tow inside. There was nothing in the contract of towage which required the Nicol to take her tow to a dock. In ordinary weather the evidence shows that tugs meet vessels going into the harbor from one to three miles outside the breakwater. The master of the Wahnapitae expected to meet with and employ a tug outside, and prepared his harbor line soon after he was headed for Cleveland. He admits his disappointment at finding no tug to take him in. Neither was there any such apparent peril in waiting for a tug as to impose on the Nicol the hazard and the delay of attempting to take her tow inside without the aid of a harbor tug. In rough weather the evidence shows that the custom is for a steamer having a tow to take the tow just inside the breakwater, where it is taken by tugs lying there ready to aid by picking the tow up as soon as the line is cast off. Upon approaching the opening it was seen that there was no tug inside, ready to take the barge. Under the circumstances it was no fault to turn out in the lake to wait for a tug. As we shall hereafter see, the Nicol and her tow were a second time placed in as good position to go in as they had when they first approached the opening, and it is difficult to see how the turning out to wait for a tug was the proximate cause of the subsequent mishap.

2. Upon a careful scrutiny of the evidence we are of opinion that

the weight of the evidence is that the Wahnapiatae did get straightened out in the wake of the Nicol when the latter was a second time headed for the entrance, and that after thus getting substantially in line behind the steamer, and headed for the entrance, she took a sudden, heavy sheer, which threw her nearly into a right angle with the direction in which the Nicol was steering.

Upon this point there is a sharp conflict in the testimony. The master and five of the crew of the barge deny that the Wahnapiatae had completed the turn, and testify that she never did get into line behind the Nicol after the latter went out into the lake. They deny that she took any sheer after the Nicol was headed the second time for the entrance, and say that the barge was slowly coming around under a port helm, and that if the circle in which the Nicol made the turn had been larger she would have straightened out, and followed the Nicol through the opening. They agree in saying that when the Nicol cast off the towline she was swinging into line, and agree in the opinion that if the Nicol had continued to pull both vessels would have gone safely through the entrance. On the other hand the master and four of the crew of the Nicol unite in saying that the Wahnapiatae did make the turn, and did get into line behind the Nicol, and followed, headed for the opening, for several minutes, and that when within about one-fourth of a mile from the opening she took a strong sheer to the port side of the Nicol, and headed directly for the east breakwater. The master and crew of the Nicol are corroborated in this statement of fact by the master and engineer of the tug Alva B, which was following the Wahnapiatae a little on the starboard quarter. These witnesses were disinterested, and in good position to know the position of the barge. Further corroboration is found in the evidence of Capt. Dwyer, master of a harbor tug lying inside the harbor in a place where he could see the tow as it approached the harbor, and in the evidence of Russel T. Rumsey, a customs officer, who was in the river custom office, observing the tow through a marine glass, and also in the evidence of Thomas Shay, one of the life-saving crew, on watch in the tower at the life-saving station. From the position of the side lights on the Nicol and on the Wahnapiatae, these witnesses concur, substantially, in saying that the barge did get into the wake of the steamer, and did follow, headed for the opening, until she took a sheer which threw her out of line.

The Wahnapiatae was a barge 280 feet in length and 51 feet in beam. She is described as having the bow of a schooner and the stern of a scow. She had but one mast, rigged with a jib sail, which was not in use that night. We are better prepared to credit the testimony as to the sheer by the reason of the well-established character of this barge as a bad steerer in shallow water, and her habit of taking such sheers in a most unaccountable way. Besides this, her steering power was affected by the fact that she was leaking badly, and, at the time of the alleged sheer, had not less than 16 inches of water in her hold.

Under this evidence it is immaterial to consider whether the circle made by the Nicol in coming around was large or small. If the

Wahnapiatae had made the swing and had straightened out behind the Nicol, the turn was completed, and the subsequent sheer cannot be attributed to the circle described. When the Wahnapiatae took this sheer, the Nicol was headed for the entrance, and within about three boat lengths of the opening. The effect of the sheer was to throw the barge into such a position as to head her directly onto the east breakwater. The obvious thing for the master of the Nicol to do was to break the sheer if he could. He at once gave the signal to work his engines strong, and ported his wheel so as to head upon the west breakwater. After pulling strong for about two minutes, and until the propeller was within about a boat's length of the breakwater, the master of the Nicol—seeing that the sheer was unbroken, and that to continue to pull would inevitably result in pulling the tow onto the east breakwater—sounded one long whistle, as a signal to let the towline go. This was done. The master of the barge put down his anchor, and the tug made several ineffectual efforts to get a line to the barge. All was of no avail. The barge dragged her anchor, and went to pieces against the west breakwater, having drifted with the wind and sea across the entrance. After the towline was cast off, it was not possible for the Nicol to do anything to avoid the catastrophe. The tug was in every way better able to assist, and yet it was unable to do anything.

This sheer, under the circumstances detailed, produced a most dangerous and alarming emergency. It was an emergency without the fault of the Nicol. Three courses were open to her when it occurred:

- (1) To put on steam, and endeavor to break the sheer and go through the opening.

- (2) To turn out again into the lake.

- (3) To hold on to the line, though the sheer was unbroken, and take the consequences.

To turn out again into the lake, after the sheer, seems, on the evidence, to have been almost impossible. The vessels were too close in for the turn, in view of the wind and choppy sea.

To put on steam and break the sheer was apparently the most favorable course. This failed. To pull the Wahnapiatae longer, would, on the evidence, have been reckless. She was from two to six points off the port quarter of the Nicol, and headed for about the center of the east breakwater.

The Nicol was already within a boat's length of the end of the west breakwater. To go on was apparent destruction for the tow, to cast off the line gave the barge its only chance. These chances were:

- (1) That her anchor might hold.

- (2) That she might drift in such a way as to escape contact with the breakwater.

- (3) That the very powerful tug right behind her might get a line to her, and pull her out.

It seems to us that under the circumstances the Nicol took a course for which she is not to be condemned. But, if it be admitted that some other course might have resulted better, yet the emergency

was such that we cannot condemn the order given as a fault. The judgment of the master of the Nicol, after a strenuous effort, was that he could not break the sheer, and that to pull longer was to pull the barge onto the breakwater. His further judgment was that the emergency required that the line should be cast off. If this was error,—which, on the weight of the evidence, we do not believe,—it was at least not a fault. In this judgment the master of the Wahnapiatae seemed to concur at the time, for it is clearly shown that on the day following the catastrophe he expressed the opinion that Capt. Stewart was not in fault.

The decree must accordingly be affirmed.

THE MICHIGAN.

NEALLY et al. v. THE MICHIGAN.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 83.

1. COLLISION BETWEEN STEAM AND SAILING VESSELS—NEGLIGENCE—EVIDENCE.

In a libel by the owners of a schooner against a steamer for collision near Cape Henry, in a fog, at 3:35 a. m., it appeared that the schooner was on the starboard tack; that the weather was calm, and she was making but little headway; and that she was struck by the steamer at almost right angles, on the port side, a little forward of the mizzen mast, and sunk. Six of her crew testified positively that her fog horn was diligently sounded at intervals of not more than two minutes, one blast at a time, as required by law, for 20 minutes or more before collision. Her lights were all in place, and burning brightly, and she kept her course. All the seamen on the steamer testified that they did not hear the fog horn, except just before the collision, and that the steamer's fog whistle was constantly blown, and could be heard for several miles; some of them, that it was so loud as to "drown all other noises" while it was sounding. *Held*, that the schooner was not in fault.

2. SAME.

The fact that the testimony of the schooner's lookout, given on a previous examination, about six weeks after the collision, showed that he then testified that he only blew the fog horn once before he saw the steamer coming down on the schooner, was insufficient to discredit the positive evidence of himself and the other witnesses for libelants on the trial that the fog horn was continuously sounded, where such witness gave a reasonable explanation of his former contradictory testimony.

3. SAME.

The evidence showed that the steamer was seen by the schooner's crew 20 minutes before the collision; that the steamer's lookout did not see the schooner; that the former then plunged into a fog bank at a speed of five or six miles an hour; that on emerging from it she was making that speed, and close upon the schooner; and that the reversal of her engines failed to check her headway. *Held*, that the steamer was in fault.

4. SAME.

It appeared that the steamer's main deck was 20 feet above the water level; that her captain's bridge was 35 or 40 feet above the water; that her lookout bridge was 8 feet above deck, nearly 30 feet above water, and set nearly 40 feet to the rear of the high-pointed stem of the vessel; and that it was impossible for a man standing on the lookout bridge to

keep a proper lookout at night, in hazy weather, for the vessels lying low on the water, which navigate the approaches to the Virginia capes. *Held*, that the steamer was in fault in not having a lookout in her bow, close up to her stem.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by B. Frank Neally and others, owners of the schooner *John Holland*, against the steamship *Michigan*, for collision. There was a judgment for libelee (63 Fed. 295), and libelants appeal. Reversed.

On the 16th June, 1893, at about 3:35 in the morning, the four-masted schooner *John Holland* and the British steamer *Michigan* were in collision, about nine miles eastward of Cape Henry, Va., in the Atlantic ocean. The *Holland* was 205 feet long over all, 40 feet beam, and about 18 feet deep. She was four-masted, and nearly new. At the time of collision, she was bound from Lambert's point (Norfolk) to Providence, R. I., with coal. Her main deck was out of water about 3 feet at the main hatch, and her bow about 10 feet. Her lights were hung 20 feet above the rail. She was of medium sheer. The *Michigan* was 370 feet long, 41 feet beam, and 29 feet depth of hold. She had four masts. She had two bridges on deck. The lookout bridge was 35 feet back from her stem, and 6 feet above the deck. The main bridge was about the center of the ship, 170 feet to the rear of the stem, and 16 feet above deck. It was about 35 feet above the water, as the steamer was then loaded; the deck itself being about 20 feet above the water. The masthead light of the steamer was 90 feet above the water, and the green light 30 feet. The *Michigan* was bound from Baltimore to London, England, with a full cargo, chiefly cattle. Her highest speed on a voyage is about 11½ knots an hour. Just before the collision she was running full half speed. The collision occurred by the *Michigan* running into the port side of the schooner, almost at right angles, striking her a little forward of the mizzen mast. The schooner sank in 40 or 45 minutes after receiving the blow. She had on a cargo of 1,702 tons of coal, and vessel and cargo were a total loss.

The weather on the morning of the collision was good. There was fog to the northward, which obscured Cape Charles light, but the light of Cape Henry does not seem to have been hidden from the schooner at any time before the collision. Fogs about the capes of Virginia are somewhat peculiar in the summer season. According to the testimony of a very intelligent pilot—J. Richard Thompson—produced by appellee, they usually rise after midnight; are hazy first, with easterly winds; afterwards becoming more or less dense, and rarely rising more than 100 feet, above which height it is clear. As a rule, they are denser towards the water surface. They do not spread generally over the water, but form in separate clouds or banks, leaving the atmosphere more or less clear in greater or less intervals between them. Such was the character of the weather and the fogs on the night in which the collision under examination happened. The schooner *John Holland* came to anchor off Cape Henry, 8 miles east, about 10 o'clock of the night of collision, the weather being still. By 2 o'clock a very light wind from the east sprang up, and she got under way. She was put on the starboard tack, heading northeast by north, and remained so until the collision. The wind slackened soon after she got under way, so that she quite or very nearly lost her steerage way. On first starting she made only one mile and a half an hour over the water, and for some time before the collision was making very little headway at all.

Stevens, master, testifies that about 3 o'clock Cape Henry appeared to look dim, and he told the second mate to go forward, and get the fog horn out, and give it to the man on the lookout, and, if it grew foggy, to blow it one blast at a time. He then went down to his cabin, and heard it blowing a number of times as soon as he got in the cabin, and for 15 to 20 minutes afterwards heard it blowing regularly, one blast every 1 or 1½ minutes. The

fog horn of the schooner was a mechanical one, and could be heard for two or three miles. The rule of law governing the Holland on this occasion, as to her fog horn,—she being on the starboard tack,—was this: "A sailing ship under way shall make with her fog horn at intervals of not more than two minutes, when on the starboard tack, one blast. She shall be supplied with an efficient fog horn, to be sounded by bellows or other mechanical means."

As to the blowing of the fog horn, Pommer, the wheelsman on duty, testifies that she began to blow about a quarter to 3, and continued blowing at the regular intervals until the collision, and that from the time he saw the white light of the Michigan to the collision was 20 minutes.

Kiel, the lookout of the Holland, testifies that shortly after he came on lookout the second officer gave him a fog horn, and the weather shut in a little hazy. As soon as it got hazy, which was a little before 3 o'clock, he began to blow one blast, and kept on blowing one blast. He saw the white light of the steamer about 3:05, and from the time of seeing her until the collision he was blowing the fog horn signal. Kiel had stated in a previous deposition that he blew one blast, in a manner to justify the inference that he had blown but one blast before the collision. In his testimony afterwards given he corrects this inference in the following extract taken from the record (page 46), which occurs after a recital of his earlier testimony: "That is some testimony that you gave before Mr. Rogers, in Boston. Do you wish that to be understood as the correct testimony you gave? A. No. You said I blew one blast. I blew one blast at a time. I started to blow the foghorn first once, when it was passed up to me, to try if it was in good order; and I stopped about for five minutes; and the haze came around the ship; and then I blew one blast at a time for about twenty minutes; and finally, when I saw that the steamer was going afoul of us, I sounded one continuous blast all the time to give them warning." He adds that it was about 25 minutes from the time he commenced to blow the second time until the collision.

Olsen, another witness from the Holland's crew, who was not on duty, and slept near where Kiel, the lookout, was blowing the horn, says: There was such a noise around the deck, and the big horn blowing, that he could not go to sleep. It was sounding one blast at a time, somewhere about 20 minutes before the collision. It made a loud noise. It was in the forecabin head. He finally went on deck to see what was up, hearing howling around the deck, and the fog horn blowing.

Hultman, the second officer of the schooner, says in his testimony: He got the fog horn out, and gave it to the man on the lookout, and he blew it one blast to try it. Five or 10 minutes afterwards, the lookout began to blow a second time, one blast at a time, and continued to blow for 20 to 25 minutes up to the time of collision. He could see the masthead light of the steamer all along from the time he saw her green light, at 3 o'clock, until the collision. At 3 it was clear, but began to grow foggy; and at the time of collision it was misty, not foggy. Fearing that the steamer would not see his side lights, the schooner being very long, he showed a white light in the aft rigging at 3:30, until the collision occurred. The fog horn was sounded regularly during that period.

Schmidt, one of the schooner's crew, not on duty, who was in bed about midships at the time, says: He got out once. Could not tell the time. Heard the fog horn blow. Went below again, and turned in. Heard the fog horn blow four or five times, and went off to sleep again.

Stevens, master of the Holland, testifies, among other things: After giving orders through the second officer to have the fog horn blown, went down to his cabin. Heard the blowing a number of times as soon as he got into the cabin. About 15 or 20 minutes after he went below, he heard the horn blowing very regularly. He had come on deck a while before the collision, and heard the fog signals blown two or three or four times, one blast at a time. The lookout began afterwards to blow blasts one right after another. This he forbade, and was told by the lookout that he blew the long blast because the steamer was showing her red light and coming right into the schooner.

Capt. Layland, master of the Michigan, testified, among other things, as follows: His steamer had on a full cargo, but was not quite down to her lowest mark in the water, and drew 23 feet 8 inches forward and 24 feet 6 aft. Left Baltimore about noon of the 15th June, and after midnight discharged pilot four to five miles off eastward of Cape Henry. Then gave the order to go ahead, and at 3:05 put her at full speed. Had a lookout on the forward bridge, the captain himself and the second officer being on the captain's bridge, and a man was at the wheel. There was no lookout on the deck in the stem of the ship. No sail was set. Steered E. S. E. until Cape Henry bore W., after which the course was changed to E. $\frac{1}{4}$ S., at about 3:20. The German steamer Dresden started out about the same time, bound to Bremen, and was a mile behind. Two or three minutes afterwards, noticed that Cape Henry light was obscured, and that his side lights had a little haze around them. Was going then 10 knots an hour, and he put the engines at half speed, and blew the fog whistle. Heard the German steamer's whistle astern. Heard no other fog signals. Half speed was four to five knots an hour. Shortly after slackening speed he saw a light forward quarter to half a point on his starboard bow. By the use of glasses, saw it was a red light. Gave the order full speed astern and blew whistle four times. Heard one blast of their fog horn when 30 to 50 feet off, and heard their men shouting just before the collision. The schooner sank about 40 to 45 minutes after the collision. In the interval the crew of the schooner all got aboard the steamer. During that period Capt Stevens, master of the schooner, came twice upon the captain's bridge to confer. On the last occasion, the master of the steamer says, "he came up the ladder, and said to me, 'Captain, your steamer is drifting onto the schooner,' and I told him to mind his own business and to go down." The bridge of the steamer was 170 feet from the bow, and the lookout bridge 120 to 130 feet forward of that. The steamer's fog whistle blows so loud that it was impossible to hear another fog horn sounding ahead at the same time that it was sounding.

Watkins, the mate on duty on the Michigan on that morning, testifies, among other things: He put the steamer on full speed about 5 minutes past 3, and kept her so until about 25 minutes past 3, when it came on foggy, when he put down her speed, and started the steam whistle. The fog was a low-lying fog, such as prevails in the early morning. The steamer kept ahead at half speed, blowing her steam whistle at intervals of a minute to a minute and a half. At 3:35 saw a red light on her starboard bow, 400 feet off. The master gave orders to put helm hard a-port, and reverse full speed astern. Gave four blasts in quick succession. The next thing they were into him; they had struck him. It was a minute to a minute and a half after seeing the red light of the schooner that they collided with her. Both Capt. Layland and this mate, Watkins, aver that Capt. Stevens, in answer to their question why he was not blowing his fog horn, said that it was not necessary. Both say they heard the fog horns of the Dresden before and about the time of the collision. The collision was about at right angles with the schooner. The propeller was a right-hand screw, and the tendency of putting helm to port was to throw the ship's head to starboard. If the engine had been reversed a half minute before it was, says Watkins, there would have been no collision. On other points of inquiry Watkins said: From 3 to 3:05 it was clear weather. The steamer went full speed ahead. There was no need of sounding a fog signal. The steamer sounded none. It was clear for two miles around.

Wood, lookout on the steamer, testified, among other things: Thick fog came on shortly after 3 o'clock. Twenty minutes afterwards saw a vessel a ship's length off on starboard side, in plain sail. Heard no signal or fog horn from her up to the time of collision. Was on the lookout bridge of steamer from midnight until the collision. Steamer's powerful fog horn was sounded up to time of collision, one blast every two minutes. Collision occurred at about 3:25. He reported no lights from 3 o'clock to time of collision. He saw no red light on the schooner; even on collision he saw no light. He heard a fog horn from schooner about a minute before the collision, but before hearing it she was visible, and at the same time heard voices of those on deck of the schooner. He made no reports at all to any one from 3 o'clock

to collision, as there was nothing visible to report. In that time he saw no lights of vessels at anchor or any other lights.

Capt. Supper, master of the German steamer Dresden, testified in part as follows: After putting off his pilot outside of the Virginia capes, saw a steamer about a mile ahead of him, and followed her out to sea. She went into a fog bank, and he afterwards heard her whistle four times. When he got abreast of the steamer he saw a four-masted schooner right ahead of her, close to her. He thinks it was the duty of the schooner, at the time he saw her, to make as much noise as possible. It was calm, and she could do nothing else. The wind was so light that she could not sail much, or make much headway. She could not do anything else. The wind was so light, so she did not make any headway. Witness said that when he had passed the steamer, and when he saw the schooner, both the Dresden and the Michigan had passed through the fog bank, so that, though it was not quite clear, yet there was a little light, so that he could see the steamer and schooner. This was one of witnesses for appellee.

Oesselmann, chief officer of the Dresden, said, among other things: After testifying to having followed the Michigan into the fog bank after 3 o'clock in the morning, he says he heard the whistle blow from that steamer, and afterwards four short whistles, when the Dresden was nearly abreast of her. Then, it cleared off, and he saw the steamer close together with the schooner. The preceding dense fog had lasted about 10 minutes, and the Dresden had been in it about that time, in which she moved about a mile. Mechanical fog horns can be heard, in his opinion, about a mile, and should be so heard by law. This witness says that besides the fog bank spoken of he entered another before 4 o'clock, and that between the two banks he had clear weather, during which he saw these two vessels, the steamer and the schooner, abreast of him. The distance between the two fog banks must have been a mile. The schooner must have been still in the water. She could not make headway. The weather, in the space between the two fog banks, was not quite clear. He should call it hazy weather. This witness was examined in behalf of the appellee.

Eugene P. Carver and Robert H. Smith, for appellants.

J. Wilson Leakin and Harrington Putnam, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge (after stating the facts). The rules of navigation bearing upon the case under consideration are as follows:

"In fogs, whether by day or night: A steamship under way shall make with her steam whistle, at intervals of not more than two minutes, a prolonged blast. A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack, one blast; when on the port tack, two blasts in succession. Every ship shall in a fog go at a moderate speed. In general, if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary. Every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course."

From the preceding statement of the material portions of the evidence given in this case, and from the foregoing rules of navigation, it is clear that the principal question to be solved by this court is whether the men in charge of the schooner Holland at the time she was run into and sunk by the steamer Michigan exercised a due diligence in blowing the schooner's fog horn before the collision

happened. Although there was no fog when the collision did occur, and it was not actually incumbent upon the schooner to blow her horn just at that time, yet the question will be considered on the hypothesis that the schooner was herself, at the time of collision, enveloped in a fog bank. If she was, then it was certainly her duty to sound her fog horn diligently, at intervals of not more than two minutes, one blast at a time, during the period that the fog was upon her. The testimony of all members of her crew who could have any knowledge on the subject is full, positive, consistent, and emphatic in the affirmative of that question. The court is bound to credit the testimony of unimpeached witnesses as respectable and intelligent as those of the schooner appear to be. The case of the Michigan depends on breaking this testimony down. This has been attempted by two means: First, the seamen who were on board the steamer all depose that they did not hear the fog horn of the schooner except just before the moment of collision; and they all aver at the same time that the steamer's fog whistle was constantly blown, and was so exceptionally loud in tone that it could be heard for a distance of several miles. Some of them say that this whistle was so loud and shrill as to "drown all other" noises while it was sounding. We have little doubt that within the range of the sound of such a whistle those on board the steamer failed to hear any sounds from the schooner. The fog horn of the schooner, which was diligently blown, must have been drowned by the steamer's own overpowering whistle. It may be said generally, however, of negative evidence of this sort, that very little weight is ever given to it when contradicted by positive proof from credible witnesses in position to know the facts. Not to hear a sound, not to see an object, does not disprove its existence.

We come, therefore, to the other means by which the appellee assails the testimony given by the schooner's crew. As said before, all her witnesses, six in number, testify positively that her fog horn was diligently blown for as much as 20 minutes before the collision. A preliminary examination of three of these witnesses—Kiel, the lookout; Hultman, the deck officer; and Pommer, the helmsman—had been taken in the city of Boston six weeks after the collision. In these depositions Hultman and Pommer testified substantially as they did six months afterwards in court in Baltimore. But on the part of the appellee it is maintained that the first testimony of Kiel, taken in Boston, not only contradicts that given by himself afterwards in court, but discredits that given by other witnesses of the schooner on the point on which Kiel is alleged to contradict himself; that is to say, on the blowing of the schooner's fog horn. This would be laying down very hard lines for the libelants in the case at bar. All their witnesses, if credited, prove a proper diligence in respect to the fog horn. Their character and credibility are not impeached. They must be esteemed to be as worthy of credit as any other witnesses examined in the cause. They seemed to be exceptionally intelligent. But yet it is contended by counsel for appellee that their testimony must be discredited because one of their number, whose testimony in court

accorded with their own, had given different testimony in a previous examination. The mere statement of such a contention shows it to be of questionable soundness. But, be this as it may, it is denied on the part of the appellants that there is any material discrepancy between Kiel's testimony given in Boston and that which he afterwards gave in court. The deposition of this witness taken in Boston was in substance as follows; his own language being given as far as practicable. He had said that the weather had become hazy about 3 o'clock:

"I began blowing just when a little haze set in, and the haze just lasted for about two minutes, and everything cleared away again; it was clear weather."

He added that he did not keep on blowing the fog horn after that. After he saw the light of the steamer, he continues:

"I immediately started to blow the fog-horn, which I had still on the fore-castle head, and made a noise,—an alarm. Gave him a warning that he was going foul of us that way. It seems he didn't pay any attention to it."

Kiel went on to say that he had no conversation at Norfolk with any one in which he said that, because the weather was clear for half an hour before the collision, he did not sound his fog horn. He said further:

"It wasn't quite foggy. I shouldn't think it was necessary to blow the fog horn; but we saw several vessels laying round us, and to anchor. I saw one three-masted schooner ahead of us, and, in case the fog should keep on, I had it handy. It was given up to me to have it handy. Int. You sounded one blast, then, on the fog horn? A. Yes, sir; I sounded one blast. Int. Then it cleared off? A. Then it cleared off. Int. You didn't sound it again? A. No, sir. Int. The next time you sounded it you saw that the Michigan was coming down on you? A. Yes, sir. Int. And then the collision occurred a very few minutes after that? A. Yes, sir."

In his testimony given afterwards in court at Baltimore he says, on being asked what he meant by "one blast," as above:

"When the second mate gave me the fog horn, I tried it to see if it was in good order, and it was clear then, and I let it stand for about five minutes, and the haze came on, and I commenced blowing one blast. * * * When you are on the starboard tack, you are supposed to blow one blast at intervals, and so I did. Q. How many times do you think it was from the time you commenced blowing the second time until the collision; how long do you think it was? A. About twenty-five minutes. Q. How many times do you think you blew that horn in that interval? A. About twenty times."

A candid examination of Kiel's testimony shows that it is in substantial accord with that of the other witnesses who testified in behalf of the schooner. We think it is obvious from the testimony of the schooner's crew that they believed for some time after the cause of action in this case arose that the real question which would be tried would be as to whether the schooner's lights were up and were burning brightly at the time of the collision. They seem to have had no thought that the case would turn upon the question of her fog horn being blown. Entertaining this idea, it could hardly have entered their heads to meet and concert together what their evidence in regard to the fog horn should be. It is certain that they had not conspired together on this subject when the testimony of three of them was taken in Boston in July, shortly after the col-

lision. Yet two of the witnesses, Hultman and Pommer, testified there that the fog horn was blown all the time from when the steamer was first seen, which was about 20 or 25 minutes before the collision, up to the moment of the accident. The idea that the real question at issue was in regard to the lights of his vessel evidently possessed Kiel when he was under examination at Boston. Feeling that the matter of the fog horn was a merely incidental question, he seemed to testify thoughtlessly and confusedly on that subject, and to be lacking in precision of statement. He was liable, therefore, to be easily misled by the leading questions put to him by the astute counsel of the appellee on the subject of the fog horn. This impression of the schooner's crew that the case would be tried upon the condition of her lights grew out of the fact—which seems to be established by the evidence—that there was no real fog where the schooner was before and at the time of collision, but only a haze. The testimony of the steamer's own witnesses establishes that fact. The testimony of Supmer, master, and of Oesselmann, deck officer, of the Dresden, is clear and positive on that point. Oesselmann proves that the schooner was in a hazy space between two heavy fog banks, and that the Michigan had passed through one of these fog banks into a comparatively clear space when she encountered the Holland. We think the consistent and persistent testimony of all the crew of the schooner who were examined, to the effect that there was no fog where the schooner was, but only a haze, was true, and that this thoroughly established fact is of special significance and importance in this case. Every witness examined on the part of the schooner testifies that her fog horn was persistently blown throughout the period required by law, in the manner required by law. She must, therefore, be regarded by the court as without fault in that particular. Her lights were all in place, and burning brightly. She kept her course on the approach of the steamer. We think, therefore, that she was without fault in the affair.

The case of the Michigan was different. Although 20 minutes before the collision she was seen by two or more of the crew of the schooner, yet her own lookout did not see the schooner. She then plunged into a fog bank at a speed of five to six miles an hour. On emerging from it she was close upon the schooner, making that speed. Five to six miles an hour is too great a speed to move with in a fog over waters always as full of vessels of every kind as the waters at the entrance of the Virginia capes into Chesapeake bay, Hampton Roads, and James and Elizabeth rivers. The cause of this accident was the fact that the reversal of the Michigan's engines failed to check the headway of the steamer, and to prevent her from plunging into the side of the schooner. Five to six miles an hour is a questionable speed in a fog everywhere. The event here demonstrates that it was a reprehensible speed in the waters off Cape Henry, and it was gross fault on the part of this steamer. This speed was the cause of this collision.

The steamer was also guilty of a very grave incidental fault, but for which the accident would not have occurred. A very large

portion of the carrying trade of our eastern seaboard is done by the modern three and four masted schooners. They have great capacity for freight in the hull, and lie low upon the water. Their decks are not more than 5 to 8 feet above the surface. Vessels of this class traverse all the waters of our Atlantic seaboard, night and day. The Michigan was a vessel of different build. Her main deck was 20 feet above the water level. Her captain's bridge was 35 to 40 feet above the water. Her lookout bridge was 8 feet above deck, and nearly 30 feet above the water. This latter bridge was set nearly 40 feet to the rear of the high-pointed stem of the vessel. It was impossible for a man standing 40 feet back of the stem, on this lookout bridge, to keep a proper lookout, especially in hazy weather, at night, for the large class of vessels lying low on the water, which navigate the approaches to the Virginia capes. It was a flagrant fault in the Michigan that on the occasion of this collision she had no lookout in her bow, close up to her stem, in position to look over the point of the vessel on each side, and to discover in good time vessels that might be ahead of her in her course. The lookout of the Michigan seems from his own evidence to have been of no service on the occasion. He says that he reported no light from 3 o'clock to the time of the collision. He saw no red light on the schooner. Even at the collision he saw no light. It seems that the lookout of the steamer could see nothing, and the rest of the crew could hear nothing, which could have been of use in avoiding the accident. Masters of ships are not at liberty to adhere to machine rules in matters as important as the duties of lookouts. On the broad ocean, under clear skies, it may be sufficient for a lookout to be 30 to 40 feet back of the stem of a ship, and 30 feet in the air from the water; but in fogs, and in emergent crises, when it is necessary to be alert, and to meet every unusual exigency, it is the duty of a lookout to be at the place on the ship where he can best see what is in her path, and to be in the best position to discover and report all that is to be seen and all that should be reported. On the occasion under consideration the lookout was not where he could see the vessel ahead of him, and, mainly on that account, was inefficient, useless, and neglectful. The Michigan was in fault in not having had a competent lookout in her bow, close to her stem, diligent in duty, alert to see what was before him, and prompt in reporting in time the position of the Holland.

We are of the opinion that the court below erred in the particulars set forth in the appellants' assignment of errors; that its decree must be reversed; that the Michigan was in fault as to her speed and her lookout; and that a decree should go against her for the damages sustained by the owner of the schooner from the collision.

THE IRON CHIEF.

WINEMAN v. THE IRON CHIEF.

(Circuit Court of Appeals, Sixth Circuit. May 21, 1894.)

No. 86.

1. COLLISION—STEAM AND SAIL — FAILURE OF STEAMER TO KEEP OUT OF THE WAY.

A steamer with a barge in tow, bound up the river Ste. Marie, to Lake Superior, when near the upper end of the river, saw a schooner in the bay, headed towards the entrance of the channel, beating northeasterly under a strong northwesterly wind, in such a position that, to enter the channel, she must make a sharp turn, and might need a good deal of sea room before she could get straightened down. The steamer was at a safe distance, with ample opportunity to prepare for passing. Her master, being uncertain whether the schooner intended to enter the channel or go up the lake, stopped, but, on seeing the schooner turning into the channel, went ahead with full steam, porting a little, into the jaws of the entrance, on the north side of it, reaching there just as the schooner was swinging into the opening. *Held*, that this was not a compliance with the rule requiring him to keep out of the way of the sailing vessel, and the steamer was liable for a collision between her and the schooner before the latter had completed her swing. 53 Fed. 507, reversed.

2. SAME—RIGHT TO NAVIGATE CHANNEL.

The schooner might have gone to the southward of the channel, through an open spread of shallower water, deep enough for her, through which vessels occasionally went, and thereby would have avoided risk of collision. *Held*, that she was not in fault in taking the well-known navigated channel. 53 Fed. 507, reversed.

3. SAME—CHANGE OF COURSE IN EXTREMIS.

The schooner, swinging into the channel with her helm hard a-port, changed it to starboard, almost at the instant of collision, for the purpose of easing the blow. *Held*, that this was not a fault. 53 Fed. 507, reversed.

4. SAME—TUG AND TOW.

After the collision between the schooner and the steamer, the barge in tow of the latter, on a line 600 feet long, not having been released in time to prevent her colliding with the schooner, struck the schooner a heavy blow. *Held*, that the steamer was liable for the damage therefrom.

5. ADMIRALTY—APPEAL—REHEARING.

A rehearing of an appeal in admiralty should not be granted on the ground of newly-discovered evidence of a fact not known to the petitioner, but which was known to the witnesses of the opposite party, and not disclosed by them, where no sufficient reason is shown why it was not ascertained and proved while the case was regularly open.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This was a libel by Henry Wineman, Jr., against the steamer the Iron Chief (the Detroit Transportation Company, claimant), for damages by collision to libellant's schooner the J. F. Card. The district court dismissed the libel. 53 Fed. 507. Libellant appealed.

The libel in this case was prosecuted by the owner of the schooner J. F. Card, to recover for the damages sustained by that vessel from a collision with the respondent, the Iron Chief, and another collision, immediately following, with the barge Iron Cliff, in the steamer's tow; and the allegation of the libel substantially was that the collision was brought on by the fault and negligence of the steamer in not keeping out of the way. The answer denied that there was any fault on the part of the steamer, and charged that the fault was wholly with the Card, and chiefly in that she did not keep on the course she

had adopted prior to the collision, but suddenly, when the vessels were about to meet, ceased to pay off on her swinging course, and forged straight on upon the steamer's side, and thereby produced the collision complained of.

The evidence showed that, upon the coming together of the schooner and the steamer, the head booms, stem, and rails of the former were carried away, and several of her stanchions, her bulwarks, stringers, and deck beams broken. Upon the collision of the vessels the fore end of the schooner was carried about in the direction of the movement of the steamer, and, as she lay drifting in that situation, she was again struck on the starboard bow by the barge in tow of the steamer, and further damage was inflicted.

The accident happened between the buoys marking the channel at the upper end of the river Ste. Marie, where the waters descending from Lake Superior through Waiska bay begin to contract in the channel of the river. The Iron Chief was just steaming out of the channel into the bay, with the Iron Cliff in tow, on a line of about 600 feet. The Card was bound down from Lake Superior, and on the morning of the collision had been tacking about on sharp courses across the bay in search of a tug, and, not finding any, started to go down the river alone. All three vessels were loaded. The Card was 137 feet long; the other vessels were each 228 feet long; and the channel at the place of their collision was about 600 feet wide.

Upon the hearing in the court below, the district judge, being of opinion that the schooner was alone to blame for the collision, dismissed the libel. From that decree the libellant appeals.

Henry C. Wisner, for appellant.

John C. Shaw and Herbert A. Wright, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case generally as above, delivered the opinion of the court.

By the twentieth of the sailing rules prescribed by section 4233 of the Revised Statutes (article 17 of the revised international regulations; Act March 3, 1885), it is provided that, when a steamer meets a sailing vessel under circumstances where a collision is to be guarded against, the steamer is bound to keep out of the way of the sailing vessel; and when it is shown that she has not done so, and a collision has occurred, a presumption arises that the steamer was at fault. *The Oregon v. Rocca*, 18 How. 570; *Steamship Co. v. Rumball*, 21 How. 372; *The Fannie*, 11 Wall. 238; *The Carroll*, 8 Wall. 304; *The Pennland*, 23 Fed. 551. That presumption applies to the present case, and fastens the liability for the injury which occurred upon the steamer, unless it is shown that the accident happened, not through the disregard of the rule by the steamer, but in consequence of the violation by the schooner of the duty which devolved on her in the situation in which the respective vessels were, or by inevitable accident. The learned district judge held that the burden of proof imposed upon the claimants by the operation of the above-mentioned rule was sustained, and came to the conclusion, upon the testimony, that the steamer was not chargeable with fault contributing to the collision, which, as he thought, was solely due to the negligence and mismanagement of the schooner.

Under some circumstances, we would appreciate more fully the disadvantage we are under from being unable to see the witnesses and attend to their manner of delivering testimony; but in the present case there are certain leading facts about which there is no

serious dispute, and from which we think controlling inferences ought justly to be drawn.

We will first consider the conduct of the steamer. When her captain was first required to pay attention to the schooner, the steamer was moving up the channel in the middle or a little to the north side, a safe distance away, with ample opportunity to make the necessary preparation for passing. The weather was clear, and it was broad daylight. The schooner was over his port bow, well down in Waiska bay, bearing northeasterly under a strong northwesterly wind, and headed towards the entrance of the channel between the buoys, directly in front of him. He saw that she was "loaded deep," as he says, and he saw that she was so low down to the southeast in the bay that, as she came up to enter the channel, she must accomplish a sharp turn, and might need a good deal of sea room before she could make the turn and get straightened down, and he must have recognized her right to come down in such part of the channel as she found necessary. He was by his own account in this situation when he checked the speed of his engine, and then ordered it stopped, to enable him to see what the schooner was "intending to do," and to determine his own course,—a very proper precaution. Then, on seeing the schooner making preparations for turning into the channel, by taking down her mainsail and beginning to pay off from her course on a port wheel, instead of stopping or going slowly, as his situation permitted, until the schooner had come in and had taken her course down, he rang up the engine to put on full steam, ported a little, and moved up into the jaws of the entrance on the north side of the middle, reaching there just at the moment when the schooner was performing the most difficult part of her movement. We are of opinion that this was not a compliance with the rule which required him to keep out of the way of the sailing vessel. It was a case where, as it seems to us, he was bound to the utmost circumspection.

The measure of the obligation of a steamer when such danger of meeting exists is thus stated by the supreme court in *The Carroll*, 8 Wall. 302-306. Having referred to the rules prescribed for such a case, it is said:

"They require, when a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, that the steamship, from the moment the sailing vessel is seen, shall with the utmost diligence watch her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact."

And in the case of *The Falcon*, 19 Wall. 75, the court again repeat the rule in the following language:

"It was the duty of the steamer to see the schooner as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so to govern herself as to guard against peril to either vessel." "The general tendency of the authorities is to enforce the duty of great caution and unremitting vigilance on the part of those engaged in the navigation of vessels propelled by steam." *Ward v. Ogdensburgh*, Newb. 139, 154, 5 McLean, 622, Fed. Cas. No. 17,158.

Evidence was offered to show that the captain of the *Iron Chief* was uncertain about the intentions of the *Card* when he first saw

her on her last course across the bay, his judgment rather inclining to the conclusion that she was going up the bay into Lake Superior; and it seems to have been supposed that this uncertainty might have some bearing upon the question whether he exercised due precaution in his movements. We cannot see in the evidence any good reason for the impression which he says he had. But, as he acknowledges that he was in doubt, a situation existed by his own confession into which he could not blindly run. But this is of little moment. It is perfectly clear that he was fully advised of the schooner's purpose to come down the channel while he yet had time to regulate his own course so that she could pass in safety. The statement in his testimony that, if he had remained where he was, a collision must have occurred, appears to us to have no foundation. By his own account, he was then some 1,200 feet below the entrance of the channel, and there was full opportunity for the schooner to have resumed her course before meeting him. We are therefore constrained to a different conclusion from that of the district judge, and hold that the steamer was in fault.

In respect to the conduct of the Card, we are unable to find sufficient ground for holding her blamable. The steamer being convicted of a plain violation of the legal rule, and thereby bringing on the collision, her countercharge that the other party was guilty of misconduct contributing to it ought to be clearly made out.

The principal grounds upon which the conduct of the schooner is censured by the court below and by the counsel at the hearing on appeal are two. The first in their order is that the schooner should have gone to the southward of the usually navigated channel, and passed through an open spread of shallower water, but yet deep enough for her, and through which vessels occasionally went. It is urged that she should have done this because she was so low down in the bay that it was difficult and might lead to embarrassment if she attempted to go up and turn nearly at right angles, as she must, into the channel, and that she was blamable for needlessly taking a course which invited risk of collision. We may observe in passing that this suggestion of a risk of collision re-enforces the charge of the libellant that the movement in which his vessel was engaged was of such a nature as to impose upon the steamer the duty of great caution. But it cannot be said that the schooner was in fault in taking the well-known navigated channel. It was the one marked out on the government chart and directions for sailing, and on the land and water by the beacons, stakes, and buoys placed there for the purpose of furnishing guides for navigation. The schooner had the same privilege to navigate the channel that the steamer had; and, while the situation was such as to require from both parties a careful attention to their respective duties, there was no such risk of collision, when she attempted to go down the channel, as to warrant the imputation that she was guilty of misconduct in claiming and exercising her common right, and she was justified in expecting from the steamer that she would carefully continue to watch the schooner's movements until all danger should be passed.

The learned district judge, in his opinion, which is printed in the record, held that there was nothing in the situation to make the passage hazardous, and in this we concur with him.

The other ground of censure taken in behalf of respondent against the Card, and one more strongly maintained than any other by counsel for the claimant, is that the schooner did not observe the duty which belonged to her, in that she did not keep her course, as she was bound to do by the twenty-third rule of section 4233, Rev. St. (article 22 of the regulations of March 3, 1885). This rule, while it has more general application to vessels standing on a direct course, yet undoubtedly applies to one moving on a circular or swinging course, under circumstances where it may reasonably be supposed that the swinging is intended to be for a time maintained until the general course of the vessel can be resumed. And the rule itself is subject to such modification as the necessities of navigation require. In the case of *The John L. Hasbrouck*, 93 U. S. 405, which arose from a collision on the Hudson river between a steamer coming up and a sloop going down, Mr. Justice Clifford, in discussing the application of the rule in regard to sailing vessels navigating a channel where it is necessary to go around the projections from the banks or avoid any other impediment to a straight course, or when from any other cause deviations are necessary, says:

"Variations of the kind in the course of the vessel are allowable, because they cannot be avoided without imminent danger of immediate destruction; nor is a sailing vessel under such circumstances forbidden to yield to such a necessity, even though those in charge of her deck are aware at the time that a steamer is coming up the river on a course which involves risk of collision, if it appears that a change of course is reasonably necessary to prevent the sailing vessel from running into the bank, or encountering any other natural obstruction to the navigation. Necessary changes made in the course of the voyage to avoid such obstructions are not violations of the sailing rule which requires the sailing vessel to keep her course whenever an approaching steamer is required to keep out of the way."

In the present case, the schooner, having a right to shape her course towards such portion of the opening of the channel as she should find necessary or convenient in order to go down, and expecting the steamer to look out for her movements and keep out of the way, took down her mainsail, put her helm hard a-port, and swung off to starboard. The extent to which she was swinging was presumably watched and estimated by the steamer. The latter then moved rapidly up the channel, and, going somewhat to the northward of the center of the channel, passed directly across the bows of the schooner, and almost at right angles with her. It is charged that the schooner, although for a time she swung or paid off as she should in order to get by, yet, when the steamer was almost passing, suddenly ceased to swing off, and, starboarding her helm, forged ahead into the steamer. There is a degree of improbability in this proposition which makes it dubious. It is difficult to believe that the captain of the schooner, being on a safe course to pass the steamer, and with no peril to disturb his judgment, should have adopted a maneuver which would inevitably bring him into disaster. It is true that, after the schooner's helm was put hard a-port, it was changed to starboard. The captain of

the schooner testified that this was done almost on the instant of collision, for the purpose of easing the blow by turning the head of his vessel in the direction of the movement of the steamer. Other witnesses corroborate this account of the matter, and there is no testimony of sufficient moment to justify us in coming to the conclusion that the captain's statement is not true, confirmed, as it is, by the moral probability that he would not have done so wanton and senseless a thing as that wherewith he is charged. It is not claimed that, if the starboarding was done at the time and for the purpose stated by the captain of the schooner, any fault could be found. It was in extremis, and, besides this, had no effect in producing the collision, and probably lessened the injury.

The other blow from the barge seems to have been altogether needless, if the proper measures had been seasonably taken. The captain of the Chief says that, when he saw the danger of collision, he ordered the towline cut. If he is not mistaken as to the time of giving this order, we are satisfied its execution was delayed. It was cut at some time. The witnesses differ as to the time, some saying it was about concurrent with the collision with the steamer, others fixing it at about the time the barge struck the schooner. We are satisfied that the latter is near the fact. The barge traveled 600 feet after the first collision, and delivered a heavy blow upon the schooner. If the barge had been released promptly, as she was going up the current, her speed would have been much reduced, and she could also have been made free to direct her own course away from the schooner. Be this as it may, the damage shown was all the legitimate consequence of the prime error, which was not in any degree alleviated before the end.

We think the libelant is entitled to recover for the injury complained of. The decree should be reversed, and the cause remanded to the district court, with directions to ascertain the damages and enter the proper decree thereon in accordance with this opinion.

On Rehearing.

(July 3, 1894.)

The first and second grounds of the petition involve questions which have already been fully argued by counsel and considered by the court.

The third and only other ground is that evidence has been discovered since the original hearing which it is claimed bears strongly against the libelant's claim that his vessel was free from fault. This newly-discovered evidence consists of statements made by affidavits showing that there was a fault in the steering apparatus of the libelant's vessel which was not known to claimant, and of which the libelant's witnesses made no disclosure, although they knew of it when they gave their testimony. We think that the allowance of the petition for rehearing in such circumstances and for such reasons would set a mischievous precedent, would encourage negligence in the preparation of causes for hearing, and would embarrass the court with applications for rehearing of causes once fully considered and disposed of. No sufficient reason is seen in the present case why, if the fact be as claimed, it should not have

been ascertained and proven while the case was still regularly open to proof. It is shown by the petition that the attention of the claimant and his proctor had been seasonably drawn to the matter to which the newly-discovered evidence relates.

The petition is denied.

THE MICHIGAN.

NEALLEY et al. v. THE MICHIGAN.

(District Court, D. Maryland. March 10, 1894.)

1. COLLISION—STEAM AND SAIL IN FOG—BURDEN OF PROOF.

Where the steamer's witnesses testify that they were watchful and vigilant, but heard no fog signals from the sailing vessel, and there is nothing in their appearance or testimony to cause the court to hesitate in accepting their statements, the burden is then upon the sailing vessel to show by evidence which is satisfactory and convincing, and not consistent with any theory opposed to her contention, that the fog horn was properly sounded, and that, if not heard on the steamer, it was because of inattention.

2. SAME—"MODERATE SPEED."

The requirement of moderate speed by steamers in a fog is sufficiently met by half speed, when that is but five or six knots an hour, and such that the steamer was actually able, by reversing, to nearly stop in a distance of about two lengths.

3. SAME.

"Moderate speed" is that rate which will permit a steamer to stop, after hearing a fog signal, in time to avoid the vessel which has complied with the law in giving it.

4. SAME—FOG SIGNALS.

In a case of collision between a steamer and a schooner, *held*, on the evidence, that the schooner was in fault for failure to sound fog signals, apparently assuming that the fog was not so dense as to obscure her lights.

For opinion on appeal, see 63 Fed. 280.

Carver & Blodgett and Robert N. Smith, for libelants.

I. Wilson Leakin, for respondent.

MORRIS, District Judge. This is a libel by the owners of the four-masted schooner John Holland against the steamship Michigan to recover the value of the schooner and her cargo, consisting of 1,700 tons of coal, which was sunk and lost in consequence of a collision with the steamship. The collision happened between 3 and 4 o'clock on the morning of the 16th of June, 1893, at a point outside the capes of the Chesapeake bay, about 10 miles east of Cape Henry light. The faults alleged against the steamship are that her lookout was not properly placed, that she negligently failed to see the light and to hear the fog signals of the schooner, and that she was going at too great a rate of speed in a fog. The fault charged against the schooner is that, in a fog too dense to permit her lights being seen, she failed to give notice of her presence by sounding proper signals with a fog horn.

The fog was not widespread, but was in low-lying banks. Its existence is proved by the officers and witnesses from on board the Michigan, and by the officers of the Dresden, a steamship following about a mile astern of the Michigan, by the two pilots who had just been discharged from the steamers, and by witnesses from schooner-

ers which were anchored within two or three miles of the place of collision. The Michigan was being navigated with reference to the existence of the fog. She was sounding her steam whistle, as is proved by many disinterested witnesses not on board or connected with her. It is also established by her own witnesses that when she entered the dense fog bank, about 10 minutes before the collision, she slowed her engines to half speed on account of the fog. Her officers testify that they were uneasy and watchful, because they were in the track of vessels close to the capes. The master and second mate, with a quartermaster at the wheel, were on the main bridge, and a lookout forward on the lookout bridge, 35 to 40 feet from the extreme bow. Their testimony is that, although watchful and attentive, they heard no fog signal, except from the steamship astern, and could see no light until they were close upon the schooner, when they saw the schooner's red light dimly, and then heard a fog horn; that immediately the engines of the steamer were reversed full speed astern, and her helm put to port, but too late to avoid the collision. The blow inflicted upon the schooner was a perpendicular blow aft of midship on the schooner's side, but it did not throw any one on board the schooner off his feet, and did not penetrate deep, and was hardly felt at all on the steamer, facts which indicate that the steamer's speed was moderate, and that, was very nearly checked.

Nothing in the appearance or testimony of the steamer's witnesses has caused me to hesitate in accepting their statements that they were vigilant and watchful, and, knowing that the safety in the fog was dependent on their listening for signals, were listening attentively. In such a case the libelants must assume the burden of satisfying the court, by witnesses whose testimony is satisfactory and convincing, that the schooner's fog signal was properly sounded, and that the reason those on the steamer did not hear it was their want of proper attention. Under such circumstances the testimony in support of their contention should be free from contradictions, and not consistent with a reasonable explanation opposed to their contention, suggested by the facts, or which their own witnesses have at any time put forward. It is quite obvious, I think, that immediately after the collision those on the schooner did not suppose that the fault which caused the collision was the steamer's not hearing the schooner's fog signals, but was the steamer's not having seen the schooner's lights. This appears from the conversations detailed by the schooner's crew, and also by the steamer's witnesses, and is confirmed by the master's protest made the same day at Norfolk, in which no mention is made of the fog or foghorn, and in which the master says they saw the steamer's lights 20 minutes before the collision. It also appears in the testimony of the schooner's lookout, taken in Boston in July, the substance of which is that he considered it only a little hazy; that he began blowing the horn when the haze set in, and then presently it cleared away, and he stopped blowing until he saw the steamer close upon him, and saw both her lights, and concluded that she had changed her course, and was not going clear, and then he began blowing a warning to the steamer. I think this testimony given in July must be taken as more accurate than that

given by him in court the following January. I am quite satisfied, notwithstanding the schooner's witnesses may have persuaded themselves, after a lapse of time, to the contrary, that the fact, in all probability, is that the fog horn was only sounded by way of trial when it was first brought on deck, and then, the lookout not deeming it necessary, it was not sounded again until the steamer was close upon him, and that blast, as well as the hail, was heard on the steamer; and I think it is also established that the blast was not given until after those on the steamer had seen the schooner's red light, and had given the order to reverse full speed astern, and to put her wheel hard a-port. I shall not attempt to cite the testimony of the other witnesses from on board the schooner, but a careful consideration brings me to the conclusion that, notwithstanding many positive statements about sounding her fog horn, there are matters which are only consistent with the finding that the horn was not regularly sounded, and that those on board the schooner did not think the thickness of the fog required it. It appears probable that the steamer's lights, which were electric lights of high power, were seen from the schooner a long way off before the fog shut in. The master of the schooner, seeing the steamer's green light, supposed she would pass ahead of him. As the schooner was drifting out to sea with the tide, and was becalmed, and had no steerage way, there was nothing for her to do, and the master went below. The second mate, the wheelsman, and the lookout, who were on deck, if they paid any attention to the signals which both the Michigan and the Dresden were sounding as fog signals, may have supposed they were signals for the pilot boat. At any rate, they paid no attention to them, and say they did not hear them, although it is proved that they were sounded. This does not indicate vigilance, and is only consistent with the supposition on their part that the schooner's lights could be seen.

There remains to consider whether the steamship was going at too great a speed. Moderate speed in a fog is that rate which will permit a steamer to stop, after hearing a fog signal, in time to avoid the vessel which has complied with the law in giving it. There is hardly room for doubt in this case that if a proper fog signal had been given, and had been heard on the steamer, she could have easily avoided the schooner. Her half speed was not above five to six knots, and, seeing the schooner's light at about two lengths off, she was even then nearly able to stop her headway, and was able to change her course so that, if the schooner had been making any speed through the water, she would have escaped. Less than half a minute earlier warning to the steamer would have been sufficient to have averted the disaster.

It is urged that the steamer's lookout would have been more advantageously placed if in the eyes of the ship. But the sea was smooth, the wind very light, and from the east, bringing sounds from the direction of the schooner, and from all vessels directly ahead of the steamer, and there were no exceptional circumstances requiring the lookout to be put in the very eyes of the steamer. All the testimony adduced tends to prove that in a fog of this character the best place for the lookout, both for hearing and seeing, was on the lookout bridge, constructed for the purpose, and where he was

placed. I find that the libelants have failed to make out their case, and the libel must be dismissed.

This case was reversed on appeal by the circuit court of appeals for the fourth circuit at the October term, 1894.

WORKMAN v. MAYOR, ETC., OF THE CITY OF NEW YORK et al.

(District Court, S. D. New York. August 15, 1894.)

1. COLLISION—NEGLIGENCE OF FIRE BOAT.

The fire boat New Yorker, belonging to New York City, in hastening to reach a fire opposite pier 48, East river, collided with a barkentine which was properly moored to the dock. At the time of the collision another fire boat was already at work on the fire. *Held*, that the urgency created by the duty to extinguish the fire was not so extreme as to excuse the New Yorker's failure to exercise reasonable care.

2. SAME—LIABILITY OF MUNICIPAL CORPORATION—FIRE DEPARTMENT.

Laws 1882, c. 410, § 27, declares that, "for all purposes, the local administration and government of the city of New York, shall continue to be in, and to be performed by the corporation aforesaid," i. e. the mayor and aldermen. Section 34 creates "the following other departments,"—among them, the fire department,—and the act declares the powers and duties of these departments to be "administrative and governmental." *Held*, that the extinguishment of fires is a work of local administration, within the meaning of the statute, and as such, though assigned to the fire department of the corporation, is a duty of the corporation, to be performed by that department as its agent, and that the corporation is liable for a tort committed by its agent in negligently performing such duty; and is also liable as "owner of the vessel" under the maritime law.

In Admiralty. Libel by Robert W. Workman against the mayor and aldermen of the city of New York, the fire department of said city, and James A. Gallagher, for damages caused by a collision.

Wing, Shoudy & Putnam and Mr. Burlingham, for libellant.

William H. Clark, Corp. Counsel, and James M. Ward, Asst. Corp. Counsel, for Mayor, etc.

William L. Findlay, for Fire Department and Gallagher.

BROWN, District Judge. In the afternoon of July 11, 1893, a fire broke out on the westerly side of South street, about opposite pier 48, East river. For the purpose of assisting in putting out the fire, the fire boat New Yorker, belonging to the mayor, aldermen, etc., made her way into the adjoining slip, and in the haste of the occasion she was run into the bow of the barkentine Linda Park, causing the latter considerable damage, for which the above libel was filed.

1. For the respondent it is contended, that a less rigid rule of care is applicable in the urgencies of such an occasion, and that considering the circumstances, the collision should not be held to have proceeded from negligence. I have no doubt that some acts which might properly be deemed negligent under ordinary circumstances ought not to be held negligent under the stress of fires. But the same general rule is, I think, nevertheless to be applied as the test of what is due care, viz., the care that a man of ordinary prudence would be reasonably supposed to exercise under like circumstances, if the burning property, and the property damaged, had been his own. Making all such allowances, and looking at the facts from that point

of view, I still think, considering that the Linda Park was properly moored at the dock, that the fire boat Havemeyer was already at work in the slip, and the urgency not being extreme, that the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary, and negligent.

The fire boat belonged to the city, but was under the control and management of the fire department, the heads of which are appointed by the mayor. It is contended that neither the mayor, aldermen, etc., nor the fire department, is legally answerable for these damages; not the mayor, etc., it is said, because though owner, it had no control over the management of the vessel; and its duties were not corporate duties. The fire department, it is said, is not liable, because not a corporation capable of being sued, nor having any funds for the payment of any decree.

2. It is certainly a startling proposition, that all the shipping of this port, foreign and domestic, should be at the mercy of the city fire boats, and liable to be negligently run down and sunk at any moment, without responsibility for damages. By the maritime law, both the vessel and the owner are ordinarily liable for such a marine tort. But if the vessel is in the public service, she is not allowed to be withdrawn therefrom by arrest and sale, for reasons of the public convenience (*The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4,758); or, if the owner, by whose authority and consent she is navigated, can show any other independent legal principal in control of the navigation, such, for example, as a charterer in possession, then the latter only is personally responsible, on the principle of *respondeat superior*. If the legal principal at the time of the injury was the state; that is, if the vessel was strictly in the service of the state, and in the performance of state duties, the state as sovereign not being suable, there is, perhaps, no redress, except by action against the particular individual in fault, and an appeal to the grace and the moral obligation of the sovereign for compensation by legislative act.

But it is obvious that the fire boat New Yorker, at the time she inflicted this injury, was not in the service of the state, nor performing any duty of the state. The extinction of fires is not a duty of the state, nor a work which the state has ever undertaken to perform, as a part of its general governmental functions. The state was certainly not the principal in the navigation of the New Yorker. Only the corporation, or the fire department, as an independent legal entity, could, therefore, be the principal; and if the fire department is not an independent legal entity capable of being sued, as the defendant contends, then, inasmuch as the city corporation owned the vessel, appointed the heads of the fire department, and put the vessel in their charge to be navigated for this very work, the corporation must be responsible, in the view of the maritime law, as the only legal principal in the case. To absolve itself, it must show some other independent legal principal in charge of the navigation. *The F. C. Latrobe*, 28 Fed. 377.

3. The relations of the city corporation and the fire department to each other, and to the state, and their respective rights and obli-

gations, are questions of local municipal law, upon which the decisions of the court of appeals, as the highest tribunal of the state, are binding on the federal courts. *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012; *Claiborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489.

The court of appeals has made no adjudication as to the status of the fire department of this city under the consolidation act of 1882, or as to the responsibility of the corporation for the acts or negligence of that department.

As respects the general responsibility of municipal corporations for torts, the settled law of this state, since the decision of the court of appeals in *Conrad v. Trustees*, 16 N. Y. 158, adopting the opinion of Seldon, J., in *Weet v. Brockport* (see note, 16 N. Y. 163), is that the conferring of corporate powers, privileges and duties, if accepted and acted upon by the corporation, is a sufficient consideration for the implied agreement to exercise such duties with fidelity, and that "whenever the corporation assumes to exercise its corporate powers, it is bound to see that due care and caution are used to avoid injury to individuals" (*Id.* p. 172). In all subsequent discussions, the decisions have turned essentially upon the question, whether the work or duties in the execution of which the negligence occurred, were properly corporate duties, intended to be imposed by law on the corporation; or whether they were duties of a general governmental nature, appropriate to the state, and imposed, not upon the corporation itself, but only upon certain officers of the corporation, or a department of the corporation, as an independent agency of the state, as the state might have appointed any other individuals, or board, to perform the same duties.

In the former case, the corporation is held liable; in the latter, not. To the latter class, under the acts prior to 1882, belong the duties of the department of charities and correction, in charge of the poor, the criminal and the insane (*Maxmillian v. Mayor*, etc., 62 N. Y. 160); those of the police department (*Swift v. Mayor*, 83 N. Y. 535); those of the board of education (*Ham v. Mayor*, 70 N. Y. 459); in all which cases the corporation was held not liable. See, also, *New York*, etc., *Sawmill Co. v. City of Brooklyn*, 71 N. Y. 580, and *Bieling v. City of Brooklyn*, 120 N. Y. 105, 106, 24 N. E. 389. The doctrine of the first three cases was, that the duties there in question were a part of the general governmental functions of the state, such duties as the state was accustomed to provide for, and to enforce, by means of some officers, throughout the state, and in the most retired townships—"such duties as are to be performed in every political division of the state, not for its peculiar benefit, but for the public" at large (per *Folger, J.*, in *Maxmillian v. Mayor*, etc., 62 N. Y. 168); and that when the duties are of such a nature, and, by the acts in question, are "not laid upon the corporate body," and do not inure to its peculiar benefit, profit or advantage, the imposing of such duties on individual officers, or a department, of the corporation, is not to be construed as imposing any new duties or liabilities upon the corporation itself, and therefore does not make the corporation legally responsible as principal.

On the other hand, where the nature of the work and of the duties required by the statute to be performed, are not of the above character, but are essentially local, in which the municipality has a special interest, as distinguished from the public at large; or where the corporation derives therefrom some emolument, profit or advantage, then the imposition of duties upon officers, or a department, of the corporation, though not expressly laid upon the corporation itself, is construed as intended to create corporate duties, to be performed by the corporation through the designated instrumentalities as the agents of the corporation. *Bieling v. City of Brooklyn*, 120 N. Y. 103, 106, 24 N. E. 389. Such has been held to be the nature of the duties of the street department and the park department, in the case of the public streets, the bridges, and the sewers; of the dock department, as respects the docks, and of the Croton water commissioners, on the introduction of Croton water; in all which cases, the city, on similar statutory provisions, has been held liable. See *Ehrgott v. Mayor, etc.*, 96 N. Y. 271, and the cases there cited; *Barney Dumping-Boat Co. v. Mayor, etc.*, 40 Fed. 50; *Philadelphia & R. R. Co. v. Mayor, etc.*, 38 Fed. 159.

Upon the numerous cases cited, and the full discussion of the general subject by Earl, J., in *Ehrgott v. Mayor, etc.*, supra; by Folger, J., in *Maxmilian v. Mayor, etc.*, supra; and by Mr. Justice Hunt in the case of *Barnes v. District of Columbia*, 91 U. S. 540, upon a statute in all respects analogous to the New York statutes prior to the act of 1882 (cited by Earl, J., with evident approval), there seems to me no doubt that the present case belongs to the latter class, and that the corporation is liable for the negligence of the fire department, not only from the local nature of the duties of that department, and the special benefits therefrom to the municipality, and the advantages to the corporation, but also from the language of the consolidation act itself (Laws 1882, c. 410, §§ 27, 34, 123, 193, 424).

The court of appeals, as above mentioned, has not adjudicated this question, under the act of 1882. On the contrary, in the most recent reference to the subject that I have found, viz., in the case of *Fire Department v. Atlas Steamship Co.*, 106 N. Y. 566, 13 N. E. 329, though that act in some of its relations was there fully considered in the opinion of Earl, J., the question was left undetermined, as immaterial in that case, "whether it [the fire department] acts independently as a distinct entity with corporate powers, within the doctrine of *Maxmilian v. Mayor, etc.*, 62 N. Y. 160, or whether it acts as an agency of the city, representing it." Page 577, 106 N. Y., and page 333, 13 N. E. This language is of itself a sufficient answer to the respondent's contention that the exemption of the city from liability for the fire department's acts under the existing statute, has been already adjudged by that court.

It further shows that there was present in the mind of the court the language and the views presented by the same experienced judge in his opinion in *Ehrgott v. Mayor, etc.*, supra, in which he said that "although this duty [to keep the streets of the city in repair in the annexed district] is to be exclusively performed by the

park commissioners, yet it is a duty which they perform for it [the city], and it remains responsible for the condition of its streets."

The duties of the fire department are not, I think, within the ruling of *Maxmilian v. Mayor*, etc.; they come rather within the other class of cases, such as streets, sewers, etc. Their nature stamps them as essentially local, and mainly of local concern, like the duties relating to the sewers, bridges, and streets; and as being of even more distinctly local concern than the streets, bridges, etc., which, in a measure, are for the use and benefit of all the people of the state. There is no benefit that can be affirmed to result to the corporation from the care of the streets, that does not inure more largely and more directly from the extinction of fires.

In the case of *Bates v. Inhabitants*, 151 Mass. 184, 23 N. E. 1070, a state whose courts have pushed furthest the doctrine of municipal exemption, Holmes, J., says: "The interest of towns in the sewers is so distinct from that of the public at large, that they are held with reason to the ordinary responsibilities of owners." This is manifestly equally true of the instrumentalities used, and of the work done, in extinguishing fires.

Again, the work of the fire department is not in the least of a general governmental nature, enforced in some form throughout the state for the benefit of the public at large. The extinction of fires is not, and never has been, a state function. It has always been done either by volunteer companies, or by such special local organizations as have been formed and authorized to perform this service; or else by local municipalities or boards similarly authorized in particular localities.

Public governmental duties are such as pertain to the administration of general laws for the benefit and protection of the whole public. "Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it deprives special advantage; or for the increased comfort of its citizens; or for the well ordering and convenient regulation of particular classes of the business of its inhabitants; but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit." Per Shipman, J., in *Hart v. Bridgeport*, 13 Blatchf. 293, Fed. Cas. No. 6,149; *Greenwood v. Town of Westport*, 60 Fed. 571, 572. In the case of *Jewett v. New Haven*, 38 Conn. 389, Chief Justice Butler says:

"There is no mode by which to determine whether a power or duty is governmental or not, except to inquire whether it is in its nature, such as all well-ordered governments exercise generally for the good of all, and one whose exercise all citizens have a right to require directly, or by municipal agency; and whether it has ever been assumed or imposed, as such, by the government of this state, and would have been exercised by the state, if it had not been by the city. Tested by these criteria, the extinguishment of fires is not a public governmental duty."

Nothing could be more apposite to the present case, than these observations in the cases last cited,

The extinction of fires is, moreover, not merely for the benefit of the individual owners; but for the immediate pecuniary benefit of the corporation as well, whose yearly revenues of \$35,000,000, and upwards, come mainly from the annual taxation upon improved property—taxation that amounts on the average to about one-sixth of the entire annual value of the property, which is more or less directly saved to the city by the extinction of fires. Here, again, the interest and the advantage to the corporation are more special and peculiar than in the care and preservation of the streets.

The whole course of reasoning in *Maximilian v. Mayor*, etc., supra, plainly, as it seems to me, excludes the work of the fire department from the analogy of that case. The extinction and prevention of fires seem peculiarly appropriate to the localities immediately concerned. The usage and past history of fire companies attest it; so that in the absence of any indication of a contrary intent in the statute of 1882, there seems to me no doubt that the duties as to fires imposed by the act of 1882 on the fire department of the corporation, were designed to be made a duty of the corporation, to be performed by that department, as the agent of the city, and representing it, as intimated by Earl, J. See, also, per Bradley, J., in *Bieling v. City of Brooklyn*, 120 N. Y. 106, 24 N. E. 389. In this respect the case of *Barnes v. District of Columbia*, 91 U. S. 540, 545, 547, is precisely analogous, and its reasoning convincing. In that case every argument here adduced to exempt the city from liability, seems to me to be fully met and answered. That case has been repeatedly followed, and says Mr. Justice Harlan, in *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, has "never since been questioned." See, also, per Mr. Justice Bradley, in *Metro-politan R. Co. v. District of Columbia*, 132 U. S. 9, 10 Sup. Ct. 19, and the learned and exhaustive opinion of Judge Townsend in *Greenwood v. Town of Westport*, 60 Fed. 560, 572-574.

4. Aside from the above general considerations, however, the intent of the act of 1882, to make the work of the fire department a duty of the corporation, seems clearly indicated in the very language of the consolidation act (Laws 1882, c. 410, §§ 27, 34, 424, et seq.). Section 27 of that act declares that "for all purposes, the local administration and government of the city of New York, shall continue to be in, and to be performed by the corporation aforesaid," i. e.: the mayor, aldermen, etc. Section 29 invests the board of aldermen with certain legislative powers, and section 34 provides that there shall be "the following other departments in said city," naming 11, of which the fire department is one. The powers and duties of these departments, as defined in the other sections of this act, are all "administrative and governmental;" and almost the whole field of municipal duties is distributed among these various departments.

The different provisions of this act are to be construed harmoniously "and so as not to bring them into conflict with each other." Per Earl, J., in *Fire Department of New York v. Atlas Steamship Co.*, 106 N. Y. 576, 13 N. E. 329. When section 27, therefore, declares that "for all purposes, the local administration and government shall be performed by the corporation," it must mean

that every "local" administrative and governmental duty found distributed among any of the departments afterwards named in the same act, is intended to be made a corporate duty, "to be performed by the corporation." The only duties that can be excepted from the effect of this provision are such administrative and governmental duties as are not "local;" and even if that exception can properly and consistently with the language of the act, be made to include such duties as have been previously recognized as state functions, and enforced as such by the state in one form or another throughout the state, such as the work of the departments of charities and correction, of the police, and of the board of education—duties which in that sense are not "local"—still, it is manifest, that the work and the duties of the fire department, in the inspection and regulation of buildings in the city of New York, in order to prevent fires, as well as its work in extinguishing fires, are not, and never have been of that general nature; but that they are strictly "local," and that consequently by the language of section 27, the duties of the fire department are by the very terms of the act of 1882 "laid upon the corporation," as corporate duties.

The few cases as to the status of the New York fire department cited for the defendant all arose prior to the act of 1882, and under different statutes. *O'Meara v. New York*, 1 Daly, 425, arose in 1862, when the fire department was a distinct corporation. *People v. Pinckney*, 32 N. Y. 377, 389-392. The case of *Woolbridge v. Mayor*, etc., 49 How. Pr. 67, arose under the metropolitan fire department, also a distinct corporation. *Clarissey v. Fire Department*, 1 Sweeney, 224. In *Terhune v. City of Rochester*, 88 N. Y. 247, the case was of acts ultra vires, and decided on that ground. The Massachusetts cases are no guide here, because the doctrine of municipal responsibility there is essentially different from that of New York.

The intent of the act of 1882 being sufficiently clear from its language, to make the work of the New York fire department a corporate duty, there is no occasion and no room for the application of principles of legal "construction," such as are appropriate upon ambiguous or doubtful statutes, in order to convert that department, which in itself is a mere branch of the corporation, into an independent legal entity, acting as an agency of the state, instead of being an agency of the corporation.

The decisions of the court of appeals are clear and uniform, as I understand them, that as soon as it appears that the duties in question "are laid upon the city," or "rest upon the corporation," the city is answerable for negligence in performing them. So says Folger, J., in *Maxmillian v. Mayor*, etc., 62 N. Y. 169. To the same effect are *Kennedy v. Mayor*, etc., 73 N. Y. 365, 368; *Ham v. Mayor*, 70 N. Y. 464; *Rehberg v. Mayor*, etc., 91 N. Y. 142, 145; *Ehrgott v. Mayor*, etc., 96 N. Y. 272-275; *Bieling v. City of Brooklyn*, 120 N. Y. 98, 106, 24 N. E. 389; *People v. State Board of Canvassers* (per Earl, J.) 129 N. Y. 368, 29 N. E. 345.

For these reasons, the libellant is entitled to a decree against the mayor, aldermen, etc., and the defendant Gallagher, with costs.

CORNELLS, Judge, et al. v. SHANNON et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 409.

CREEK NATION—JUDGMENT—JURISDICTION OF PARTIES.

In a suit by the owners and mortgagees of cattle to declare void a judgment of a court of the Creek Nation imposing a fine on the owners for bringing the cattle into the Nation contrary to its law, and making it a lien on the cattle in accordance with such law, it will, on demurrer to the answer, be held that the Creek court had jurisdiction to render the judgment, the answer alleging that such court had jurisdiction of the owners of the cattle.

Appeal from the United States Court in the Indian Territory.

Suit by George Shannon and others against Temaye Cornells, judge, and others, to declare a judgment void. Decree for plaintiffs. Defendants appeal. Reversed.

N. B. Maxey (S. S. Fears and G. B. Denison were with him on the brief), for appellants.

G. W. Pasco, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. An act of the council of the Creek Nation entitled "An act establishing quarantine regulations against foreign cattle, and to prevent smuggling cattle into the Creek Nation," approved October 29, 1891, makes it unlawful for any citizen of the Nation "to introduce or invite into the Creek Nation cattle of any kind at any time," except between the first day of January and the last day of March of each year, and declares that any citizen violating this provision of the act "shall be fined a sum that will be the equivalent of three dollars per head for each and every head of cattle" unlawfully introduced. The act makes the judgment a lien on the cattle unlawfully introduced, and provides that, if the judgment is not paid in 30 days, the cattle shall be sold to satisfy it. In a proceeding instituted in the criminal court of the Muskogee district against George Shannon and James Willison, charging them with introducing 10,000 head of cattle into the Nation in violation of this act, that court entered the following judgment:

"Judge's Office, Muskogee Nation, Wellington, 18 Aug., '92.

"Muskogee Nation vs. George Shannon, James Willison.

"For Violating Creek Cattle Law of Oct. 29, 1891.

"In Case No. 111, the Muskogee Nation vs. George Shannon and James Willison, the court orders and adjudges that the sum of thirty thousand dollars be adjudged against George Shannon and James Willison to be well and truly paid, that sum being the amount of fines, to wit: Three dollars on each of ten thousand head of cattle introduced by them into the Creek Nation, and into the Muskogee district thereof. And it is further ordered that this judgment of thirty thousand dollars, by virtue of the statute made and provided, is made and become a lien upon all the cattle unlawfully introduced, of the brand [brand here given]. It is also ordered that the defendants, to wit,

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George Shannon and James Willison, be notified that judgment as aforesaid has been rendered against them; and that if the amount thereof, to wit, thirty thousand dollars, and the costs of the suit in which they are made defendants, be not paid in thirty days from this date, the said cattle of the brand [brand here given], or a sufficient number thereof, will be sold to pay said fine and costs of suit, as provided for by an act establishing quarantine regulations against foreign cattle, and to prevent smuggling cattle into the Creek Nation. Approved 29th of October, A. D. 1891.

"Temaye Cornells, Judge Muskogee District, M. N."

After the entry of the judgment, process was issued to the captain of the light-horse company (an officer exercising duties similar to those of a sheriff) commanding him to collect the judgment, and not to permit the cattle to be removed from Muskogee district until the judgment was paid. The captain of the light-horse company took possession of the cattle, and thereupon Shannon and Willison, claiming to be the owners of the cattle, and Godair, Harding & Co., claiming to have a mortgage upon the cattle, filed this bill against Temaye Cornells, as judge of the Muskogee district of the Creek Nation, and Jim Cornells, as captain of the light horse of the same district and Nation, alleging that "plaintiffs, and each and every one of them, speaking for themselves individually and collectively, further say that said pretended judgment is unjust, utterly void, and of no effect as to them, because they have never, nor have any of them ever, introduced any cattle into said district, nor into any other portion of the Indian Territory, contrary to law; because they never were indebted to said Muskogee Nation in any sum whatever; because said court had no jurisdiction to render any judgment against them, or either of them, in the premises; because, being non-citizens of the Muskogee Nation, they could not be admitted to defend said suit in said Muskogee or Creek court; because said Godair, Harding & Co. were not, and could not have been, parties to said proceedings in said Creek court, and because said judgment was procured against plaintiffs herein by fraud and collusion on the part of said defendants,"—and praying that the defendants be enjoined from executing or enforcing the judgment, or interfering in any manner with the cattle or other property of the plaintiffs, and that, upon the final hearing, the injunction be made perpetual. By agreement of the parties, the cattle were released from the custody of the captain of the light horse, and the plaintiffs permitted to ship them out of the Nation upon executing a bond in the sum of \$31,000 "to take the place of the cattle." A demurrer to the bill was overruled, and thereupon the defendants filed an answer, to which a demurrer was sustained; whereupon a final decree was rendered, as prayed for in the bill, and the defendants appealed.

The judgments of the courts of the Creek Nation are entitled to the same respect and to the same faith and credit as the judgments of the territorial courts of the United States (*Mehlin v. Ice*, 5 C. C. A. 403, 56 Fed. 12; *Exendine v. Pore*, 6 C. C. A. 112, 56 Fed. 777); and white men residing in the Indian Territory who appear and submit themselves to the jurisdiction of the courts of the Nation are bound by their judgments (*Id.*). If the court that rendered the

judgment, the collection of which is sought to be enjoined by the bill, had jurisdiction of the subject-matter and the parties, its judgment is as valid as the judgment of any other court. If it did not have jurisdiction, its judgment, like the judgment of any other court rendered without jurisdiction, is void. This court is not invested with appellate jurisdiction over the proceedings and judgments of the courts of the Creek Nation, and cannot therefore review mere irregularities and errors in the proceedings of those courts. However irregular or erroneous their proceedings may be, their judgments, like the judgments of any other court, are not void, and are not subject to collateral attack when it appears they had jurisdiction of the subject-matter and the person. No testimony was taken on the question of jurisdiction. The record does not disclose the proceedings in the Creek court. Whether the defendants were or were not summoned to answer the action in the Creek court, and, if they were summoned, whether they made default, or appeared and submitted to the jurisdiction of the court, or protested against its exercise of jurisdiction over them, does not appear. In this state of the record, we can express no opinion on the question of jurisdiction founded on the facts, and we can only consider the question as it is presented by the pleadings, which are extremely indefinite and unsatisfactory on the point. The bill alleges, and the answer admits, that Willison is an Indian and a citizen of the Creek Nation, and the answer avers that Shannon is a resident and naturalized citizen of the Creek Nation, and expressly avers that the defendant had jurisdiction over the defendants Shannon and Willison. We are constrained to hold that the lower court erred in sustaining the demurrer to the answer, which in terms alleged that the court had jurisdiction to render the judgment. The fact may be otherwise, but, in the face of this averment in the answer and its admission by the demurrer, we cannot say the court did not have jurisdiction. On the next hearing, the parties can put on the record all the facts relating to the jurisdiction of the court, and the question can then be determined intelligently and on its merits.

No objection is taken in plaintiffs' bill to the validity of the act of the Creek Nation upon the ground that it is in conflict with that clause of the constitution which invests congress with the power to regulate commerce "with the Indian tribes." The appellants seem not to have anticipated that this question would be raised, and, as it did not receive that attention on the argument that its importance demands, we have not considered it. See *Railroad Co. v. Husen*, 95 U. S. 465. The decree of the court below is reversed, and the cause remanded for further proceedings.

GREEN v. ELBERT et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 400.

JURISDICTION—DISBARMENT IN STATE COURTS.

A federal court has no jurisdiction of an action for damages for conspiracy to disbar an attorney from practice in state courts, his right to practice in federal courts not being affected thereby, though the disbarment was for statements made in a federal court.

In error to the Circuit Court of the United States for the District of Colorado.

Action by Thomas A. Green against Samuel H. Elbert and others for damages for conspiracy to cause plaintiff's disbarment. Action dismissed. Plaintiff appeals.

T. A. Green and J. M. Washburn, for plaintiff in error.

Frank C. Goudy, Joseph C. Helm, M. A. Rogers, and M. J. Stair, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. The plaintiff in error, Thomas A. Green, had been duly admitted to practice law in the courts of the state of Colorado, and afterwards, upon a proceeding instituted for that purpose in the supreme court of that state, that court disbarred him. He thereupon brought this action for damages in the circuit court of the United States for the district of Colorado against Samuel H. Elbert, Joseph C. Helm, and William E. Beck, judges of the supreme court who rendered the judgment of disbarment, and against Merrick A. Rogers, Lucius P. Marsh, and J. Jay Joslin, alleging that there was no cause for his disbarment, and that the judgment of disbarment was the result of a conspiracy among all the defendants to willfully, maliciously, and corruptly oppress and wrong him. The citizenship of the parties is not alleged, and a demurrer to the complaint for want of jurisdiction was sustained, and this ruling of the lower court is assigned for error. It is contended that the subject-matter of the action is such as to give the circuit court jurisdiction. This contention is rested on the alleged conspiracy, and on the fact that the proceeding in the supreme court of the state to disbar the plaintiff, and which resulted in the judgment of disbarment, was based on the contents of a bill in equity filed in the circuit court of the United States for the district of Colorado by the plaintiff as an attorney for the complainants in that suit. The judgment of disbarment in the state courts did not affect the right of the plaintiff to practice in the courts of the United States. The plaintiff derived his right to practice law in the state courts from the constitution and laws of the state, and not from the constitution and laws of the United States; and any invasion of this right through a conspiracy or otherwise was an invasion of his right as a citizen of the state, for which he must seek

redress in the state courts in the absence of the requisite diverse citizenship, which alone could give the federal court jurisdiction. The enforcement act of 1870 and the civil rights bill of 1875 have no application to the case. It would serve no useful purpose to set out these acts, and quote from the decisions of the supreme court construing them, and the constitutional provisions upon which they rest. It is sufficient to say that it is well settled that the provisions of the fourteenth amendment which prohibit a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws, add nothing to the rights of one citizen as against another, but are limitations upon the powers of the state, and guaranty immunity from state laws and state acts invading the privileges and rights specified in the amendment; that, while the government of the United States is, within the scope of its powers, supreme, it can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction by the constitution of the United States; and that rights and privileges not so placed within its jurisdiction are left to the exclusive protection of the states. *U. S. v. Reese*, 92 U. S. 214, 217; *U. S. v. Cruikshank*, Id. 542, 1 Woods, 308, and *Fed. Cas. No. 14,897*; *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, Id. 339; *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601; *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617; *U. S. v. Patrick*, 54 Fed. 338.

A conspiracy to deprive a lawyer of his right to practice law in a state court is not a conspiracy to interfere with any right or privilege granted, secured, or protected by the constitution or laws of the United States. There is no act of congress conferring on the courts of the United States jurisdiction over a civil suit for damages resulting from such a conspiracy, and it would be beyond the constitutional competency of congress to pass such an act. It makes no difference that the judgment of disbarment in the state court was granted for what the plaintiff had said or done in the United States circuit court. The proceeding in the state court did not purport to interfere, and did not interfere, with the right of the plaintiff to practice law in the courts of the United States or with his prosecution of the case in which he made the allegations which were the groundwork of the proceedings for his disbarment in the state court. The judgment of the court below dismissing the complaint for want of jurisdiction is affirmed.

ARTHUR et al. v. OAKES et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 169.

1. RAILROAD EMPLOYEES—QUITTING SERVICE WITHOUT CAUSE—LIABILITIES.

If an employe of a railroad company quits without cause, and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and, perhaps, in some states of case, to criminal prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness was required upon his part in the discharge of a duty he had undertaken to perform.

2. SAME—INVOLUNTARY SERVITUDE.

It would be an invasion of one's natural liberty to compel him to work for, or to remain in the personal service of, another. One who is placed under such restraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction.

3. SAME—CONTRACT OF EMPLOYMENT—REMEDIES FOR BREACH.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employe, engaged to perform personal service, to quit that service, rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case, or the discharging in the other, is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day, or the affirmative acceptance, of merely personal services. Relief of that character has always been regarded as impracticable.

4. SAME.

Undoubtedly, the simultaneous cessation of work by any considerable number of the employes of a railroad corporation without previous notice will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employes and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employes and employers, so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employe from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employe in their service.

5. SAME—EQUITY JURISDICTION—PERFORMANCE OF CONTRACT.

The fact that employes of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employes, against their will, to remain in the personal service of their employer.

6. RAILROAD EMPLOYEES—QUITTING SERVICE OF RECEIVER.

These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment which did not limit the exercise of the right to quit the service, their peaceable co-operation, as the result of friendly argument, persuasion, or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If in good faith, and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employes exercising their lawful rights in orderly ways, or to the receivers when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among employes, and their withdrawal from service.

7. CONSPIRACY—WHEN ILLEGAL.

According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So, a combination or conspiracy to procure an employe or body of employes to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law.

8. SAME.

An intent, upon the part of a single person, to injure the rights of others or of the public, is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent; but a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal.

9. UNLAWFUL COMBINATION OF EMPLOYEES.

It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employes would be illegal which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employes remaining in their service, or by using like methods to cause employes to quit, or prevent or deter others from entering the service in place of those leaving it.

10. SAME.

The act of congress of June 29, 1886, legalizing the incorporation of national trade unions (24 Stat. 86, c. 567), does not sanction illegal combinations.

11. STRIKE—WHEN ILLEGAL.

In the absence of evidence, it cannot be held, as a matter of law, that a combination among employes, having for its object their orderly withdrawal in large numbers, or in a body, from the service of their employers, on account simply of a reduction in their wages, is not a "strike," within the meaning of that word as commonly used. Such a withdrawal, although amounting to a strike, is not illegal or criminal.

12. SAME—INTERFERENCE BY EQUITY.

Circumstances stated under which a court of equity may interfere to prevent strikes or illegal interference with property.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Petition by P. M. Arthur and others to modify certain injunctions issued in a consolidated suit brought by the Farmers' Loan & Trust Company and others against the Northern Pacific Railroad Company and its receivers, Thomas F. Oakes, Henry C. Payne, and Henry O. Rouse. 60 Fed. 803. The injunctions were only modified in part, and the petitioners appeal.

Quarles, Spence & Quarles, for appellants.

George P. Miller, for appellees.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

HARLAN, Circuit Justice. The questions before us relate to the power of a court of equity, having custody by receivers of the railroad and other property of a corporation, to enjoin combinations, conspiracies, or acts upon the part of the receivers' employes and their associates in labor organizations, which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation.

The original bill was filed on behalf of stockholders and creditors of the Northern Pacific Railroad Company, a corporation created by an act of congress, and had for its general object the administration under the direction of the court of the entire railroad system, lands, and assets of that corporation, and the enforcement of the respective rights, liens, and equities of its preferred and common stockholders, bondholders, and creditors.

The railroad company having filed its answer, receivers were appointed, with authority to take immediate possession of its railroads and other property, and to exercise its authority and franchises, conduct its business and occupation as a carrier of passengers and freight, discharge the public duties obligatory upon it, or upon any of the corporations whose lines of road were in its possession, preserve the property in proper condition and repair so as to be safely and advantageously used, protect the title and possession of the same, and employ such persons and make such payments and disbursements as were needful. The receivers were also authorized to manage all other property of the company at their discretion, and in such manner as in their judgment would produce the most satisfactory results consistent with the discharge of the public duties imposed on them, and to fix the compensation of officers, attorneys, managers, superintendents, agents, and employes in their service. It was further ordered that an injunction issue against the defendant and all claiming to act by, through, or under it, and against all other persons, to restrain them from interfering with the receivers in taking possession of and managing the property.

Subsequently the Farmers' Loan & Trust Company, as trustee for the holders of bonds and collateral trust indentures, filed an original bill in the same court against the Northern Pacific Railroad Company, the individual plaintiffs in the first suit, and the receivers. The relief asked was that the plaintiff, as trustee under the mortgages named in the bill, be placed in possession of the mortgaged premises, or that receivers of the rights, franchises, and property of the railroad company be appointed with authority to operate its railroads and carry on its business under the protection of the court; that the liens created by the several mortgages be ascertained and declared; and that the mortgaged property, in certain contingencies, be sold, and the proceeds applied accordingly to the rights of parties.

The railroad company having appeared in that suit, an order was entered appointing the same persons receivers who were appointed in the first suit, and the two suits were consolidated, to proceed together under the title of the Farmers' Loan & Trust Company v. Northern Pacific Railroad Company, etc.

By a writ of injunction dated December 19, 1893, the officers, agents, and employés of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all persons, associations, and combinations, voluntary or otherwise, whether in the service of the receivers or not, were enjoined—

From disabling, or rendering in any wise unfit for convenient and immediate use, any engine, cars, or other property of the receivers;

From interfering in any manner with the possession of locomotives, cars, or property of the receivers, or in their custody;

From interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the receivers, or with men employed by them to take the place of those who quit;

From interfering with or obstructing in any wise the operation of the railroad, or any portion thereof, or the running of engines or trains thereon as usual;

From any interference with the telegraph lines of the receivers along the lines of railways operated by them, or the operation thereof;

From combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad; and, generally,

From interfering with the officers and agents of the receivers or their employés in any manner, by actual violence or by intimidation, threats, or otherwise, in the full and complete possession and management of the railroad and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the receivers, whether belonging to them or to shippers or other owners, and from interfering with, intimidating, or otherwise

injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of the receivers, or any portion thereof, or by interfering in any manner, by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by the receivers, until the further order of this court.

This injunction was based on a petition of the receivers, urging, in view of the general depression in the business of transportation, the necessity of reducing expenses, and representing to the court that many employes were threatening that if their compensation were diminished as indicated in a revised schedule of wages which the receivers had adopted, to take effect January 1, 1894, they would prevent or obstruct the operation of the railroads in the hands of the receivers. Upon the filing of the petition, and before the writ of injunction was issued, the court adjudged and decreed that the receivers—

"Be, and they are hereby, authorized and instructed to put in operation and maintain upon the Northern Pacific Railroad the revised schedule and rates, more specifically in said petition described, and ordered by said receivers to take effect January 1, A. D. 1894, and for that purpose, and to that end, their action in abrogating and revoking the schedules in force on said railroad at the time of their appointment as such receivers, August 15, 1893, is hereby confirmed."

A second writ of injunction was issued December 22, 1893. It was based on a supplemental petition of the receivers, and was in all respects like the former one, except that it contained, *in addition*, a clause by which the persons and associations to whom it was addressed were enjoined—

From combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, *and from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time*, and from ordering, recommending, advising, or approving, by communication or instruction or otherwise, the employes of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time, until the further order of this court.

The appellants, as chief executive officers, respectively, of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, the Brotherhood of Railway Trainmen, and the Switchmen's Mutual Aid Association, appeared in court on behalf of themselves and their respective organizations and associations, as well as on behalf of such employes of the receivers as were members of those associations and organizations, or of some of them,

and moved that the court modify the orders and injunctions of December 19, 1893, and December 22, 1893—

(1) By striking from both writs of injunction these words: "And from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

(2) By striking from the writ of injunction of December 22, 1893, the above clause or paragraph relating specially to "strikes," which was not in the writ issued December 19, 1893.

The motion was in writing, and upon its face purported to be based on the petition and supplemental petition filed by the receivers, on the orders of the court made December 19 and 22, 1893, respectively, and on the above writs of injunction. Beyond the facts set out in those petitions, the only evidence adduced at the hearing of the motion was documentary in its nature, to wit, the constitutions and by-laws of the associations whose principal officers had been permitted to intervene in the cause.

The court, upon the hearing of the motion, modified the writ of injunction of December 22, 1893, by striking therefrom the above words in italics: "And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time."

The grounds upon which these words were stricken from the second writ of injunction are thus stated in the opinion of the court:

"In fairness this clause must be read in the light of the statements of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations, and that the men would obey such orders, instead of following the direction of the court. The clause is specially directed to the chiefs of the several labor organizations. The use of the words 'order, recommend, approve, or advise' was to meet the various forms of expression under which, by the constitution or by-laws of these organizations, the command was cloaked, as, for instance, in one organization the chief head 'advises' a strike; in another, he 'approves' a strike; in another, he 'recommends' the quitting of employment. Whatever terms may be employed, the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear; that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joinder in a strike.

"It is said, however, that the clause restrains an individual from friendly advice to the employes as a body, or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived,

and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ."

Except in the particulars mentioned in the opinion of the circuit court, the motion to modify the injunctions was denied, and the injunctions continued in force. Of this action of the court the interveners complain.

In considering the important questions presented by the record, we have assumed, as did the circuit court, the truth of all the material facts set out in the petition and supplemental petition of the receivers. This is the necessary result of the interveners having based their motion on those petitions, and on the orders of the court directing writs of injunction to be issued. As those orders were based on the petitions of the receivers, it must be taken that the interveners, although insisting that the injunction should have been modified to the full extent indicated by their motion, concede, for the purposes of the motion, the facts to be as alleged in those petitions.

It is consequently to be regarded as undisputed in this cause that at the time the writ of December 19, 1893, was issued, some of the railroad employes were giving it out and threatening that if the revised schedules and rates in question were enforced they would suddenly quit the service of the receivers; by threats, force, and violence would compel other employes to quit such service, and by organized effort and intimidation prevent others from taking the places of those who might quit; would disable locomotives and cars so that they could not be safely used, or used only after expensive repairs; would take possession of the cars, engines, shops, and roadbeds in the possession of the receivers, and otherwise prevent their being used; would so conduct themselves with regard to the property in the hands of the receivers as to hinder and embarrass them, their officers and agents, in its management and in the operation of trains; and that such dissatisfied employes, and others not in the employ of the receivers, but co-operating with those employes from a spirit of sympathy or mischief, would, unless restrained by the order of court, have carried out their threats, with the result that the receivers would not only have been compelled to abandon the revised schedules and rates proposed to be enforced, but would have been disabled from operating the railroads in their custody, from discharging their duties to the public as carriers of passengers and freight, and from transporting the mails of the United States, bringing thereby incalculable loss upon the trust property, as well as causing inconvenience and hardship to the public, particularly to the people in that part of the country traversed by the Northern Pacific Railroad, who were dependent upon the regular, continuous operation of that road for commercial facilities of every kind, as well as for fuel, provisions, and clothing.

It will be observed that the motion of the interveners does not question the power of the court to restrain acts upon the part of the employes or others which would have directly interfered with the receivers' possession of the trust property, or obstructed their control and management of it, as well as attempts, by force, intimidation, or threats, or otherwise, to molest or interfere with per-

sons who remained in the service of the receivers or with others who were willing to take the places of those withdrawing from such service.

But it was contended that the circuit court exceeded its powers when it enjoined the employés of the receivers "from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of said receivers, with or without notice, as to cripple the property, or prevent or hinder the operation of said railroad."

This clause embodies two distinct propositions,—one, relating to combinations and conspiracies to quit the service of the receivers with the object and intent of crippling the property or embarrassing the operation of the railroads in their charge; the other, having no reference to combinations and conspiracies to quit, or to the object and intent of any quitting, but only to employés "so quitting" as to cripple the property or prevent or hinder the operation of the railroad.

Considering these propositions in their inverse order, we remark that the injunction against employés so quitting as to cripple the property or prevent or hinder the operation of the railroad was equivalent to a command by the court that they should remain in the active employment of the receivers, and perform the services appropriate to their respective positions, until they could withdraw without crippling the property or preventing or hindering the operation of the railroad. The time when they could quit without violating the injunction is not otherwise indicated by the order of the court.

Under what circumstances may the employés of the receivers, of right, quit the service in which they are engaged? Much of the argument of counsel was directed to this question. We shall not attempt to lay down any general rule applicable to every case that may arise between employer and employés. If an employé quits without cause, and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and perhaps, in some states of case, to criminal prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had undertaken to perform. And it may be assumed for the purposes of this discussion that he would be liable in like manner where the contract of service, by necessary implication arising out of the nature or the circumstances of the employment, required him not to quit the service of his employer suddenly, and without reasonable notice of his intention to do so.

But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or

to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors, or musicians, who, after agreeing, for a valuable consideration, to give their professional service, at a named place and during a specified time, for the benefit of certain parties, refuse to meet their engagement, and undertake to appear during the same period for the benefit of other parties at another place. *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 617; *Id.*, 5 De Gex & S. 485, 16 Jur. 871; *Montagne v. Flockton*, L. R. 16 Eq. 189. While in such cases the singer, actor, or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing or to act or to play. In *Powell Duffryn Steam-Coal Co. v. Taff Vale Ry. Co.*, 9 Ch. App. 331, 335, Lord Justice James observed that when what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case Lord Justice Mellish stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employé engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 740, Taft, J., and authorities cited; *Fry, Spec. Perf.* (3d Am. Ed.) §§ 87-91, and authorities cited.

It is supposed that these principles are inapplicable or should not be applied in the case of employés of a railroad company, which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly

the simultaneous cessation of work by any considerable number of the employés of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employés and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employés and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employé from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employé in their service. It was competent for the receivers in this case, subject to the approval of the court, to adopt a schedule of wages or salaries, and say to employés, "We will pay according to this schedule, and if you are not willing to accept such wages you will be discharged." It was competent for an employé to say, "I will not remain in your service under that schedule, and if it is to be enforced I will withdraw, leaving you to manage the property as best you may without my assistance." In the one case, the exercise by the receivers of their right to adopt a new schedule of wages could not, at least in the case of a general employment without limit as to time, be made to depend upon considerations of hardship and inconvenience to employés. In the other, the exercise by employés of their right to quit in consequence of a proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public. The fact that employés of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employés, against their will, to remain in the personal service of their employer.

The result of these views is that the court below should have eliminated from the writ of injunction the words, "and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

But different considerations must control in respect to the words in the same paragraph of the writs of injunction, "and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad." We have said that, if employés were unwilling to re-

main in the service of the receivers for the compensation prescribed for them by the revised schedules, it was the right of each one on that account to withdraw from such service. It was equally their right, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body from the service of the receivers because of the proposed change. Indeed, their right, as a body of employes affected by the proposed reduction of wages, to demand given rates of compensation as a condition of their remaining in the service, was as absolute and perfect as was the right of the receivers representing the aggregation of persons, creditors, and stockholders interested in the trust property, and the general public, to fix the rates they were willing to pay their respective employes. But that is a very different matter from a *combination and conspiracy* among employes, with the *object and intent*, not simply of quitting the service of the receivers because of the reduction of wages, but of *crippling the property* in their hands, and *embarrassing the operation* of the railroad. When the order for the original injunction was applied for it was represented—and the interveners admit by their motion that it was correctly represented—that unless the restraining power of the court was exerted the dissatisfied employes, and others co-operating with them, would physically disable and render unfit for use the cars and other property in the possession of the receivers, and by force, threats, and intimidation used against employes remaining in their service, and against those desiring to take the places of those quitting, would prevent the receivers from operating the roads in their custody, and from discharging the duties which they owed on behalf of the corporation to the parties interested in the trust property, to the government, and to the public.

The general inhibition against combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operation of the railroad must be construed as referring only to acts of violence, intimidation, and wrong of the same nature or class as those specifically described in the previous clauses of the writ. We do not interpret the words last above quoted as embracing the case of employes who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution, nor intimidation towards employes who do not join them, nor any device to molest, hinder, alarm, or interfere with others who take or desire to take their places. We use the word "device" here as applicable to cases like that of *Sherry v. Perkins*, 147 Mass. 212,¹ in which it appeared that parties belonging to a labor organization displayed and maintained certain banners in front of the plaintiff's place of business for the purpose of deterring workmen from remaining in or entering his service. As the acts complained of were injurious to the

¹17 N. E. 307.

plaintiff's business and were a nuisance, it was held that they could be reached and restrained by injunction. So in *Spinning Co. v. Riley*, L. R. 6 Eq. 551, equity interfered by injunction to restrain the conduct of parties, officers of a trades union, who gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiff pending a dispute between the union and the plaintiff. See, also, *U. S. v. Kane*, 23 Fed. 748; *Emack v. Kane*, 34 Fed. 46; *Casey v. Typographical Union*, 45 Fed. 135; *Walker v. Cronin*, 107 Mass. 555.

These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion, or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employes exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among employes, and their withdrawal from service.

The combinations or conspiracies which the law does not tolerate are of a different character. According to the principles of the common law, a conspiracy upon the part of two or more persons, *with the intent*, by their combined power, to wrong others, or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employé or body of employes to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law. It is one thing for a single individual, or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public.

An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal.

The general principle is illustrated in *Callan v. Wilson*, 127 U. S. 540, 555, 8 Sup. Ct. 1301. That was an information in the police court of the District of Columbia charging the defendants Callan and others with a conspiracy to prevent certain named persons, who had been expelled from a local association, a branch of a larger one known as the Knights of Labor of America, from pursuing their calling of musicians anywhere in the United States. This result, the information charged, was to be effected by the defendants refusing to work as musicians, or in any other capacity, with the persons so named, or with or for any person, firm, or corporation working with or employing them; by procuring all other members of those organizations, and all other workmen and tradesmen, not to work in any capacity with or for them or either of them, or for any firm or corporation that employed either of them; and by warning and threatening every person, firm, or corporation employing such obnoxious persons that, if they did not forthwith cease to employ and refuse to employ them, they should not receive the custom or patronage either of the persons so conspiring, or of other members of said organizations. The question in the case was whether the accused were entitled to a trial by jury or whether the offense charged was of the class called "petty," for the trial of which a defendant could not at common law claim, of right, a jury. The court held that the offense charged was not a petty or trivial one, but one of a grave character, affecting the public at large, and for the trial of which a jury was therefore demandable as of right.

Among the authorities cited in that case were *Com. v. Hunt*, 4 Metc. (Mass.) 111, 121, in which it was said that "the general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual;" *State v. Burnham*, 15 N. H. 396, 401, where it was held that "combinations against law or against individuals are always dangerous to the public peace and to public security; to guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult;" and *Reg. v. Parnell*, 14 Cox, Cr. Cas. 508, 514, where the court observed, that "an agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character; when done by one alone it is but a

civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of a combination."

One of the cases cited in *Callan v. Wilson* is *Com. v. Carlisle*, Brightly, N. P. 36, 39, 40, in which Mr. Justice Gibson considered the law of conspiracy with care, and among other things said:

"There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition. But, the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."

There are many other adjudged cases to the same effect. In *State v. Stewart*, 59 Vt. 273, 286, 9 Atl. 559, it was held, after an extended review of the authorities, that:

"A combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are per se indictable, or promote objects or adopt means that are per se oppressive, immoral, or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material property of the country, they work injury to the whole people."

In *State v. Buchanan*, 5 Har. & J. 317, 352, 355, the court of appeals of Maryland adjudged that:

"Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, and therefore need not be stated in the indictment."

Again:

"There is nothing in the objection that to punish a conspiracy where the end is not accomplished would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense by the nature of the object to be effected."

In *State v. Glidden*, 55 Conn. 46, 75, 8 Atl. 890, the court said:

"Any one man, or any one of several men acting independently, is powerless; but when several combine, and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its number increases. * * * The combination becomes dangerous, and subversive of the rights of others, and the law wisely says that it is a crime."

In *Queen v. Kenrick*, 5 Q. B. 49, Chief Justice Denman said that by the law of conspiracy, as it had been administered for at least the previous hundred years, any combination to prejudice another

unlawfully was considered as constituting the offense, and that the offense consisted in the conspiracy, and not in the acts committed for carrying it into effect.

See, also, *Carew v. Rutherford*, 106 Mass. 1, 13; *Steamship Co. v. McKenna*, 30 Fed. 48; *Coeur d'Alene C. & M. Co. v. Miners' Union*, 51 Fed. 260, 267; 3 Whart. Cr. Law (8th Ed.) § 1337 et seq.; 2 Archb. Cr. Pr. & Pl. (Pom. Ed.) 1830, note; 2 Bish. Cr. Law, § 180 et seq.

It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employes would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employes remaining in their service, or by using like methods to cause employes to quit or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter or attempt to enter the service of those against whom such combinations are specially aimed. And as acts of the character referred to would have defeated a proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as are specifically mentioned, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad by the receivers.

Some reference was made in argument to the act of congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. 86, c. 567. It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established "for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled, or unemployed members or the families of deceased members, or for such other object or objects for which working people may unlawfully combine, having in view their mutual protection or benefit." As-

sociations of that character are authorized to make and establish such constitutions, rules, and by-laws as they deem proper to carry out their lawful objects. Those objects, as defined by congress, are most praiseworthy, and should be sustained by the courts whenever their power to that end is properly invoked. What we have said about illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats, or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best.

The principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing may have been done in execution of that intent, has been embodied in the statutes of Wisconsin, in which state the present cause is pending. By an act passed April 2, 1887, it was declared that:

"Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punishable by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars."

And by a subsequent act, passed April 8, 1887, it was declared that:

"Any two or more employers who shall agree, combine, and confederate together for the purpose of interfering with or preventing any person or persons seeking employment, either by threats, promises, or by circulating or causing the circulation of a so-called black list, or by any means whatsoever, or for the purpose of procuring and causing the discharge of any employé or employes, by any means whatsoever, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a period of not more than one year, or by a fine of not less than fifty dollars, or by both." 1 Laws Wis. 1887, pp. 299, 380, cc. 287, 349; 2 Sanb. & B. St. Wis. §§ 4466a, 4466b.

This legislation was followed by an act published May 3, 1887, providing:

"Section 1. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage-worker, or who shall attempt to so hinder or prevent, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment in the discretion of the court.

"Sec. 2. Any person who shall individually or in association with one or more others, wilfully break, injure or remove any part or parts of any railway car or locomotive, or any other portable vehicle or traction engine, or any part or parts of any stationary engine, machine, implement or machinery, for the purpose of destroying such locomotive, engines, car, vehicle, implement or machinery, or of preventing the useful operation thereof, or who shall in any other way wilfully or maliciously interfere with or prevent the

running or operation of any locomotive, engine or machinery, shall be punished by fine not exceeding one thousand dollars or by imprisonment in the county jail or the state prison not exceeding two years, or by both fine and imprisonment in the discretion of the court." 1 Laws Wis. p. 462, c. 427.

It thus appears that combinations and conspiracies by two or more persons, with the intent to injure the rights of others were illegal at common law, and are public offenses in the state where this cause is pending.

For the reasons stated, we are of opinion that the circuit court properly refused to strike from the writs of injunction the words, "And from combining and conspiring to quit with or without notice the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad."

We come next to that clause in the writ of injunction of December 22, 1893, expressly relating to strikes.

What is to be deemed a strike, within the meaning of the order of the circuit court? In the opinion of the circuit judge, made a part of the record, we are informed that at the argument below the definition proffered to the court by the interveners as one recognized by the labor organizations of the country was as follows:

"A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of employment are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employé to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions."

The learned circuit judge said that a more exact definition of a strike was "a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand," and he said:

"It is idle to talk of a peaceful strike. None such ever occurred. The suggestion is an impeachment of intelligence. All combinations to interfere with perfect freedom in the proper management of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic, or with the lawful employment of others, are within the condemnation of the law. It has been well said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but by the necessary prevention of labor by those who are willing to assume their places, and as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed."

Under this view of the nature and object of strikes the injunction was directed, generally, against combinations and conspiracies upon the part of employés with the design or purpose of causing a strike on the lines of railroad operated by the receivers; against the ordering, recommending, advising, or approving the employés

to join in a strike; and against the ordering, recommending, or advising any committee or class of employes to strike, or to join in a strike.

If the word "strike" means in law what the circuit court held it to mean, the order of injunction, so far as it relates to strikes, is not liable to objection as being in excess of the power of a court of equity. Indeed, upon the facts presented by the receivers and admitted by the motion of the interveners, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the circuit judge.

But in our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold, as matter of law, that a combination among employes, having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a "strike," within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal. In *Farrer v. Close*, L. R. 4 Q. B. 602, 612, Sir James Hannen, afterwards lord of appeal in ordinary, said:

"I am, however, of opinion that strikes are not necessarily illegal. A 'strike' is properly defined as 'a simultaneous cessation of work on the part of the workmen;' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employes, or any other lawful purpose."

In our opinion the order should describe more distinctly than it does the strikes which the injunction was intended to restrain. That employes and their associates may not unwittingly place themselves in antagonism to the court's authority, and become subject to fine and imprisonment as for contempt, the order should indicate more clearly than has been done that the strikes intended to be restrained were those designed to physically cripple the trust property, or to actually obstruct the receivers in the operation of the road, or to interfere with their employes who do not wish to quit, or to prevent, by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employes, in peaceable ways, of rights clearly belonging to them, and were not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers.

In our consideration of this case we have not overlooked the observations of counsel in respect to the use of special injunctions to prevent wrongs which, if committed, may be otherwise reached by

the courts. It is quite true that this part of the jurisdiction of a court of equity should be exercised with extreme caution, and only in clear cases. *Brown v. Newall*, 2 Mylne & C. 558, 570. Mr. Justice Baldwin, in *Bonaparte v. Railroad Co.*, Baldw. 205, 217, Fed. Cas. No. 1,617, properly said:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless in cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its own suitors and its own principles to administer the only remedy the law allows to prevent the commission of the act."

The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is, Justice Story said, because of the varying circumstances of cases, "that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld." "And," the author proceeds, "there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts, thus operating by special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence." Story, Eq. Jur. § 959b.

In using a special injunction to protect the property in the custody of the receivers against threatened acts which it is admitted would, if not restrained, have been committed, and would have inflicted irreparable loss upon that property, and seriously prejudiced the interests of the public, as involved in the regular, continuous operation of the Northern Pacific Railroad, the circuit court, except in the particulars indicated, did not restrain any act which, upon the facts admitted by the motion, it was not its plain duty to restrain. No other remedy was full, adequate, and complete for the protection of the trust property, and for the preservation of the rights of individual suitors and of the public in its due and orderly administration by the court's receivers. "It is not enough," the court said in *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, "that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." And the application of the rule that equity will not interfere where there is an adequate

remedy at law must depend upon the circumstances of each case as it arises. *Watson v. Sutherland*, 5 Wall. 74, 79. That some of the acts enjoined would have been criminal, subjecting the wrongdoers to actions for damages or to criminal prosecution, does not therefore in itself determine the question as to interference by injunction. If the acts stopped at crime, or involved merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of property for all the purposes for which that property was adapted, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate. "Formerly," Mr. Justice Story says, "courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country." 2 Story, Eq. Jur. § 928. So, in respect to acts which constitute a nuisance injurious to property, if "the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the court by way of injunction." Kerr, *Inj.* 166, c. 6, and authorities there cited. This jurisdiction, the author says, was formerly exercised sparingly and with caution, "but it is now fully established, and will be exercised as freely as in other cases in which the aid of the court is sought for the purpose of protecting legal rights from violation."

In the course of the argument some reference was made to the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act, and upon the general principles that control the exercise of jurisdiction by courts of equity.

For the reasons we have stated the order complained of is reversed in part, and the cause is remanded with directions to sustain the motion to strike out and modify the injunction to the extent indicated in this opinion.

Reversed.

CLAY et al. v. DESKINS et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 75.

RES JUDICATA—IDENTITY OF ISSUES.

Where, in a suit to set aside a sale of lands as in fraud of the rights of complainants therein, who claim the land under a prior contract of purchase, a state court decides that they have lost all rights under their contract, and hence cannot attack the sale, such decision is conclusive of complainants' rights in a subsequent suit by them in a federal court against the same defendants to recover, on the strength of the same contract of purchase, the profits made by the vendee in the fraudulent sale on a resale of the land.

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a bill by Samuel Clay, Jr., and George W. Headley, against L. S. Deskins, W. H. Deskins, Stuart Wood, William Blackham, and Annie Blackham, his wife, to recover the profits on the sale of certain land by W. H. Deskins to defendant Wood. A demurrer to the bill was sustained, and complainants appeal. Affirmed.

Clay and Headley, the appellants in this case, on 25th May, 1888, entered into a contract with L. S. Deskins and William Blackham for the purchase of a tract of land in West Virginia of some 5,000 acres. By the terms of the contract, the price of the land was to be \$3 per acre, of which the sum of \$230 was to be paid, and was paid in cash, the remainder within 10 months from date, at which time, and on receipt of the money, a deed of the land would be executed by the vendors. At the date of this contract, there was pending in Logan county, W. Va., a suit in chancery against L. S. Deskins, one of the contracting vendors,—a creditors' bill, Patton Bros. v. L. S. Deskins and others,—seeking, among other things, the enforcement of a judgment against him for some \$262.57, and a decree had been entered thereon 6th October, 1886, and an order for sale of these lands contracted to be sold for the satisfaction of the decree. Owing to the absence and inability of the commissioner appointed to conduct the sale, and some delay in appointing a substitute, the sale did not take place until 1st April, 1889. On that day, H. K. Shumate, duly appointed commissioner, offered the lands at public auction, and they were bid in by W. H. Deskins, at the sum of \$10,000. Shortly afterwards, owing to a higher offer by another person, the bid was raised to \$15,000. At that price the land was conveyed by Shumate, the commissioner, to W. H. Deskins, and the sale was confirmed by the court. Thereupon, Samuel Clay and George W. Headley, who are now the appellants in this case, instituted proceedings by way of bill in equity in Logan county, W. Va., against Shumate, the commissioner, who made the sale, L. S. Deskins, and William Blackham, who had made the contract of sale, and W. H. Deskins, the purchaser at the sale, and Stuart Wood, who had contracted to buy the land from W. H. Deskins. The bill charged that the sale was fraudulent and void as against the complainants, and that it infringed against, and was an attempt to destroy, the rights acquired by them on the contract. This contract they set out in the first paragraph of the bill, and claim and rely on it as the foundation of their right of action. The circuit court of Logan county, after full hearing, sustained the allegations of the bill, set aside the sale as fraudulent and void, and declared that the complainants were entitled to the relief prayed for in the bill. A part of this relief, and as a consequence of setting aside the sale, was that L. S. Deskins and William Blackham, upon receipt of the remainder of the purchase money under the contract, would be compelled to make to the complainants a proper deed of conveyance of these lands. The cause was carried into the supreme court of West Virginia by appeal on the

part of the defendants, and that court, at January term, 1892, reversed the decision of the lower court and dismissed the bill. 15 S. E. 85. The supreme court, in its opinion, held that the bill was really for the specific performance of the contract, and that, unless the complainants could establish their right to such relief, they had no standing in court to complain of the fraud in the sale. The same complainants, on 17th December, 1892, filed their bill of complaint in the circuit court of the United States for the district of West Virginia against L. S. Deskins, W. H. Deskins, Stuart Wood, and William Blackham and wife, as defendants. This bill sets out the contract of sale of 25th May, 1888, between them and L. S. Deskins and William Blackham for these 5,000 acres of land, the pending suit of Patton Bros. v. L. S. Deskins and others, the sale under this last-named suit, the proceedings in the circuit court of Logan county to set aside the sale, and the decree of that court setting it aside. It then avers that the only question made in that suit was the validity of the sale, the question of specific performance of the contract not being in issue, and therefore not adjudicated; but that, at the hearing of the appeal, the supreme court of West Virginia rest the decision wholly on the question of specific performance, and on this issue reverse the decree below; and, for this reason, that the decree did not adjudicate the rights of the parties, and is simply obiter dictum. The bill then sets up the rights of the complainants under the contract, which they claim is an absolute deed of conveyance; denies all notice of the pendency of the Patton Bros. suit, constructive or actual; and denies any laches on their part. They charge that the sale to W. H. Deskins by Shumate, commissioner, was fraudulent and void as to them. They then allege that W. H. Deskins has sold this land to Stuart Wood at the large advance on his original purchase of \$7,240, and claim that, inasmuch as the lands were really their property, they are entitled to this advance on the price, and that, as Wood has not yet paid all that he had contracted to pay, to an amount exceeding this \$7,240, he be decreed to pay this sum to the complainants. The defendants demurred to the bill. The circuit court sustained the demurrer, upon the ground that the rights of the complainants had already been adjudicated in the supreme court of West Virginia,—a court of competent jurisdiction. To this decision the appellants excepted, and have filed their assignments of error.

Z. T. Vinson, for appellants.

C. C. Watts, for appellees.

Before SIMONTON, Circuit Judge, and JACKSON and HUGHES, District Judges.

SIMONTON, Circuit Judge (after stating the facts). It will be noted that the complainants in the bill in the circuit court of Logan county, W. Va., are the same persons who are complainants in the circuit court of the United States for the district of West Virginia, and the defendants to both suits are the persons who have, or claim to have, an interest in the land the subject-matter of both suits. In the proceeding instituted and completed in the state courts of West Virginia to set aside the sale to W. H. Deskins, the only ground upon which the complainants could sustain their right to complain was that they had a valid contract of sale, which clothed them with the equitable interest in the property; and this was recognized by the supreme court of West Virginia. Before that court would discuss the question of fraud in the sale, it inquired into the right of the complainants to raise the question; in other words, had they locus standi in court? So, also, the case in the circuit court of the United States depends upon the decision of the same question. The complainants demand the net proceeds,—the profit made upon the sale of these lands to Stuart Wood. They cannot be entitled to these

net proceeds unless they are or were the equitable owners of these lands. They could only become the equitable owners by virtue of a valid contract of sale of the lands to them. The supreme court of West Virginia, in a cause between the same parties, relating to the same subject-matter as the suit in the circuit court, has determined that these complainants have lost all rights they may have had under the contract of sale, and that they did not have such an interest in these lands at the date of the sale by the commissioner, Shumate, to W. H. Deskins, as would authorize them to question in a court of equity the validity of the sale. This question is therefore *res judicata*. If they could not question the validity of the sale to W. H. Deskins, a *fortiori* they can have no right or title to any profit he may have made in the resale of these lands. The case in the state courts of West Virginia¹ and that in the circuit court of the United States for the district of West Virginia² were between the same parties, each dependent upon the same question; that is, did complainants have an equitable interest in these lands under the contract of sale?

The appellants, with much earnestness, insist that this decision of the supreme court of West Virginia was *obiter dictum*; that the only issue presented to that court was the fraud in the sale to W. H. Deskins; and that the exceptions brought up this issue only. The record disclosed that the complainants in that case (the appellants here) set out and relied upon their right to a specific performance of the contract as ground for *locus standi* in court, giving them a right to complain of the fraud, and that right was first discussed and denied by the court. The supreme court of West Virginia then take up and discuss the question of fraud, and announce their conclusion that the charge was unfounded. This being so, W. H. Deskins held under a valid sale, and obtained a valid title in fee simple; and the claim of the appellants that he purchased for them, or that they have an equitable interest in the proceeds of a sale made by him, and a consequent interest in the profit made by him in such sale, falls to the ground. The decision of the case in the state courts of West Virginia made the matter *res judicata*. *Aurora City v. West*, 7 Wall., at page 96. Where the parties are the same, the legal effect of the former judgment is not impaired because the subject of the second suit is different, provided the second suit involves the same title and depends on the same question. *Steam Packet Co. v. Sickles*, 24 How. 333, 341; *Stockton v. Ford*, 18 How. 418; *Franklin Co. v. German Sav. Bank*, 142 U. S. 93, 12 Sup. Ct. 147. The decree of the circuit court is affirmed, with costs.

¹*Clay v. Deskins*, 15 S. E. 85.

²No opinion.

BLUEFIELD WATERWORKS & IMP. CO. v. SANDERS.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 79.

1. BOUNDARY—COUNTY LINE—EVIDENCE.

Acts Va. 1845, pp. 37, 38, provide that the surveyors of the counties out of which any new county shall be formed, together with the surveyor of such new county, shall act as commissioners for running and marking the boundary lines designated in the act creating such county; that said lines, when so run and marked, shall be the dividing lines between such counties; that the commissioners shall report their doings, accompanied by a plat showing courses, distances, streams, etc., to the county court of each county interested therein; and that such "plat" shall be "conclusive evidence in all controversies" which may arise touching said lines. *Held*, that a plat made pursuant to such statute of the line between Mercer county, on one side, and Giles and Tazewell counties, Va., on the other, and which is now part of the line between the states of Virginia and West Virginia, is in all cases conclusive evidence of the location of such line, however crooked or erroneous it may be, and of the location, with regard to such line, of a natural object shown by such plat.

2. COURTS—JURISDICTION—RESIDENCE OF DEFENDANTS—PROCESS.

In an action in Virginia against a corporation of West Virginia, and other nonresidents, to enjoin the diversion of waters of a stream, it appeared that defendants were laying pipes and constructing waterworks on ground most of which plaintiff conceded, and all of which defendants claimed, to be in West Virginia; and that process was served on defendants on a few feet only of such ground which plaintiff claimed to be in Virginia. *Held*, that the court would hesitate to violate the privilege a citizen has of being sued in the jurisdiction of his residence, and would earnestly scrutinize the steps taken in the institution of an action against a defendant unwittingly in its jurisdiction.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

This was a bill by Walter M. Sanders against the Bluefield Waterworks & Improvement Company and others to enjoin the diversion or appropriation of the waters of a natural stream. There was a decree for complainant (58 Fed. 133), and defendant company appeals. Reversed.

This is a bill in equity brought by a riparian owner of lands watered by a stream in Tazewell county, Va., to enjoin the use of water from a spring out of which the stream flowed into and through the lands of the plaintiff, in diminution of the natural supply of water in the stream in quantity to which the plaintiff claimed to be entitled. The appellant is a corporation chartered by the legislature of West Virginia, and resident at the incorporated city of Bluefield, Mercer county, in that state. This is a rapidly growing city, now possessing 1,500 inhabitants. The appellant company was endowed by Bluefield with a franchise and right to construct and maintain works for supplying the city, its inhabitants, and property holders with water for domestic and manufacturing purposes. Three tracks of the Norfolk & Western Railroad converge at Bluefield, where the railroad company has important works. This company depends upon the appellant corporation for the water it requires for its engines and works at Bluefield. The charter of the appellant company authorizes it, among other things, to erect and operate waterworks, to supply persons and corporations with water, to build and lease houses, and to acquire and hold such lands and property, and such rights and interests therein, as may be necessary and useful to its purposes. Under its powers thus derived, the appellant company purchased sundry properties containing springs of water in the vicinity of Bluefield, and also purchased, at a large price, one acre of land two or more miles from

Bluefield from one Carmack Baily, a citizen of Tazewell county, Va., which adjoins the county of Mercer. This acre of land contained a very bold, prolific spring, called the "Beaver Pond Spring." Having contracted with the city of Bluefield to supply it with water for all purposes, and with the Norfolk & Western Railroad Company to furnish it with a full supply of water for its engines and works at Bluefield, the appellant company, by pipes and machinery, had availed itself of the full use of the several springs of which it had become owner, other than the Beaver Pond spring, and was, when the present litigation began, laying pipes from Bluefield towards this spring, and erecting machinery and suitable buildings on the acre of land purchased from Baily, with the view of availing itself of the water of that more prolific spring. While thus engaged, the appellee, in this suit, Walter M. Sanders, a citizen of Tazewell county, Va., and owner of some 3,000 acres of land in that county lying below the Beaver Pond spring, and watered by Beaver Pond creek, which flowed from the spring, presented a bill of injunction to the judge of the circuit court of Tazewell county, praying, among other things, that the appellant company and four citizens, who were named, and supposed to be its agents, be made parties defendant, and that the appellant and the persons named, and its agents and servants generally, be enjoined from taking any water from the spring or from the stream flowing out of it, and from diverting the water or the flow of the water from its natural course. The judge of the circuit court of Tazewell county granted the injunction prayed for, by an order restraining, until the further order of the court, the appellant and its agents from interfering with and from diverting or in any manner appropriating the water from the said spring, whether in the spring or in the natural bed flow of its water, except so far as the water might be necessary for the domestic use of persons and live stock living and grazing on the acre of land containing the spring, and especially restraining appellant from diverting or appropriating the water, by means of pipes or other appliances, from the spring and its outflowing stream.

It is to be observed that Beaver Pond spring is very near the boundary line between Virginia and West Virginia, which is also the boundary line between Tazewell county, Va., and Mercer county, W. Va. Local opinion was divided upon the question whether the spring was within Tazewell or Mercer county, within Virginia or West Virginia. If the spring was in West Virginia, then the laying of pipes between Bluefield and the spring, and the erection of buildings and machinery at the spring, were beyond the jurisdiction of an injunction issuing from the judge of the circuit of Tazewell county, Va., until the process provided by law for bringing nonresidents into court had been resorted to. The bill of injunction assumed, however, contrary to public opinion in Bluefield and Mercer county, and contrary to the belief of the appellant company and its agents, that the Beaver Pond spring was in Tazewell county, Va.; and the process under the bill was issued and served on that theory. Summons was issued from the office of the clerk of the Tazewell circuit court against the appellant company, described as a corporation of West Virginia, and against the four persons named in the bill,—Lowder, A. Tackett, H. Tackett, and Crouch. The summons was addressed to the sheriff of Tazewell county, and this summons, on which was indorsed the restraining order of the judge, which has been mentioned, was placed in the hands of his deputy. The return filed by the deputy on these papers was as follows: "I executed the within summons on the defendant T. J. Crouch on the 4th day of June, 1892, by delivering to him an office copy of said summons. On the 8th day of June, 1892, I executed this summons on L. C. Tabb, an agent of Bluefield Waterworks and Improvement Company, whom I found on the premises, overseeing the work mentioned in the indorsement on this writ of injunction. On the same day, to wit, on the 8th June, 1892, I executed this summons on the following persons, to wit: Hill, an engineer of the defendant company; Graves and Bige Lowder, engaged on said work,—to all of whom I gave an office copy of the within summons." A like summons and indorsement were delivered to the sergeant of the city of Roanoke, Va., the return on which was as follows: "Executed June 10, 1892, by delivering a copy of this writ to M. W. Bryan, treasurer of Bluefield Waterworks and Improvement Company, in the city of Roanoke, where he resides, the

president of the said company not being found in my bailiwick." In addition to the mesne and special process just described, complainant below, the appellee here, made publication once a week for four weeks in a newspaper published at Tazewell Courthouse, Va., under a law of the state relating to suits against nonresidents, in which the bill of injunction under consideration was described, the parties to the suit named, and its object set forth. No affidavit, however, was attached to this publication, as required by law. The appellant company and its agents proceeded with the pipe laying and other work in which they had been engaged when the papers from the Virginia clerk's office were served upon them, but did nothing in violation of the Virginia judge's order restraining them from "interfering with and diverting or in any manner appropriating the water from the Beaver Pond spring." Nevertheless, proceedings were at once begun against them for contempt. Upon affidavits filed charging them with acts committed in violation of the restraining order that had been served upon them, and with contempt of court, the judge of the Tazewell circuit court issued an order requiring the appellant and its agents, who were named, to appear before him to show cause why they should not be attached and punished for their contempt. Copies of this order to show cause were delivered to the attorney of the defendants by a deputy of the sheriff of Tazewell county, and also to some half dozen persons supposed to be agents of the appellant company. None of the returns made by the deputies of the Tazewell sheriff, either upon the original process or the subsequent order to show cause, state that the service was made within the county of Tazewell, Va. Thus required by punitive process, the appellant company made a special appearance before the judge of the circuit court of Tazewell county, and filed a special answer, confined exclusively to the matter of contempt, in which it denied the contempt, and supported its denial by affidavits of several witnesses cognizant of the facts of the case. The judge before whom this special appearance was made promptly entered an order recognizing, in terms, that the appearance had been special, and summarily dismissing the contempt proceeding. A few weeks afterwards, the appellant company and the four persons mentioned as codefendants in the original bill filed a petition in the circuit court of Tazewell county praying for a removal of the cause into the circuit court of the United States for the western district of Virginia, sitting at Abingdon. The petition was granted, and the cause removed into the federal court. On the 22d of October, 1892, the appellant company filed a motion in that court, parts of which are here given: "The Bluefield Waterworks and Improvement Company, one of the defendants to the bill of complaint of the plaintiff [Walter M. Sanders], appears in this cause for the sole purpose of objecting to the process issued in this cause against said defendant, and to move the court to quash and abate the same, for the following reasons: (1) The circuit court of Tazewell county had no jurisdiction to entertain this suit, and no process could legally issue thereon. (2) Said court had no jurisdiction of the subject-matter of the suit. (3) Said court had no jurisdiction over the said defendant, it being a corporation chartered by the state of West Virginia, and doing business exclusively in said state of West Virginia, and owning no land, estate, or debts in the state of Virginia. (4) Because the suit is not a proceeding in rem. It does not seek to recover any land, or interest in any land, owned by the defendant in the state of Virginia; nor does it seek to subject to the claim of the plaintiff any estate or debt owing to said defendant situate in the state of Virginia." Other reasons are stated for quashing the process issued in the cause, which need not be detailed here. On the same day on which this motion to quash was made, to wit, on the 22d October, 1892, the court overruled the motion. On the next day, the appellant company and the other defendants in the original bill filed a demurrer to the bill. The first ground of the demurrer was that the circuit court of Tazewell county had no jurisdiction of the cause, either of the persons of the defendants or the subject-matter of the suit. The second ground of objection related to the want of proper parties to the cause. The court overruled the demurrer. Thereupon, and not until after all these proceedings were had, the defendants in the original suit, having no other recourse, filed their answer to the bill, and made defense on the merits of the controversy. After the usual course of pro-

ceeding, the court below entered a final decree perpetuating the injunction originally granted, and denying to the appellant company the use of the Beaver Pond spring for supplying the city of Bluefield and the Norfolk & Western Railroad Company with its waters, from which decree appeal was taken to this court.

During the progress of the suit in the court below, an order was entered by that court directing W. M. Dunlap, a civil engineer, to run and ascertain the line (of boundary) between the county of Mercer in the state of West Virginia and the county of Tazewell, in the state of Virginia, as run and marked by Robert Hall, late surveyor of Mercer county, Kiah Harman, late surveyor of Tazewell county, and William Hale, late surveyor of Giles county, as shown by the report and plat of said late surveyors, filed in the year 1848. This order was executed by the engineer designated, and a report and plat of a line were filed by him, and are made part of the record in this suit. Apropos of this order of court looking to the running of a boundary line for these counties by a civil engineer, the following facts must needs be stated: In the year 1848, the county of Mercer having some time before been formed from the territory of Giles and Tazewell counties, the three surveyors who are mentioned in the order of the court just mentioned were appointed, in accordance with the laws of Virginia, to run and mark and make plat of the boundary lines between the new county of Mercer and the other two counties. This was 16 years before West Virginia was cut off from Virginia, carrying Mercer county with it. These three surveyors, acting as joint commissioners, made in due time report of the work they had performed, accompanied by a plat of the boundary lines which they had run and marked. Their tripartite report and plat were filed in each of the three counties, were accepted by the courts of the counties, and became, by force of law, the authoritative markings of the boundary lines to which they related.

A general law of Virginia was then, and is still, in force (Acts Assem. 1845, pp. 37, 38), which, among other things, declares as follows: "The surveyor or surveyors of the county or counties out of which any new county shall hereafter be formed, together with the surveyor of such new county, shall be, and they are hereby, appointed commissioners for running and marking the boundary lines designated in the act creating such county. * * * The said lines, when so run and marked by them, shall be taken and held as the dividing lines between the said counties. It shall be the duty of the said commissioners to report their proceedings and doings in the matter, accompanied by a plat showing the courses and distances, and the streams and other natural and artificial objects or points referred to in the act aforesaid, to the county court of each county interested therein, to be recorded in their respective offices," etc. "And the said plat shall be conclusive evidence in all controversies which may arise touching said lines."

On the formation of the state of West Virginia, in which Mercer county was embraced, and in which the counties of Giles and Tazewell were not included, the lines run and marked by the three surveyors, Hall, Harman, and Hale, as laid down on the plat and report which they made and filed, showing the boundary line between Mercer county, on one side, and Giles and Tazewell counties, on the other, became incontrovertibly the boundary line between Virginia and West Virginia.

The facts which have been above recited seem to be all that are necessary to the decision of this appeal. The grounds of the decision which will be rendered in the cause will now be stated.

A. W. Reynolds, for appellant.

S. C. Graham, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge. The question which presented itself at the threshold of this litigation was the vital one whether the circuit court of Tazewell county had jurisdiction of the suit, and especially of the defendants to the bill of complaint that was ex-

hibited in the cause. The defendants were nonresidents of the county of Tazewell and of the state of Virginia. They were residents of the adjoining county of Mercer, in the state of West Virginia, and citizens of that state. The original motion against them was made *ex parte*, and without notice. The process served on them was issued out of the office of the clerk of Tazewell county, and was served by a deputy of the sheriff of that county. It was served, as they believed and contended, on the territory of West Virginia, and beyond the limits of Tazewell county and of Virginia. They deny their liability to be sued in Virginia for the cause of action mentioned in the bill of injunction originating this suit. They deny the validity of the process which was issued against them, and which it was their first act in the suit to move to quash. They deny the validity of the service which was made upon them of this process. At every stage of the suit below, they made constant protest against the jurisdiction of the courts before whom they were brought to entertain jurisdiction against them in a state and county in which they were not residents.

It is a high privilege of the citizen of the United States to be sued in the jurisdiction in which he resides, in personal actions. He may, by his own act, waive this privilege. He may enter into a contract, or do an act, in another jurisdiction, which, if it constitute a cause of action against him, will render him liable to be sued where the cause of action arose, if he go voluntarily there, and process be served upon him while there. In special cases, if he own lands or property or choses in action in another jurisdiction, and be under obligation to a citizen there, he may be sued there in respect to that property on that obligation, whether he go there or not; but in such cases the manner of notifying him of the suit and bringing him into court is carefully defined by statute, the provisions of which are required to be strictly and fully complied with. If a nonresident be unwittingly in a jurisdiction in which he is nonresident, and be served with process while ignorantly and unintentionally there, the courts will severely scrutinize the process itself and the circumstances under which it was issued and served in contravention of his natural right to be sued at home. Applicable to such a case is the remark of the chief justice of the United States in *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 105, 11 Sup. Ct. 36:

"If a person is induced by false representations [he might have added "by erroneous belief"] to come within the jurisdiction of a court, for the purpose of obtaining service of a process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside."

Of course, this remark applies to nonresident corporations as fully as to natural persons. In the same case as the one quoted, the chief justice said:

"Nor are we impressed with the tenability of plaintiff's position in relation to the service [of process] in any view. Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation, and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."

In the case at bar, a corporation of West Virginia was laying pipes and constructing waterworks on ground most of which was concededly in West Virginia, and all of which the corporation and its agents believed to be so. Only a few feet of this ground were claimed by the plaintiff to be in Virginia, and this claim was denied by the appellant company and its agents. But, on the chance that some of the agents of the company might be caught on this diminutive space of territory when process should be served upon them, and on the contention that, if any work were done on this small area by the agents of the appellant company, it would bring the company within the meaning of the law of Virginia permitting corporations "doing business" in Virginia to be sued in the courts of the state, the appellee brought this suit in the Virginia court, instead of doing so in West Virginia. Certainly will the law, under circumstances like these, hesitate to violate the privilege which the citizen has of being sued in the jurisdiction of his residence, and be disposed to look with earnest scrutiny into the steps taken in the institution of a suit invading this privilege.

Sections 3225-3227 of the Code of Virginia relate to the manner in which suits may be commenced against corporations, defining the officers or persons on whom mesne process may be served in various circumstances and contingencies and the manner of service. Whatever may have been the contention of appellee's counsel in the court below in respect to the bearing of these sections upon the service of the process which was made in this suit, they now declare, in the brief presented to this court, that "these sections have not the slightest application to this case." Whatever may have been the contention in the court below of the same counsel as to the effect in this case of the order of publication set out at page 10 of the record, they now declare in the brief filed in this court, that "it is not a legal process." The mesne process which was taken out by appellee in this suit, and the service which was made of it, is valid, therefore, if valid at all, only by virtue of sections 1104 and 1105 of the Code of Virginia. Section 1104 requires every incorporated company doing business in the state to have an office within the state for the transaction of all its business; and, if it be a company incorporated by another state, to have also an agent in this state empowered to receive service in suits and to enter appearances for it in courts. Section 1105 declares that the "officers, agents, and employees of any such company doing business in this state without complying with the provisions of the preceding section, shall be personally liable to any resident of the state having a claim against the company, and, moreover, service of process upon either of said officers, agents, or employees, shall be deemed a sufficient service on the company." Our inquiry, therefore, in this case, is limited to two questions, namely, whether the service of process which was made upon the persons of sundry agents of the appellant company as shown by the record was made in the county of Tazewell, and whether the appellant company was "doing business" in the state of Virginia. The return of the deputy sheriff of Tazewell county shows expressly as to some of

the persons served and impliedly as to all, that the process was served on them "on the premises of the appellant company." If these "premises," therefore, were not in Tazewell county, the process was not legally served; and we are, in that case, relegated to the inquiry whether the premises were in Virginia or West Virginia. We have the same question to deal with in the inquiry whether the appellant company was "doing business" in Virginia, which is only another form of the question whether the "premises" on which it was operating were in Virginia or West Virginia.

An inspection of the plat of the three surveyors, Hall, Harman, and Hale, which has been described above in the statement of the facts of this case, shows that the Beaver Pond spring is laid down on it as one of the "natural objects" which they were required by law to mark and designate on the plat. It is also obvious from the plat that this spring is laid down on it as upon the Mercer side of the boundary line between Mercer and Tazewell counties; that is to say, as upon the West Virginia side of the boundary line between Virginia and West Virginia.. If, therefore, in the language of the act of 1845, the plat of the three county surveyors be "conclusive in all controversies which may arise touching said line," then the question is closed. Under the law, this court and all courts are bound to hold that the Beaver Pond spring is in Mercer county and in West Virginia, and that any line run by any other person or persons than the surveyors of those counties throwing this spring into Virginia is illegal and spurious as to that spring. The court below, however,—that is to say, the circuit court of the United States for the western district of Virginia,—treated the plat as inconclusive, and early in the litigation under consideration made the decree which has been mentioned, directing W. M. Dunlap, a civil engineer, to run and ascertain the line between the counties of Tazewell and Mercer as run and marked by the three surveyors, Hall, Harman, and Hale, but directed it to be run "as shown by the report and plat of said late surveyors." This engineer proceeded to act under the decree. Under the language of that mandate, he was charged simply with the task of processioning the line already run and marked by the three surveyors. He failed to do this. He mistook his errand. His report shows that he found the line which had been run and marked by the original surveyors to be more or less crooked, and that he ran a line himself as a substitute for and improvement on the original one. He discarded the devious, swerving line of the original surveyors, and made and reported a different and scientific one of his own running and marking. The language of his report shows that he misconceived the meaning and object of the decree under which he was acting, and that, in making a new line, he did the very thing which the court did not and could not order to be done. The law of the land made the line of Hall, Harman, and Hale, however crooked, the true line, and the plat marking and mapping it, with sundry adjacent natural objects, conclusive of its location, and of the location of the natural objects laid down upon it, the Beaver Pond spring among others. With interesting naiveté, Mr. Dunlap declares that he found this

official line to be an awkward job of work. He therefore undertook to substitute in lieu of it another line, more satisfactory and comely, and strictly straight and scientific. The language of his report on this subject is now given, the italics not being his. Beaver Pond spring lies in the space between East River mountain and Peery's milldam. The engineer says:

"A large flag was placed at the corner on East River mountain, high above the trees, and a *straight line* was accurately run from Peery's milldam to it. Along this line were found numerous *line trees*, marked as described in the report of the three surveyors, and which are shown on the plat. It will be observed that the marked *line trees* were not exactly on this *straight line* [made by himself] joining the two corners, which may readily be accounted for from the fact that the appliances and methods used then were inferior to the present instruments and practice. In fact, it would be impossible to run a *straight line* over such ground, seven miles long, with an ordinary surveyor's compass, depending entirely upon the magnetic needle; and this long *line of marked trees* is about as most of the old lines through hilly, wooded country are found to be." (He meant to say, "is about as crooked as most of the lines of the old surveyors are found to be.")

In the fact that, pursuing the old line marked by the numerous line trees mentioned by Mr. Dunlap, and laid down on the old plat, there is found to exist a different line from the new, straight one run by this engineer with modern instruments, we have an explanation of the circumstance that the Beaver Pond spring is by the old plat in Mercer, and by the new plat in Tazewell, county.

The law declares that the plats made by the county surveyors, two or more in number, shall be conclusive in all controversies relating to them,—conclusive, not only as to the lines, but as to the natural objects laid down upon them. Mr. Dunlap's line is more scientific than the swerving line, seven miles long, which it was "impossible" for the three old surveyors to make straight; but it is the line of science, and not the line of the law. The line of the law must prevail, even though, by swerving a greater or less number of rods, poles, or perches from a scientific course, it left the Beaver Pond spring in West Virginia. All the surveys of county boundaries and private lands made in the centuries of our colonial and national history, including three-fourths of the present century, were made by surveyor's compass, Jacob's staff, and theodolite. The old surveyors possessed no long-visioned telescopes. They groped their way through forests, depending alone on the magnetic needle for their courses. In the language of Mr. Dunlap, it was "impossible" to make their lines straight with these imperfect instrumentalities. All their lines were more or less devious and rambling. But, such as they were, in order to prevent infinite disputes and ceaseless litigation, the law made the lines thus run by official surveyors, and the plats describing them by natural objects, "conclusive" evidence in all controversies relating to them. These lines are fixed and established, and cannot be changed. If now the scientific skill of modern engineers, and the highly-improved instruments now used by them, were applied to these old lines; if bright flags hoisted high above the tops of the trees on lofty mountain tops, and telescopes with range of 7 or 70 or 170 miles, were employed to straighten out the existing boundary lines of states, counties, and farms,—a

universal babel of protest would be raised throughout the land against the injustice, the innovation, and the impertinence.

In the eye of the law, and by force of law, this Beaver Pond spring is in West Virginia; and the service made by the officers of Tazewell county upon agents "on the premises" of the appellant company was null and void. This company, in laying pipes in Mercer county leading from Bluefield to this spring, and in erecting buildings and placing machinery at the Beaver Pond spring, was not "doing business" in the state of Virginia, and was not amenable to the provisions of section 1105 of the Code of Virginia, authorizing the process to be served on any of its agents. It is plain, therefore, that the court below erred in disregarding the rule of evidence prescribed by the Virginia act of assembly of February 11, 1845; in treating the plat of Hall, Harman, and Hale as inconclusive; in allowing any line to be run by a civil engineer other than that of the three surveyors; in accepting the report and plat of that engineer, laying down a different line between East River mountain and Peery's milldam in lieu of the line and plat already established by law; and in accepting this engineer's line as proving that the Beaver Pond spring was in Tazewell county, Va., and rejecting the line and plat of the three surveyors, which placed this spring in Mercer county, W. Va. In the course of political events, this line, formerly of counties only, has become the boundary line between two states; and it is incompetent for any court, in a suit between private persons, by the appointment of an engineer or otherwise, to change that line for any purpose, whether to affect the rights of citizens, or to enlarge or diminish the territorial jurisdiction of courts, or to augment the domain of one state at the expense of another state.

The decree of the court below, from which this appeal is taken, must therefore be reversed for want of jurisdiction, and the suit dismissed, but without prejudice to the plaintiff below in any suit which he may institute in a court of competent jurisdiction to enforce any rights he may have as riparian owner of lands lying upon the stream supplied from the Beaver Pond spring, which has been the chief subject of the present litigation.

INTERNATIONAL TRUST CO. v. CARTERSVILLE IMPROVEMENT, GAS & WATER CO.

(Circuit Court, N. D. Georgia. May 25, 1894.)

No. 534.

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

The trustee under a mortgage on the property of a gas company has no right of action in equity against a city to recover money which the city agreed to pay the company for gas used in lighting the city, and which the company pledged directly to the trustee for the sole purpose of paying interest on the mortgage bonds and the creation of a sinking fund, there being a complete remedy at law for the breach of a contract to pay money.

2. MORTGAGE BY GAS COMPANY—FORECLOSURE—PARTIES.

A city cannot be joined as a defendant in a foreclosure suit by the trustee under a mortgage given by a gas company, on the ground that it owes the company money for city lighting, and that any money so to become due was pledged by the mortgage directly to the trustee for the sole purpose of paying interest and forming a sinking fund.

This was a suit in equity by the International Trust Company against the Cartersville Improvement, Gas & Water Company, to foreclose a mortgage. The city of Cartersville was afterwards made a party, by amendments, and it demurred to the amended or supplemental bill. Demurrer sustained.

Neal & Swain, for complainants.

Glenn & Maddox and J. W. Harris, Jr., for defendants.

NEWMAN, District Judge. The original bill filed in this case was by the complainant, as trustee, to foreclose a mortgage made to it, as such, for the bondholders of certain bonds issued by the Cartersville Improvement, Gas & Water Company. Subsequently, an amendment was filed to the bill, in which the city of Cartersville was made a party. The allegations in the amended bill are substantially as follows: That on August 8, 1888, the mayor and aldermen of the city of Cartersville made and executed a certain contract with the Orient Illuminating Company, a Maine corporation, in which there was a provision for the organization of a corporation to be known as the Cartersville Improvement, Gas & Water Company, and further providing that upon the organization of the last-named company the Orient Company should transfer and assign to it the said contract and franchises therein provided for, and that the said improvement company should thereupon assume the rights, privileges, powers, and duties and obligations incumbent upon said Orient Company, who should thereupon be released therefrom, and that the obligations and liabilities incident thereto should immediately vest in said improvement company. It is further provided that thereupon the obligations of the city of Cartersville to the Orient Company should at once vest in the improvement company, as fully and completely as if said contract had originally been made with said improvement company. It is further alleged that the Cartersville Improvement, Gas & Water Company was afterwards organized and came into existence, and that the Orient Company assigned to it all its rights, etc., as provided in the contract, and that the city of Cartersville recognized the same. Further, on the 1st day of May, 1889, the improvement company commenced lighting the streets of the city of Cartersville, as provided for in the contract, by furnishing 75 lamp-posts in the streets of said city, in accordance with the provisions of the contract with the Orient Company. (An amendment to the contract had provided for 75 lamps, instead of 50, as in the original contract.) Further, that on May 6, 1889, the city of Cartersville accepted said gas plant and said gas as a compliance by the improvement company and the Orient Company with their contract. It is further alleged that the improvement company assigned and

transferred to complainant the contract of the city of Cartersville, so far as concerned the right to collect and receive any sum which might at any time come due from the city of Cartersville on account of lights supplied from gas posts on the streets of the city, of which assignment the said city had notice before any payment became due. On November 9, 1888, the improvement company executed and delivered to complainant its mortgage, which is being foreclosed in the original bill. By the terms of said mortgage, it is provided that all sums of money promised and thereafter paid by the city of Cartersville under the contract for the use and maintenance of the gas plant should be and were directly pledged to complainant for the sole purpose of paying interest upon the bonds as the same might from time to time mature, and that any surplus after the payment of interest then due should be placed to the credit of a sinking fund for the extinguishment of said bonds, and that no part of the income of the improvement company, paid by the city of Cartersville for the lighting of its streets by gas, should be used for any other purpose than the payment of the principal and interest of the bonds so secured, and that the said city had ample notice before the maturing of any of its obligations for the lighting of its streets. On May 10, 1889, a supplemental mortgage was executed, which, so far as material here, contained the same provisions as the original mortgage. It is further alleged that since the 1st of May, 1889, the improvement company did, until the 25th day of August, 1892, continue to supply gas, according to its said contract, from 75 posts, at the rate of \$1,875 per annum, or \$468.75 per quarter, and it is claimed that these sums became due to complainant. On the 7th day of September, 1889, at a meeting of the mayor and aldermen of the city of Cartersville, a resolution was passed in which it was conceded that the improvement company had complied with its contract, and that the city had become indebted to it in the sum of \$625 from the 1st of May to the 1st of September, and directed the payment of the same to the International Trust Company. It is then alleged that the mayor and aldermen of Cartersville have failed to pay to the International Trust Company, as they should have done, on April 21, 1890, \$334.80; June 27, 1890, \$312.50; May 29, 1891, \$482.10; and June 22, 1891, \$673.95,—and that the balance of said sums, with 7 per cent. interest from the time of their respective maturities, is due by the city of Cartersville to complainant, which amount the said city failed to pay, after being often requested to do so. It is further alleged that in October, 1889, certain citizens of Cartersville filed suit against the city to enjoin it from paying to the improvement company anything for street lighting, and to declare the contract null and void, and to cancel it. This suit was tried in the superior court of Bartow county, and afterwards taken to the supreme court of the state, resulting in a judgment for the defendant. One of the provisions of the contract of August, 1888, was that should the city of Cartersville, at any time during a period of five years from March, 1889, find itself obliged, by legal

judgment or operation of law, to assess and collect a tax against any of the property of the said improvement company, then said city of Cartersville, in consideration of the reduced price at which gas was furnished, and the circumstances thereof, shall pay, or cause to be paid, a sum of money equivalent to the amount of taxes so collected. This referred to the city taxes, and not state and county taxes. The bill alleges that this provision was intended to secure remuneration for services rendered in furnishing gaslight to the city, and part of the compensation which was to be paid by the city for lights, and was not intended to evade the payment of taxes, and, had it not been for this clause of the contract, the price charged would have been more than \$25 per post for the 75 posts. Yet, notwithstanding this provision of the contract, the city of Cartersville has collected from the improvement company certain sums of money named in the bill, and the city has also assessed the improvement company for the year 1893. The bill claims that inasmuch as the city will owe for street lighting, according to the terms of the contract, as much as the amount of the taxes so collected, in addition to the rate per post which it agreed to pay, and inasmuch as it is solely for the purpose described in the assignment in the trust deed or mortgage, as including and covering that portion of the income of the improvement company which was assigned, transferred, and mortgaged to complainant for the purpose of securing and paying said bonds, therefore the right to collect the said sums vested in complainant, and it has the right to collect the same, and that the city has refused to pay the same, although requested. It is also alleged that in the year 1892 the mayor and aldermen of the city of Cartersville passed a resolution repudiating the contract between the city and the Orient Company and the Cartersville Improvement, etc., Company, declaring the said contract not binding, and wholly refusing to be bound thereby, and putting the improvement company, complainant, and the public generally on notice that said municipal corporation would not be bound by said contract, and would not be bound by the terms thereof. This is claimed to be a breach of the contract, and gives the complainant the right to sue and recover damages for the same. Notwithstanding the action of the mayor and aldermen of the city of Cartersville, yet, hoping they would reconsider the same, it is alleged that complainant, in accordance with the terms of the contract, continued to supply lights from 75 lamp-posts until the 25th of August, 1892, at which time, finding that the said mayor and aldermen persisted in their repudiation of the contract, and in their refusal to be bound by its terms, it ceased furnishing lights, although it is now willing to resume the furnishing of said lights whenever the city is willing to resume payment, and to be bound by contract. Complainant claims pay, not only for the lights so furnished, but for lights which would have been furnished during the balance of said contract but for the repudiation of the same by said city. It is alleged that the Cartersville Improvement, etc., Company is insolvent. It is further alleged that if the city had continued

to pay for street lights the same would have inured to complainant for the purpose of paying interest on bonds, as the company would have been otherwise able to keep up its plant, and consequently the entire damage resulting from the failure of said city to keep up its contract is sustained by complainant; and complainant alleges that it is injured and damaged in the sum of \$32,500, the amount which it should have received from the city, with legal interest on the amounts respectively matured. It is further alleged that the Cartersville Improvement, etc., Company's entire property consists in its gas plant and its appurtenances, which are worth not exceeding the sum of \$20,000, and that said plant would have been worth considerably more, but for the repudiation by said city of its contract, and which destroyed one of the principal uses of the plant. Complainant says that the insolvency of the company was caused by the action of the city in repudiating its contract. It alleges that the relief prayed for and against the city is incidental to the relief prayed for against the improvement company, and that the bill is filed for the purpose of securing complete relief in the premises. The further allegations of the bill are such as show the necessity of a receiver for the property of the Cartersville Improvement, etc., Company, and the prayer is for the subpoena, injunction, receiver, and for decree against the mayor and aldermen of the city of Cartersville for the amount of its indebtedness to complainant, as set forth in the bill, and the amount of damages sustained by complainant on account of the breach of the contract on the part of the said mayor and aldermen as aforesaid.

To this amended or supplemental bill a demurrer was filed by the city of Cartersville. Argument has been heard on the demurrer, and the same submitted. The demurrer is as follows:

(1) "That as to this defendant the original bill and proposed amendment constitute no cause of action cognizant in a court of equity, and, as to this defendant, is without equity." (2) "This defendant further says that if there be any cause of action existing in the original bill of complaint and proposed amendment, as against this defendant, the same exists at law; that the plaintiff has a full, complete, ample, and adequate remedy at law for any and all of the causes of action, if such exist, set out in the said bill and amendment." (3) "Because no legal cause of action can be maintained against the mayor and alderman of the city of Cartersville for recovering municipal taxes paid by the Cartersville Improvement, Gas & Water Company to the mayor and aldermen of said city." (4) "Because the mayor and aldermen of the city of Cartersville for the year 1888 had no legal power of authority to enter into the pretended contract of August 6, 1888, whereby the property of the Cartersville Improvement, Gas & Water Company could be exempted from municipal taxation, and whereby said company was to be indemnified by the mayor and aldermen for municipal taxation for five years, which said company might be required to pay under the constitution and laws of Georgia." (5) "Because the pretended contract of August 6, 1888, is not a legal, valid, and binding contract, under the constitution and laws of Georgia, it not appearing that the mayor and aldermen of the city of Cartersville, for the year 1888, were authorized to make the contract creating said debt without first submitting the question as to whether or not the debt should be created to the legally-qualified voters of said city, and therefore no legal cause of action can be maintained under the pretended contract." (6) "That there is a misjoinder of parties in said bill and its amendment." (7) "That there is a misjoinder of causes of action in said bill and the amendment thereto."

The provision of the mortgage executed by the Cartersville Improvement, Gas & Water Company to the International Trust Company is in these words:

"It is further provided that all sums of money promised and hereafter paid by the said city of Cartersville upon its contract with said first party for the use and maintenance of a gas and electric light plant (less the actual cost of operating and maintaining said electric light as paid by said city), shall be and are hereby pledged directly to the said trustee for the purpose of paying the interest upon said bonds as the same may from time to time mature."

It is upon this clause of the mortgage or trust deed, and upon the fact of the recognition by the city of Cartersville of the trust company as the proper person to whom to make payment, and the further fact that they did make such payment, that complainant mainly rests its case for relief, as against the city. The two grounds which have been argued on the hearing of the foregoing demurrer are—First, that the complainant has a plain and adequate remedy at common law; and, secondly, that the city is improperly joined with the original defendant under the facts set forth.

On the first question, it is apparent that, if complainant has any rights at present against the city of Cartersville, it has a complete remedy at law. An action for damages for the breach of a contract, and the recovery of rents already accrued, embracing taxes already paid (if the tax paid has become legally and properly a part of or an addition to the amount due by the city for gas), are essentially matters for a common-law suit. There is nothing whatever in the matter, as thus presented, which makes it properly the subject of equity jurisdiction.

As to the second question, it is sufficient to say that, if complainant has the right now to proceed against the city, it has, as just stated, its clear remedy at law, and, if it has not a present right of action, any aid which the court can give it in perfecting its right to proceed against the city of Cartersville can be fully obtained without the presence of the city as a party. If complainant can properly invoke the action of the court at all in this case, it is for a decree assigning or transferring to it any indebtedness which may exist on the part of the city of Cartersville to the improvement company. To obtain that the city is not a necessary party. It seems clear, therefore, that the city of Cartersville is improperly made a party, under the facts shown by the pleadings. In the view that is taken of the case, it is unnecessary to consider the validity of the contract between the city of Cartersville and the improvement company, or the effect or extent of the decision of the supreme court of Georgia in the case of *Cartersville Improvement, Gas & Water Co. v. City of Cartersville*, 89 Ga. 683, 16 S. E. 25. The demurrer to the amendment, so far as it makes the city of Cartersville a party, must be sustained.

HOOK v. AYERS et al.¹

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 155.

CORPORATIONS—OFFICERS—RAILROAD BONDS—PLEDGE.

A railroad company, being the owner of 247 bonds of another company, pledged 125 of them to cross complainants, M. P. Ayers & Co. At or before that time the president of the company pledged the remaining 122 bonds to a syndicate, composed of himself, two of the cross complainants, and others, for a debt due by the company; and this with the knowledge of the cross complainants. Having subsequently acquired the interests of his associates in the syndicate, the president undertook to take title absolute to the bonds by crediting a certain amount upon the debt of the railroad company. *Held*, that the transaction was at most voidable at the suit of the railroad company, its shareholders or creditors, and could not be attacked by the pledgee of the other bonds.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit by Charles H. Brownell, trustee, against the Louisville & St. Louis Railway Company, Jacksonville & Southeastern Railway Company, doing business as the Jacksonville Southeastern Line, Jacksonville, Louisville & St. Louis Railway Company, Louisville, Evansville & St. Louis Consolidated Railway Company, Marshall P. Ayers, Augustus E. Ayers, and John A. Ayers, partners as M. P. Ayers & Co., to foreclose a trust deed, and cross bill by Marshall P. Ayers, Augustus E. Ayers, and John A. Ayers, firm of M. P. Ayers & Co., against Charles H. Brownell, trustee, Louisville & St. Louis Railway Company, Jacksonville Southeastern Railway Company, doing business as the Jacksonville Southeastern Line, Jacksonville, Louisville & St. Louis Railway Company, Louisville, Evansville & St. Louis Consolidated Railway Company, William S. Hook, and Mary B. Hook, to determine the relative rights of the bondholders. There was a decree of foreclosure and distribution, from which Mary B. Hook appeals.

Isaac L. Morrison and Thos. Worthington, for appellant.

William Brown, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge. The contention here involves the relative rights of the holders of the mortgage bonds issued by the Louisville & St. Louis Railway Company. In a suit brought by the trustee to foreclose the trust deed securing such bonds, the appellees filed their cross bill against William S. Hook, subsequently amended by bringing in the appellant, to obtain adjudication of such relative rights. The cross bill asserts that the Jacksonville Southeastern Railway Company contracted with the Louisville & St. Louis Railway Company to build the railroad of the latter company from Centralia to Drivers, in consideration whereof the latter

¹ Petition for rehearing overruled. For opinion on rehearing, see 64 Fed. —.

company was to issue and deliver to the former company its bonds, 247 in number, and in the aggregate amounting at par value to \$247,000; that the Jacksonville Company was without funds to construct the road, and that at its request the appellees furnished the necessary money for that purpose from time to time as the work progressed; that the Jacksonville Company gave its promissory notes to the appellees for such advances, and delivered to them 125 of the bonds, of \$1,000 each, as collateral security therefor,—and claims that the several advances, with interest, amounted at the filing of the cross bill to about the sum of \$120,000. It further alleges that, at the time of the execution of the bonds, William S. Hook was president of the Jacksonville Southeastern Railway Company; that he became the custodian of the remaining 122 of the issue of bonds; “that he is not entitled to the same in his personal right, and that, whatever of right he may have, it is subordinate and inferior in equity to the right of the complainants; and that he has no legal right to the bonds, other than as president of the Jacksonville Southeastern Railway Company.” The cross bill prays that the debt of the appellees against the Louisville & St. Louis Railway Company may be held to be superior to the claims of all others, and that it be paid out of the proceeds of sale. Mr. Hook answers the cross bill, claiming that the remaining 122 bonds had been lawfully transferred to him for value, and the appellant answers that she acquired the same through the gift of them to her by her husband, and asserting title to the bonds at the time of the gift to have been perfect in her husband, William S. Hook, and praying that her title to the same may be protected by the decree of the court. Upon replication and issue thus joined, evidence was taken before a master, who reported the same to the court. Subsequently, on the 1st day of November, 1893, a final decree was passed in the court below upon the original and upon the cross bill, adjudging a sale of the road, and also adjudicating the distribution of the proceeds of sale between the appellant and appellee. With respect to the contention involved, the decree finds as follows:

(14) That in the year 1887 the Jacksonville Southeastern Railway Company entered into a contract with the defendant company, the Louisville & St. Louis Railway Company, to build and construct for said last-named company a railroad from the city of Centralia to the town of Drivers, a distance of about seventeen miles, and in consideration thereof the said Louisville & St. Louis Railway Company was to issue and deliver to the Jacksonville & Southeastern Company its bonds secured by deed of trust upon said railway so constructed, which said bonds and deed of trust or mortgage are specified in said original bill. (15) That said railway was constructed in accordance with the terms of said contract, and thereupon the Louisville & St. Louis Railway Company issued and delivered to the Jacksonville Southeastern Railway Company two hundred and forty-seven of its bonds, of the denomination of one thousand dollars each, bearing interest at the rate of five per cent. per annum, and the same bonds specified in the said original bill, and secured to be paid by the mortgage also specified in said original bill. (16) That at the making of said contract the said Jacksonville Southeastern Railway Company was without the means or ready money to construct said railway, and that M. P. Ayers & Co., the complainants in said cross bill, at the request of the said Jacksonville Southeastern Railway Company, furnished the neces-

sary money for that purpose, and the Jacksonville Southeastern Railway Company executed and delivered to the said M. P. Ayers & Co. its promissory notes therefor, and with said notes delivered to the said M. P. Ayers & Co. one hundred and twenty-five of the said bonds, numbered from 1 to 125 inclusive, as collateral security for said advances. (17) That, at the delivery of said bonds by the Jacksonville Southeastern Railway Company to the said M. P. Ayers & Co., it was agreed between them that the said bonds so delivered should be the first and best lien on said mortgage estate, and superior to that of any other bonds of the same class. (18) That the defendant William S. Hook, at the delivery of said bonds and at the making of said agreement, was the president of the said Jacksonville Southeastern Railway Company, and that afterwards he, the said William S. Hook, while president as aforesaid, took the remaining one hundred and twenty-two of said bonds, numbered from 126 to 247, both inclusive, without the authority of said Jacksonville & Southeastern Railway Company, and with full knowledge and notice of the said agreement with M. P. Ayers & Co., and delivered the same to Mary B. Hook, his wife, as a gift, and that the said Mary B. Hook now holds the same, and has filed them in this case. (19) That the allegations of the said cross petition and amendment thereto are true, and that the equities are with the complainants, M. P. Ayers & Co.

The decree thereupon adjudged that out of the net proceeds of sale the master should first pay to the appellees the sum due on the 125 bonds held by them, and in case of any overplus he should pay the same to Mary B. Hook, until her full amount was paid. The appellant brings here for review the decree of the court below, so far as it adjudges the relative rights of the contesting parties with respect to priority in payment of the bonds. The facts, as disclosed by the record, are mainly undisputed. Upon one material point only can there be said to be controversy. The undisputed facts may be thus summarized:

Prior to any transfer of the bonds in question the Jacksonville Southeastern Railway Company owned and operated a line of railway from Jacksonville to Litchfield. The road was bonded in the sum of \$1,420,000, of which amount \$194,000 remained in the treasury of the company. Mr. Hook was president, and the appellees Marshall P. and Augustus E. Ayers were two of the directors, of the company; the former being also its secretary, and the latter being also its vice president. These three persons held equal amounts of the stock, their joint holdings aggregating over \$600,000, and constituted the controlling interest. Mr. Hook, on the 1st day of February, 1887, and in behalf of a syndicate of six gentlemen, contracted with the receivers of the Wabash, St. Louis & Pacific Railway Company to operate certain lines from Pekin to Jacksonville, and from Havana to Springfield (now known as the Chicago, Peoria & St. Louis Railway); the syndicate to pay operating expenses and taxes, and to pay the receiver the one-half part of the net profits. In this syndicate, Mr. Hook held a one-half interest, and Marshall P. Ayers and John A. Ayers, two of the appellees, each held a one-tenth interest. The bank account with the appellees was kept in the name of the Jacksonville Southeastern Railway Company, but, to their knowledge, embraced the earnings of all the lines. The net earnings of the leased lines accruing to the syndicate on July 1, 1887, amounted to \$38,006.57, and were deposited in the bank ac-

count of the appellees to the credit of the Jacksonville Southeastern Railway Company. On July 4, 1887, the bank account exhibited a credit of some \$8,500, but the appellees held the notes of the company for \$65,000, moneys advanced. In that month Mr. Hook sold the \$194,000 of bonds remaining in the treasury of the Jacksonville Company, realizing therefrom \$174,600 in cash, which on the 5th day of July was deposited in the bank of the appellees to the credit of the Jacksonville Company. On the 7th day of July the company took up its note held by the appellees. This transaction was had upon the understanding that the appellees should thereafter advance the necessary means to construct the Louisville & St. Louis Railway line from Centralia to Drivers, which the Jacksonville Company had contracted to build. In October, 1887, the moneys of the Jacksonville Southeastern Railway Company in the bank seem to have been exhausted, and advances were made by the appellees to that company, and were used in the construction of the Louisville & St. Louis Railway. On the 14th of November, 1888, the balance due for such advances amounted to \$35,000, for which a note was given as hereafter stated. On October 1, 1887, the Louisville & St. Louis Railway Company executed and delivered its trust deed securing the issue of 247 bonds of \$1,000 each. These bonds were early in the month of December, 1887, delivered to the Jacksonville Company for the construction of the road. The line was thrown open to the public and operated for traffic on and after the 4th day of December, 1887. On the 1st day of January, 1888, interest upon the bonds of the Jacksonville Company matured to the amount of \$42,500, and the company was without means to meet the indebtedness. Mr. Hook applied to the appellees for a loan to the company to meet that payment, and they agreed to and did advance the necessary money upon collateral security, receiving the company's note, dated December 30, 1887, for \$42,500 at 90 days, with 7 per cent. interest. The note recites that there was deposited with the appellees as collateral security "for payment of this or any other liability or liabilities of ours to said bank, due or to become due, or that may be hereafter contracted, the following property, viz. bonds of the Louisville and St. Louis Railway Company, amounting to the sum of \$125,000, being numbered from 1 to 125 inclusive." The note was signed: "Jacksonville Southeastern Railway Company, by William S. Hook, president. Attested: M. B. Ayers, Secretary." On the 1st of July, 1888, another installment of interest on the Jacksonville Railway Company's bonds to the amount of \$42,500 became due, and that company was without means to meet the payment. Mr. Hook proposed to the syndicate operating the leased lines, and also to the appellees, that, as both had made large advances to the Jacksonville Company, they should advance in equal amounts the money required to pay that interest. The plan was carried into effect, the members of the syndicate advancing one-half of the amount, and the appellees advancing the other half. The appellees, for their advance, took the note of the company, signed by Mr. Hook as president and attested by Mr. M. P. Ayers

as secretary, dated August 1, 1888, at 60 days, with 8 per cent. interest; and Mr. Hook on the same day executed a note for a like amount for the sum advanced by the syndicate, which was delivered to Mr. Marcus Hook to hold as trustee for the benefit of the syndicate. On the 31st of May, 1888, the net earnings of the leased lines operated by the syndicate, and which had been deposited in the bank account to the credit of the Jacksonville Company, amounted to \$69,125.05, and had been consumed by the railway company in the construction of the Louisville & St. Louis Railway, and for its own purposes. At that time Mr. Hook, as president of the Jacksonville & Southeastern Railway Company, executed its note dated May 31st, one day after date, for \$65,000, with 6 per cent. interest, on account of that indebtedness of the Jacksonville Company to the syndicate, and the note was delivered to Marcus Hook as trustee for the benefit of the syndicate. The remaining 125 bonds of the Louisville & St. Louis Railway Company were about January, 1888, deposited by Mr. Hook with the American Exchange Bank of New York, subject to the order of T. J. Hook & Co., a firm which was substantially William S. Hook, in trust for and subject to the order of the syndicate, and as security for such amount as might be due from the Jacksonville Company. Upon the execution of the \$65,000 note to the syndicate a dividend was declared of that amount, and receipts were taken by Marcus Hook from each member of the syndicate (except Mr. John A. Ayers, who appears to have been ill at the time) for the proportion coming to each. These receipts were delivered to Marcus Hook, and represented the share of each in the \$65,000 note, but no money was paid thereon at the time. In the month of June, 1889, William S. Hook, at the suggestion of Mr. John A. Ayers, agreed to purchase the interest of the other members of the syndicate. At this time one Southworth, a judgment creditor of the Jacksonville Company, was seeking to obtain the appointment of a receiver of the railway. To avert that result it became necessary to give a bond in the sum of \$10,000, and to obtain a supersedeas upon appeal from the judgment which he had obtained. All the members of the syndicate, except Mr. Hook, were unwilling to assume any obligation in that respect. There were also unpaid taxes owing by the Jacksonville Company, and the sum of \$42,500 of interest was maturing on the 1st day of July. The syndicate had also outstanding obligations with no means to pay the same, save such amount as could be realized on the 122 Louisville & St. Louis bonds held as collateral for advances to the Jacksonville Company. Mr. William S. Hook thereupon, at the suggestion of Mr. John A. Ayers, assumed the giving of the bond in the Southworth case, and all obligations of the syndicate, and purchased the interest of the other members of the syndicate on the basis of \$30,000 for the entire interest of the syndicate in the property. Mr. Hook paid each member of the syndicate for his interest on that basis, each of the appellees John A. Ayers and Marshall P. Ayers receiving \$3,000 from Mr. Hook for his interest. Mr. Hook also subsequently paid the Southworth judgment, amounting to some \$7,000. On November 14,

1888, the Jacksonville Southeastern Railway Company, by William S. Hook, president, and M. P. Ayers, secretary, executed its promissory note for \$35,000, which was delivered to the appellees. This note recites that the bonds of the Louisville & St. Louis Railway Company, numbered from 1 to 125 inclusive, are given as collateral. This note was given for the balance of account due by the Jacksonville Company, and represents moneys which were used in the construction of the Louisville & St. Louis Railroad. The debt due to the appellees is represented by the three notes of \$42,500, \$21,250, and \$35,000 respectively; the first two being for moneys advanced to the Jacksonville Company to pay interest on its own bonds, and the latter for advances to that company to construct the Louisville & St. Louis Railway line.

The parties agree that at the time of the deposit of moneys by the Jacksonville Company, and the payment of its note to the appellees, in July, 1887, it was arranged that in consideration thereof the appellees should advance money to be used in the construction of the road from Centralia to Drivers. They disagree as to the condition upon which such advances should be made. One of the appellees asserts that Mr. Hook stated "he would secure us," but in what way is not disclosed; another, that Mr. Hook promised they "should be reimbursed by the sale of the Louisville & St. Louis bonds," then not in existence; the third does not seem to speak to the transaction in question. Mr. Hook insists that, in consideration of the payment of the Jacksonville Company note at that time, the appellees agreed thereafter to make the necessary advances to the amount of the note then paid. He controverts any agreement to pledge the bonds when they should be issued. Subsequently the appellees took specific bonds in pledge for their advances. If they did not know on the occasion of the first of these loans that the remaining 122 bonds were claimed to be held in trust for advances made by the syndicate, of which two of the appellees were members, to the Jacksonville Company, they certainly knew it beyond contention on the 31st day of May, 1888, when they were so informed by Mr. Marcus Hook. Thereafter they made advances, taking the notes of the Jacksonville Company secured by specific pledge of the 125 bonds held by them, and without any claim made upon the remaining 122 bonds. The two cross complainants, who were members of that syndicate, with that knowledge, sold to Mr. Hook their interest in the syndicate, receiving from him \$6,000 therefor. No claim of an equitable pledge of the 122 remaining bonds would seem to have been made by the appellees before their examination in November, 1892. They assert no such claim in their cross bill filed in July, 1891. The decree finds no such agreement. If it be possible to establish an equitable pledge in the light of this evidence and of the subsequent acts of the cross complainants, it is sufficient to say that no such alleged pledge is charged in the bill, or made the foundation of the decree.

The decree finds that in December, 1887, upon the delivery of the 125 bonds to the appellees in pledge, it was agreed between them and the Jacksonville Company that the "bonds so delivered should

be the first and best lien on the said mortgaged estate, and superior to that of any other bonds of the same class."

The evidence upon which this finding is sought to be rested, is as follows:

Mr. John A. Ayers states as follows: "Statement was made that these bonds should be transferred to us from No. 1 to 125, Louisville & St. Louis, as security for advances made by M. P. Ayers & Co., of \$42,500." This was undoubtedly correct, and is the transaction disclosed by the written contract. Upon being pressed whether anything further was said "about the bonds," he replied, "The statement was then made that the Louisville & St. Louis bonds were to be sold to reimburse us for the advances made to the Jacksonville Southeastern." The subject of the interview had relation to the loan of \$42,500. The witness does not state that reference was made to any other bonds than those actually pledged. It probably was contemplated that those should be sold to meet the advance of \$42,500. They amounted at par to more than thrice the amount of the loan, and their sale was authorized by the pledge. It seems improbable, if the appellees were at the time seeking further security for the then present advance, that they should not then have demanded and received it. The whole issue of bonds was then in existence, to their knowledge. They had been signed by Mr. Marshall P. Ayers, one of their number, as secretary; and all of the appellees were in a position to be fully informed of the transactions with respect of all the lines of railway, being largely interested in all, and officially connected with all. Mr. Marshall P. Ayers states the understanding to be that the notes—that is, the three notes now existing—were to be paid out of the sale of the Louisville & St. Louis bonds when they were sold. He speaks in a very general way. He does not particularize the specific bonds, or state that he refers to the whole issue. His testimony is quite consistent with the written pledge of the 125 bonds for the loan of \$42,500, and for the notes thereafter executed. He is unwilling to say that the appellees were to be paid out of the remaining bonds to the exclusion of other creditors of the company. Mr. Augustus E. Ayers states that, at the time of the application for the loan of \$42,000:

"I then said to him that I would like some bonds as security, for the reason that I did not know what the financial condition of the country would be, and that I wanted some bonds in New York to use as collateral. He said he would get me \$125,000 in bonds; that that was all that would be issued until the completion of the track; and, more than that, he said that all the bonds should be held intact to pay any advances of M. P. Ayers & Co. to the railroad line."

But upon cross-examination he states as follows:

"We then took a note for \$42,500, and to aid us in raising money, if it was essential, he gave me an order with it for \$125,000 in bonds, and said that all the balance of the bonds belonged to the railroad treasury or syndicate."

This witness would seem to be mistaken in his assertion that Mr. Hook represented at the time of this conversation a stated number of bonds were all that could be issued until the comple-

tion of the track. He places the conversation in the last week of December, 1887, at the date of the note. It took place in the presence of Mr. John A. Ayers. The latter, in his testimony, makes no such statement. Mr. Hook denies any such statement. As a matter of fact the road was completed and in full operation on the 4th day of December previous. That was matter of public notoriety. The witness was one of the directors of the company, and could not have been ignorant of the completion of the road, and could not have been imposed upon by such a statement, if it was made. It may further be observed that his assertion that he was promised by Mr. Hook "that all the bonds should be held in trust to pay any advances of M. P. Ayers & Co. to the railroad line," if he would apply the remark to include the remaining 122 bonds, is irreconcilable with the statement that Mr. Hook informed him at the time that the balance of the bonds belonged to the syndicate. This theory of an equitable pledge to the appellees of the 122 bonds conflicts with the express declaration of the notes accepted by them, signed by one of the appellees as secretary of the Jacksonville Company, upon the occasion of subsequent advances, and stated to be secured by the pledge of the 125 bonds. It conflicts with the evidence of the cross complainants themselves, one asserting his information at the time that the bonds were held in trust for the syndicate. It is in conflict with the subsequent action of Marshall P. Ayers and John A. Ayers, who, as members of the syndicate, sold their interest therein to Mr. Hook with knowledge that he claimed that these 122 bonds were held in trust as collateral security for the claim purchased of them. The testimony of Mr. Hook with respect to this transaction appeals to us as entirely consistent with the contract executed, to accord with the subsequent acts of the appellees, and to be supported by the testimony of the appellees themselves. He states:

"I did refuse to give him more bonds than the 125 bonds to secure the \$42,500 note, and assigned as a reason that I intended to hold these bonds, the 122,000, to secure the syndicate for advances made by the Chicago, Peoria & St. Louis Company to the Jacksonville Southeastern Railway Company. I did not at that time state to A. E. Ayers that the 122 bonds were to be held to secure any advances made by M. P. Ayers & Co. to the Jacksonville Southeastern Railway Company."

The evidence of Mr. Augustus E. Ayers is only to be reconciled with itself and with the subsequent conduct of the parties, and with the written agreements, upon the construction that the 125 bonds pledged as collateral to the note of \$42,500 should serve as collateral for any future advances that the appellees might make; and that was undoubtedly the fact, as expressly stated in the written contract of pledge. And, finally, it is to be observed that there is no assertion of any such claim of equitable pledge in the cross bill, or of any claim in the cross bill or in the evidence that the 125 bonds pledged were to be a first lien upon the mortgaged estate in priority to the other bonds secured by this trust deed. It proceeds solely upon the theory that the 125 bonds, and those alone, were pledged; and it claims that the appellees are entitled

to priority of payment for those 125 bonds over the 122 remaining bonds, because, and only because, the latter are in fact the property of the Jacksonville Southeastern Railway Company, and are held by Mr. Hook merely as custodian of that company. The finding of the seventeenth paragraph of the decree that it was agreed that the 125 bonds should be the first and best lien upon the mortgaged estate, superior to that of any other bonds of the same class, has no support in the allegations of the cross bill, or in the evidence before the court.

We are next confronted with the claim presented by the cross bill, and upon which the appellees predicate their demand for priority in payment of their bonds, namely, that the 122 remaining bonds are in fact the property of the Jacksonville Southeastern Railway Company, and held by Mr. Hook as president of the company, and merely as its custodian, and that any right of his thereto is subordinate and inferior in equity to the rights of the appellees. The decree, by the eighteenth paragraph, finds that Mr. Hook took the bonds without the authority of the Jacksonville & Southeastern Railway Company, and with full knowledge and notice of the agreement alleged to have been made with M. P. Ayers & Co. that the 125 bonds delivered to them should be the first and best lien on the mortgaged estate, and superior to that of any other bonds of the same class. We have reached the conclusion that no such agreement was made, and the question of notice of it to Mr. Hook therefore passes out of the case. So that the question remains whether these 122 bonds are the property of the Jacksonville Company, and were taken by Mr. Hook without the authority of the company, or whether they became his property by the transactions detailed in the evidence. Mr. Hook claims that the 122 bonds were, about the 1st of January, 1888, deposited by him with the American Exchange National Bank of New York, subject to the order of T. J. Hook & Co., and held by T. J. Hook & Co. subject to the order of the Chicago, Peoria & St. Louis Syndicate as collateral security for such advances as had been or should be made by the syndicate to the Jacksonville Company. The note of the Jacksonville Company for \$65,000, dated May 31, 1888, was delivered to Marcus Hook as trustee of the syndicate. On October 1, 1889, William S. Hook caused to be indorsed on that note a credit of \$61,000 as the purchase price of the 122 bonds, which he then took to himself, and claimed to own absolutely. The principal stockholders of the Jacksonville Company were Marshall P. Ayers, Augustus E. Ayers, William S. Hook, and Elliott & Dunn, of Philadelphia, their holdings amounting to about \$930,000 of the \$1,000,000 of capital stock. The syndicate, or in other words, the Chicago, Peoria and St. Louis Railway Company, was composed of William S. Hook, M. P. Ayers, John A. Ayers, Edward L. McDonald, E. S. Greenleaf, and Charles S. Rannels. Prior to this indorsement of payment, Mr. Hook had purchased all the interest of his associates in the syndicate. It is contended with great earnestness that the transactions of Mr. Hook in transferring the

122 bonds, and in purchasing and taking them to himself, were void, and that the bonds still remain the property of the Jacksonville Southeastern Company. This contention is sought to be supported upon the familiar principle that one occupying fiduciary relations cannot deal with the subject matter of his trust upon his own account and for his own advantage, to the injury of those whose interests he is bound to protect. But it is a mistake to suppose that such transactions are absolutely void. They are at most voidable at the instance of the cestui que trust. Such dealings are upheld when they are fair and in good faith, and without impeachment of the fiduciary relation. *Oil Co. v. Marbury*, 91 U. S. 587; *Tyler v. Hamilton*, 62 Fed. 187-189. The transactions complained of here, if unfair and wrong, were injurious to the Jacksonville Company, and can only be impeached by that company, its creditors or shareholders. Certainly they cannot be impugned by the appellees, who are in court simply as pledgees of the other bonds. The cross bill makes no attack upon those transactions as in any way detrimental to the company, its creditors or shareholders. It may be further remarked that the transfer of these bonds in trust for the syndicate was known to the appellees probably at the time of the making of the first note, certainly before the making of the last two. Two of the appellees were members of the syndicate, and disposed of their interest therein, and in the 122 bonds so held as collateral for the advances to the syndicate, to Mr. Hook, and received from him the consideration therefor. They would seem to be estopped by their conduct from denying the right of Mr. Hook to hold the bonds as collateral for the debt due the syndicate. *Hotel Co. v. Wade*, 97 U. S. 13. If the transaction by which the bonds were taken by Mr. Hook absolutely upon crediting a certain amount upon the notes was unwarranted, it can only be gainsaid by the Jacksonville Company, its creditors and shareholders; and if it were void Mr. Hook could still hold them as collateral for the debt to the syndicate, if that pledge is sustained. We are of opinion that the appellees are in no condition, suing neither as creditors nor shareholders, to contest the right of the appellant to the bonds.

The appellant insists that that portion of the decree is erroneous which directs the payment to the appellees of the full amount of the 125 bonds, with interest, since they hold them as collateral security for a smaller indebtedness. We find in the record no assignment of error which presents that question to our consideration, and must therefore decline at this time to express any opinion upon it. If error in that respect has intervened, it can be corrected by the court below upon reconsideration. The determination of that question, we suggest, may well be postponed until the distribution of the proceeds of sale. They might prove sufficient to render the question of no practical moment. The decree is reversed, and the case remanded for further proceedings in accordance with this opinion.

CITY OF SUPERIOR v. NORTON et al.¹

(Circuit Court of Appeals, Seventh Circuit. October 16, 1893.)

No. 107.

MUNICIPAL CORPORATIONS—EXECUTION OF CONTRACTS—CITY COMPTROLLER.

In that chapter of a city charter which defined the powers and duties of the city comptroller it was provided that he should "countersign all contracts made with the city, if the necessary funds shall have been provided to pay the liability that may be incurred against the city under such contracts, and no such contract shall be valid until so countersigned;" while the chapter defining the powers and duties of the board of public works declared that "all contracts shall be signed by the mayor and clerk, unless otherwise provided by resolution or ordinance, provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have executed the same and made an indorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that may accrue under such contract." *Held*, that a contract of the city, imposing pecuniary obligation payable out of the revenue of the current year, not countersigned by the comptroller, was invalid, although the contract was made by another department of the city government than the board of public works.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Suit by Ann E. Norton and William F. Norton, Jr., against the city of Superior for specific performance. Complainants obtained a decree. Defendant appeals.

The appellees filed their bill in the court below to enforce the specific performance of a contract for the conveyance of certain real estate situated in the city of Superior. In 1890 the board of park commissioners of that city adopted a plan for a boulevard and park system for the city, extending from St. Louis bay on the west, easterly and northeasterly to the Bay of Superior, a distance of several miles. In the central portion of the system it was designed to have a large park. The lands of the appellees which form the subject of contention here were situated within the territory embraced by the system, and were desired to be acquired by the city authorities for the purposes of the proposed park. The city, under the authority of its charter, instituted proceedings for the condemnation of the lands by the exercise of the right of eminent domain. Pending these proceedings, the parties negotiated for the purchase of the lands by the city, which resulted in a contract dated December 16, 1890, between the board of park commissioners of the one part and the appellees of the other part, by which the premises were agreed to be sold to the city for the price of \$33,083.50, payable upon the delivery of a good and valid warranty deed at any time on or before six months from that date, with interest at 7 per cent. per annum, which sum the city of Superior, by the board of park commissioners, agreed to pay. This contract was ratified and approved by resolution of the common council of the city on the 6th day of January, 1891.

The defendant interposed three pleas to the bill, in substance as follows: First. That previous to the contract the common council had not provided the money or funds to discharge the liability created by it, and that there was no money in the treasury at the time of the execution of the contract, nor at the time when the deeds were to be delivered, available to pay the liability and indebtedness thereby incurred; and that the common council did not, by the resolution approving the contract or otherwise, provide for the collection of a direct annual tax sufficient to pay the principal and interest of the

¹ Rehearing pending.

indebtedness as it fell due, and whereby, as it was alleged, said contract was illegal and void, and in violation of section 3 of article 11 of the constitution of the state of Wisconsin. The second plea states the same facts alleged in the first plea, with the additional allegation that by reason of the failure of the common council to make provision for the payment of the indebtedness stated in the contract it was incompetent and illegal for the comptroller of the city to countersign the contract, or to countersign any order drawn on the treasury to liquidate the indebtedness therein stated; and that the contract was not countersigned by the comptroller, and was therefore illegal and void. The third plea sets forth the provisions of the ordinances of the city creating and defining the powers and duties of the park commissioners; that thereunder it was their duty to file with the city clerk of the city, on or before the 1st of November in each year, a detailed statement of the amount of money that would, in their judgment, be needed during the ensuing year for the acquisition of parks; that it became the duty of the city clerk thereupon to place such estimate before the common council for its guidance in making the annual levy for taxes; that the park commissioners did not make or file any such estimate, and that no estimate for the purpose of acquiring lands for the park was made or placed before the said common council, or was before it or considered by it previous to the alleged contract, or at any time thereafter; and that during the month of November, 1890, there were no moneys or funds of any kind in the park fund of the city, and no money or funds in the general fund of the city, but that, on the contrary, there was a deficit in the general fund, and that such park fund and such general fund were the only funds from which the city could have legally drawn for money to pay for park lands in accordance with the provisions of the city charter. These pleas were severally overruled by the court, and the defendant ordered to plead to the merits, and, failing therein, the bill was taken pro confesso, and a decree entered against the city that upon the tender and delivery to it of a conveyance for the land it should pay to the complainant the sum of \$38,203.43, the purchase money of the premises, with interest, and that the complainants have execution therefor.

A. C. Burnett and P. H. Perkins, for appellant.

A. L. Sanborn (William F. Vilas, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

JENKINS, Circuit Judge (after stating the facts). The contention of the appellees that the pleas interposed by the defendant below (appellant here) are not before us for review is not well founded. The pleas were set down for argument by the appellees. They thereby confessed the facts stated, and submitted to the court the question of their sufficiency in law. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534. But the pleas are not out of the case, because they were overruled. The appellant did not waive its right to stand upon the pleas by submitting to a decree pro confesso. This appeal authorizes a review of the ruling below upon the question whether the facts stated in the pleas, or in any of them, are availing to defeat a recovery upon, or the enforcement of, the contract set forth in the bill.

We will first consider the second plea, which goes to the question of the validity of the contract because it was not countersigned by the city comptroller. The question is dependent wholly upon the provisions of the charter of the city. We must look to that charter for the authority of the city to contract, and the mode in which that authority is to be exercised. The charter is

the source of power. It was said by Chief Justice Marshall in *Head v. Insurance Co.*, 2 Cranch, 127, 169:

"The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract; and when it prescribed to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, *Merrill v. Monticello*, 138 U. S. 673, 687, 11 Sup. Ct. 441.

In construing charters of municipal corporations it is the policy of the law to require of such corporations a strict observance of their power. "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Minturn v. Larue*, 23 How. 435, 436; *The Binghamton Bridge*, 3 Wall. 51, 75; *Stein v. Water-Supply Co.*, 141 U. S. 67, 79, 11 Sup. Ct. 892. And see, also, *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 268, 13 Sup. Ct. 90. And while powers expressly granted or necessarily implied are not to be defeated or impaired by any overstrict construction, yet a power cannot be upheld unless it be clearly comprehended within the language of the act, or derived therefrom by necessary implication; and the restriction imposed by the charter upon the exercise of the power granted must be upheld in the interest of the public. So that every one dealing with a municipal corporation is bound at his peril to know the extent of its powers, and the manner provided for their execution.

We proceed, therefore, to the inquiry whether by the terms of the enabling act it was requisite to the validity of the contract by the city of Superior that it should be countersigned by its comptroller. The charter of the city is to be found in chapter 152 of volume 2 of the Laws of Wisconsin for the year 1889, published March 25, 1889. In chapter 5 of the act defining the powers and duties of the city comptroller we find the following provision, in section 27 of that chapter:

"He shall countersign all contracts made with the city if the necessary funds shall have been provided to pay the liability that may be incurred against the city under such contract, and no such contract shall be valid until so countersigned."

In chapter 10 of the act defining the powers and duties of the board of public works (section 71) occurs the following provision:

"All contracts shall be signed by the mayor and clerk unless otherwise provided by resolution or ordinance. Provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have executed the same and made an endorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that may accrue under such contract."

Standing alone, and construed without reference to other legislation, the language of the provisions would seem to be plain and unambiguous, and not open to doubt. By a familiar rule of construction, the latter provision, being embodied in the chapter entitled "The Board of Public Works," has reference only to those contracts of which the board of public works had cognizance and control. The former provision is found in the chapter defining

the duties of the officers of the city, is comprehensive in its terms, and upon the face of it manifestly includes all contracts made by the city which entail upon the corporation a pecuniary liability. This view—which to us seems clear by the very language of the provision—is fortified by the manifest design of the legislature, apparent in all the provisions of the act, to inhibit the corporation from entering into any contract imposing pecuniary liability upon the city, unless and until the common council has provided the necessary means for the liquidation of such liability. The legislature sought to impose upon this municipal corporation a restriction with reference to the incurring of liability payable out of the income of the current year, similar to that imposed by the constitution of the state by amendment to section 3, art. 11, adopted November 3, 1874, upon municipal corporations with respect to their bonded indebtedness, which was that before or at the time of the incurring of such indebtedness the corporation should provide for the collection of a direct annual tax sufficient to pay the interest as it matures, and a sinking fund to discharge the principal when it should fall due. The charter evinces a consistent, harmonious, single spirit and policy governing and regulating the action of this municipal corporation, as in fact exists as to all municipal corporations of the state created under the general charter of cities, that in respect of all contracts whereby pecuniary liability is incurred, provision for payment should be made at or before the time of the execution of the contract. The considerations which led to the adoption of this policy are apparent in the history of the state prior to the adoption of the constitutional amendment. Municipal corporations had issued bonds without respect to the value of the taxable property within the limits of the corporation, and without provision for payment of the interest or principal of the bonds at maturity. Indebtedness for municipal improvements within the limits had been incurred without regard to the sufficiency of the revenue of the current year to meet the indebtedness, and without respect to the extent of the burden cast upon the taxpayer. The practice had become a scandalous evil. In many instances bankruptcy had resulted; the public debt of many corporations was compromised, and in one or two instances, where the load of indebtedness seemed too great to be met, or there was inability to compromise, repudiation was resorted to, to avoid the payment of just obligations. It was to prevent in the future this unwholesome state of affairs that the policy was adopted by constitutional amendment as to bonded indebtedness, and by statute as to indebtedness payable out of the revenue of the current year, that provision should be made for payment at or before the time of the incurring of the liability. The people of the state and their representatives in the legislature sought thus to avoid reckless extravagance, and the repudiation of just obligations. We find, therefore, throughout this act, the manifest design that there should be prior provision for the payment of every obligation incurred, and restrictive measures to insure such provision. The comptroller is named as the censor of the common council and of the several departments of the city

government. He is required, in anticipation of the annual tax levy by the common council, to lay before them a detailed statement of the expenses during the past, and an estimate of the expenses for the ensuing, fiscal year, and the income of the city for that year from sources other than taxation, so that the common council may have the necessary information to provide adequately for the pecuniary necessities of the city during the coming year. He is also to report monthly the condition of the several funds of the city and of all outstanding contracts and claims which may be payable out of each fund. He shall examine and countersign all city orders issued for the payment of obligations of the city before the same shall be valid. He shall not countersign such orders before the money is in the treasury to pay the same. Section 27.

We find further illustration and confirmation of this view in the provisions of chapter 15, treating of eminent domain. The common council of the city is authorized by section 165 to establish a board of park commissioners, and to prescribe their powers; and by section 167 is granted full power to legislate with reference to public parks, provided, however, that no park should be established at the expense of the city unless the proposition was first submitted to the vote of the electors at an annual city election, and adopted by a majority vote in its favor. By chapter 6, § 34, subd. 29, the common council is empowered to acquire by gift, grant, devise, donation, purchase, or condemnation lands for public parks, and by section 103, c. 13, the common council is vested with authority to issue bonds for the acquiring of public parks, subject to the constitutional provision that the amount thereof, together with all other indebtedness of the city, less sinking funds on hand, shall not exceed 5 per cent. of the assessed valuation of the city at the previous assessment. The city may also, under chapter 15, institute proceedings in court for the condemnation of lands necessary to be taken for a public park, or for other public use. Section 133 provides that within three months after any judgment of condemnation the common council shall cause an assessment of damages and of benefits to be made chargeable upon the property supposed to be benefited thereby. Such assessment is to be confirmed by the common council, or that body may by resolution abandon the condemnation proceedings. In case of neglect for three months to order such assessment of benefits and damages, or to confirm such an assessment, and make provision for paying the excess of damages over benefits within one year after the entry of judgment of condemnation, the condemnation proceedings shall be deemed to have been abandoned. Section 128 of that chapter provides that if the city shall not, within one year after the entry of a judgment of condemnation, cause the benefits and damages by reason of such condemnation to be assessed, and shall not have in the proper fund available for that purpose sufficient to pay the excess of damages over benefits, the condemnation proceedings shall be deemed to have been abandoned. The comptroller is required at the expiration of the year to furnish, upon demand, to the mayor or other proper officer of the city, a certificate showing whether

there was at the end of such year in any fund of the city available for that purpose a sum sufficient to pay such excess of damages over benefits. If it shall appear that there is in any fund a sufficient sum available for that purpose, then the city may take possession of the land condemned, and an order may issue for payment to the persons entitled thereto.

The ordinance defining the powers and duties of the park commissioners (section 195, Principal Ordinances) otherwise designated as "City Ordinance No. 39, § 3," provides that on or before the 1st day of November in each year the board of park commissioners shall file with the city clerk a detailed statement of the amount of money which will in their judgment be needed during the ensuing year for the acquisition, care, and improvement of parks; and this estimate the city clerk shall place before the common council at the time the common council shall receive the estimates of city officers as required by section 110 of the city charter, so that the common council may be guided thereby in making the annual levy of taxes. Section 110, therein referred to, requires estimates by the board of public works and board of education of the amount of money necessary for the ensuing fiscal year in their respective departments; by the city comptroller the statement of the several amounts required by the police department, fire department, and general fund, and for purpose of paying interest for the ensuing year on the public debt and 5 per cent. of the principal thereof. Thus it will be seen that full provision is made by law for the ascertainment in advance of all payments necessary to be made by the city during the ensuing fiscal year, and for the levy of taxes for payment thereof, and the design is apparent that no monetary obligation shall be incurred not so provided for; and as a further restriction upon the incurring of indebtedness the charter provides that all contracts involving pecuniary liability made by the city shall be invalid unless countersigned by the city comptroller. We observe nothing on the face of this statute which restricts the language to contracts of any particular department of the city government, or, as is claimed, to contracts made by the board of public works. The fact that we find in the charter treating of the board of public works an express provision prohibiting the execution of such contracts by the mayor and clerk until the city comptroller shall have certified thereon that sufficient funds are in the treasury, or that provision has been made to pay the liability that may accrue, does not restrict the language of the general provision that all contracts of the city shall be void unless countersigned by the comptroller. It is contended that the term "such contracts," used in the section defining the duties of the city comptroller, refers to the contracts of the board of public works. We conceive this contention to be unfounded. The term manifestly refers to the contracts previously mentioned, namely, such contracts as entail pecuniary responsibility upon the city; and we think it would be a strained construction of the statute otherwise to limit it. The term "all contracts" is comprehensive, and is not to be limited unless used in a connection which clearly shows that such limitation

was intended. It is not so used here, but is found stated in a general provision touching the powers and duties of the city comptroller with respect to all financial affairs of the city. Lord Coke said (*Bonham's Case*, 8 Coke, 117): "The best expositor of an act of parliament in all cases is acts of parliament themselves." We should be doing violence to the language employed to restrict the provision to contracts entered into by the board of public works.

This conclusion is further fortified by reference to chapter 124 of the Laws of 1891, being "An act to revise, consolidate and amend chapter 152 of the Laws of 1889, entitled 'An act to incorporate the city of Superior.'" The legislature, in section 27 of that act, treating of the powers and duties of the comptroller, provides as follows: "He shall examine and countersign all general and improvement bonds." There would seem to have been some question whether the original charter required the comptroller to execute such bonds, the improvement bonds being supposed by some to impose no liability upon the city, but to be chargeable only upon the property of individual taxpayers,—a claim subsequently proven unfounded (*Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800), or to refer to bonds of the city payable at the expiration of a term of years. To make the matter certain, this provision was made by way of amendment, thus emphasizing our conclusion that all contracts of every kind involving pecuniary liability upon the city of Superior were designed and intended to be countersigned by the comptroller; otherwise this anomaly would result: that countersigning is essential with respect to the bonded indebtedness and with respect to the obligations contracted through the board of public works, and not necessary with respect to contracts made by the board of park commissioners or by the common council. This would be in derogation of the general spirit and policy of the law and of the manifest design of the legislature to restrict the power to contract when no provision had been made for the payment of the liability incurred, and in enforcement of such restriction to require as a condition to the validity of such contract that it be countersigned by the comptroller. In an able and ingenious argument, the construction contended for is sought to be enforced by construing this provision of the charter in the light of chapter 326 of the Laws of Wisconsin for the year 1889, approved April 8 and published April 12, 1889, being "An act dividing cities into classes, and providing for their incorporation and government." It is claimed that this act, though passed subsequently, formed a model for the charter of the city of Superior; and it is properly insisted that under a familiar principle of construction weight should be given to the construction which the legislature passing the same has put thereon, either in other parts of the same act or in other acts relating to the same subject-matter. *Milwaukee Co. v. Ehlers*, 45 Wis. 281, 295. It becomes necessary, therefore, to inquire whether, in the light of that act, the provisions of the act in question should receive a different construction from that which is required by the language of the act, and should be limited to contracts made by the department of public works. This general

charter of cities (chapter 326) by its terms does not affect any city then incorporated, unless it be adopted in the manner therein provided, and does not apply to the city of Superior. It is, however, properly invoked by counsel for consideration as an act in *pari materia* for the purposes of interpretation. A careful comparison of the two acts leaves no room for question that the charter of the city of Superior, although prior in passage and publication, was in fact almost literally, and with Chinese fidelity, largely copied from that part of the general charter of cities referring to cities of the second class. It is part of the history of the state that this chapter 326 was prepared by a commission appointed by the legislature of 1887, and reported to and adopted by the legislature of 1889. The act divided the cities of the state, or those which should adopt the provisions of the act, into three classes: First, those containing a population of 40,000 or over; second, those containing a population of 10,000 and over and under 40,000; third, those containing a population of 2,000 and over and under 10,000. The act provides, as to cities of the first and second class, for a comptroller and a board of public works. In cities of the first class the comptroller is not a member of that board. In cities of the second class he is a member *ex officio*. The charter of the city of Superior embraces those provisions of the general charter touching cities of the second class. With respect to the duties of a comptroller in cities of the first class, the act (section 44) provides:

"He shall examine all estimates of public work to be done made by the board of public works and all contracts made by them, and shall countersign the same if they are legal and if the necessary funds shall have been provided for the proposed work, and no contract shall be valid unless so countersigned."

The act provides in respect to the duties of comptrollers of cities of the second class (section 45):

"He shall countersign all contracts made with the city if the necessary funds shall have been provided to pay the liabilities that may have been incurred against the city under such contract, and no such contract shall be valid unless so countersigned."

In the chapter treating of the board of public works (chapter 11, § 93) it is provided as follows:

"All contracts shall be signed by the mayor and clerk unless otherwise provided by resolution or ordinance. Provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have countersigned the same and made an endorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that would accrue under such contract."

It will be observed that the two provisions last quoted are identical with the provisions in section 27 and section 71, respectively, of the charter of the city of Superior. It is insisted that, as the same reasons and necessity supposedly existed to require the comptroller of cities of whichever class to countersign all contracts made by a city, and as the provision in respect of cities of the first class requires the comptroller to countersign only those contracts made by the board of public works, that the provision

in respect to cities of the second class that "no such contract shall be valid unless so countersigned" refers necessarily to the same class of contracts mentioned in the provision with respect to cities of the first class, and that such construction should be applied under the circumstances to the provision of the charter of the city of Superior. We cannot give such construction to these provisions without a straining and contortion of the language of the two provisions that would be without warrant or justification. The language of the two provisions is quite different. In cities of the first class the comptroller shall examine all estimates of work to be done made by the board of public works, and all contracts made by them. This provision is wanting in respect of cities of the second class, because, it is insisted, in the latter class the comptroller is a member of the board of public works, while in the former he is not. In the former case the language is, "He shall countersign the same if they are legal." This language is wanting in the provision respecting cities of the second class. "And if the necessary funds shall have been provided for the proposed work, and no contract shall be valid unless so countersigned." This clearly limits the provision to the contracts of the board of public works. But in case of cities of the second class the comptroller is to countersign "all contracts made with the city if the necessary funds shall have been provided to pay the liabilities that may have been incurred against the city under such contracts, and no such contract shall be valid unless so countersigned." The language here is broader and more comprehensive than in the former provision. The term "no such contract" has reference to and comprehends contracts which shall entail a liability upon the city, whether made by the board of public works or otherwise. We do not understand why the legislature made this distinction in respect to the duties of the comptroller in cities of the first class and in cities of the second class; why it required in the one case that all contracts should be countersigned, and in the other that only contracts made by the board of public works should be countersigned. But it is not our duty, because we cannot perceive the reason, to say that the legislature had no reason. The power was lodged with the legislature to make the distinction, and it is not within our province to give to the language employed a restricted meaning in the case of cities of the second class because the legislature failed to give the same power and impose the same restriction upon its exercise in the case of cities of the first class. We have no more right to restrict the language in the one case than we have to enlarge the scope and meaning of the language employed in the other case. We can only say, "*Ita scripta est*," and give to the language employed its natural meaning.

We are constrained to the conclusion that the provisions of the charter require that all contracts involving the outlay of money made by the city must be countersigned by its comptroller, and that, therefore, failing such countersigning, the contract in question was void. It is clear to us that the provisions of the law are explicit, and are not to be set aside by construction. If the con-

demnation proceedings had proceeded to judgment, the appellees would have been in no better plight than they are now. There had been no provision made for payment of the amount that might have been awarded as the value of their land, and there was no compulsion of law so to provide. The proceedings, therefore, by the very terms of the charter, would have fallen to the ground. Contracting with a municipal corporation, they were bound to know the extent of the powers granted, and the mode in which they should be exercised. They retain their land, and have lost nothing, unless it be in failing to receive a price which the city authorities unlawfully contracted that the city should pay. The conclusion to which we have arrived renders it unnecessary to consider the questions presented by the other pleas. The judgment will be reversed, and the cause remanded, with instructions to sustain the second plea and to dismiss the bill.

WACHUSETT NAT. BANK v. SIOUX CITY STOVE WORKS (HUBBARD et al., Interveners).

(Circuit Court, N. D. Iowa, W. D. October 13, 1894.)

1. CHATTEL MORTGAGE—ENFORCEMENT AGAINST LEVYING CREDITORS—ESTOPPEL.

Where a bank buys notes of the payee on the faith of a statement by the latter that the maker has a large capital, and is doing a prosperous business, when in fact such payee holds unrecorded chattel mortgages securing such notes and others on all the property of the makers for an aggregate amount greater than the actual value of the property, of which the bank has no knowledge, the mortgagee and its assignee for the benefit of creditors are estopped to set up such mortgages to defeat an attachment by the bank, levied after the mortgages are recorded.

2. SAME.

The facts that the other creditors of the mortgagor represented by the assignee are holders of other notes secured by the mortgages, that when they purchased the notes they had no knowledge of such mortgages, and that they had no knowledge of, and did not consent to, the fraudulent acts of the mortgagee, will not enable the assignee to avoid such estoppel as against the bank, which does not consent to assume the position of a beneficiary of the mortgages.

This was a bill by the Wachusett National Bank, filed in proceedings for the appointment of a receiver of the Sioux City Stove Works, in which E. H. Hubbard, assignee for benefit of creditors of the Union Loan & Trust Company, was appointed such receiver, to settle priority of liens, and attacking the validity of certain chattel mortgages executed by the stove works to the trust company.

Wm. Milchrist and Swan, Lawrence & Swan, for complainant.
Wright, Hubbard & Bevington, for interveners.

SHIRAS, District Judge. The questions in dispute in this proceeding grow out of the following state of facts: The Daniel E. Parish Stove Company, in the year 1892, and prior thereto, was a corporation created under the laws of the state of Iowa, and was engaged in an extensive manufacturing business at Sioux City.

For the purpose of procuring money to be used in its business from time to time, it entered into a contract with the Union Loan & Trust Company, of Sioux City, under date of May 17, 1892, whereby it was agreed that the stove-works company should execute and deliver to the trust company its three several promissory notes,—one for \$75,000, one for \$25,000, and one for \$100,000,—all payable on demand, the first-named note to be secured by the deposit of first mortgage bonds, the second note to be secured by a mortgage upon its real estate, fixtures, and machinery, and the third note by a chattel mortgage upon all the personal property of the corporation, including after-acquired property and manufactured goods. In the contract it is declared that “the purpose of giving said notes and securing the same as aforesaid is to enable the said party of the first part to procure a line of credit with the said party of the second part, and to borrow money on said notes and securities within the limits of said two hundred thousand dollars;” it being further agreed “that said notes, and the securities put up to secure them, shall stand and remain in the hands of the said party of the second part to secure any advances now made or that may be made hereafter, during the continuance of this agreement, by the party of the second part to the party of the first part, and the said notes and securities so put up shall stand and remain as security for any renewal of said advancement, or change in said advancements, the purpose of said securities being to secure any debt within the amount of said notes that may be due and owing the said party of the second part from the party of the first part at any time during the continuance of this agreement by reason of any advancement that may be made by the party of the second part to the party of the first part and not repaid.” Subsequent to the date of this agreement the corporate name of the stove-works company was changed to that of the Sioux City Stove Works. In pursuance of the arrangement between the parties, the stove-works company, on the 17th day of May 1892, executed its three promissory notes for the sums of \$25,000, \$75,000, and \$100,000, delivered to the trust company \$75,000 of its first mortgage bonds, and executed and delivered to the trust company two mortgages covering substantially all the personal property of the corporation. Subsequently, on the 10th day of January, 1893, the Sioux City Stove Works executed its promissory note, payable on demand, to the order of the Union Loan & Trust Company, for the sum of \$175,000, and to secure the same executed a chattel mortgage upon its personal property, it being therein declared that: “The intention of this instrument being that this note and this mortgage shall stand as full security for any advances made by said Union Loan & Trust Company to said Sioux City Stove Works upon said note and mortgage in addition to the said sums of money advanced by said Union Loan & Trust Company to this company under the previous note and mortgage made by this company to the said Union Loan & Trust Company.” It appears that the trust company did not, from its own funds, advance or loan any sum to the stove-works company, but from time to time the latter company executed

its promissory notes, generally for the sum of \$5,000 each, payable to the order of the Union Loan & Trust Company, which notes the latter company would indorse and sell to banks located in different sections of the country, and the money thus obtained would be paid to the stove-works company. On the 25th day of April, 1893, the Union Loan & Trust Company, being insolvent, executed to E. H. Hubbard an assignment of its property for the benefit of its creditors, under the provisions of the statute of Iowa upon that subject. Upon entering upon the trust thus created, the assignee found that the several chattel mortgages executed by the stove-works company as hereinbefore stated had not been filed for record, and thereupon, on the said 25th day of April, 1893, the assignee caused the same to be filed and recorded in the proper office in Woodbury county, and at once took possession of the property therein described. It also appears that in February, 1893, the Wachusett National Bank of Fitchburg, Mass., purchased, through the Union Loan & Trust Company, three notes for \$5,000 each, executed by the Sioux City Stove Works, and coming due August 7, 8, and 9, 1893, these notes being payable to the order of the trust company, and being indorsed by it. On the 1st day of May, 1893, the Wachusett Bank brought an action at law in this court, aided by a writ of attachment, upon these notes against the maker thereof, and the writ of attachment was duly levied upon a large amount of the personal property of the stove-works company, which was then in the hands of E. H. Hubbard, assignee of the Union Loan & Trust Company. On the 2d day of June, 1893, a petition on behalf of creditors was filed in this court, asking the appointment of a receiver to take possession of the property of the stove works, and on the day named E. H. Hubbard was appointed receiver, and the property of the stove works was placed in his hands for the benefit of all interested, including the property levied on under the attachment process in favor of the Wachusett Bank. For the purpose of settling the rights of the parties, the Wachusett National Bank filed a petition in the proceedings for the appointment of a receiver, setting forth the lien claimed by it under the attachment process, and asking the court to direct the payment of the sums due it, as evidenced by the judgment obtained in its action at law on the notes issued by the stove-works company. Thereupon E. H. Hubbard, as assignee of the Union Loan & Trust Company, intervened in said proceedings, and filed a petition setting up the giving the notes and chattel mortgages to his assignor by the stove works, and averring that the lien created thereby was superior in law and equity to the lien of the Wachusett Bank in favor of the parties who had purchased the notes of the stove works indorsed by the trust company; and several of the banks who are owners of these notes have likewise intervened for the protection of their rights under the chattel mortgages executed to the Union Loan & Trust company. The question at issue is whether the lien created by the levy of the attachment in favor of the Wachusett Bank is superior at law or in equity to that created by the execution of the chattel mortgages.

It is well settled that the lien of a chattel mortgage as against third parties without actual knowledge of its existence dates from the time when it is filed for record in the proper county. *Allen v. McCalla*, 25 Iowa, 464; *Bacon v. Thompson*, 60 Iowa, 284, 14 N. W. 312. As it is admitted that the chattel mortgages had been duly filed for record in the proper county on the 25th day of April, 1893, whereas the writ of attachment in favor of the bank was not sued out until May 1, 1893, it follows that at law the lien of the mortgages antedates and is superior to that of the attachment. Are the equities of the situation such that the lien of the mortgages should be postponed and be held inferior to that of the attaching creditor? On behalf of the Wachusett Bank it is claimed that the trust company intentionally withheld the mortgages from record, concealed the fact of their existence, and misrepresented the business and financial standing of the stove works in order to induce the bank to purchase the notes of the stove works; and therefore the bank is entitled to estop the trust company, and all parties claiming under or through it, from asserting the priority of the lien under the mortgages. The evidence in the case clearly shows that the trust company did intentionally withhold the mortgages from record, and when negotiating the sale of the notes of the stove works to the bank it represented that "the stove works have a capital of \$200,000. Their plant is a very extensive one, covering over seven acres of ground, and the company is doing a prosperous business,"—these statements being contained in a letter dated January 27, 1893, and upon the faith thereof the bank bought the notes. Under these circumstances, if the question was simply between the bank and the Union Loan & Trust Company, it would be most inequitable and unjust to permit the trust company to assert and maintain the superiority of the lien, created by the mortgages to it, as against the equity existing in favor of the bank, growing out of the fact that the bank had been induced to purchase the notes of the stove works on the faith of the representation made by the trust company that it was doing a prosperous business, when in truth the trust company then held unrecorded mortgages covering the entire property of the stove works, and for an aggregate amount greater than the actual value of the property. *Blennerhassett v. Sherman*, 105 U. S. 100; *Goll v. Miller* (Iowa) 54 N. W. 443.

It is, however, earnestly contended by the assignee that the facts in this case are such as to take the case out from the operation of the general rule recognized in the cases just cited, it being claimed that in fact the Wachusett Bank is one of the beneficiaries under the mortgages, and therefore cannot object to the enforcement of the lien thereof for the common benefit of all; and, further, that the real beneficiaries are the other creditors who now hold the notes of the stove works, and that these parties were ignorant of the acts of the trust company, did not consent thereto, and should not be estopped thereby. In the agreed statement of facts it is admitted that the bank had no knowledge of the existence of the mortgages executed to the trust company until after they were

recorded, unless such knowledge is inferable from a statement contained in the letter of the trust company forwarding the notes to the bank, in which, following a description of the notes, it is said "All being amply secured by good collateral." It is entirely clear that the bank must have regarded this as a statement in regard to collaterals held by the trust company to protect it, in that it indorsed the paper, for the bank had already agreed to take the notes upon the faith of the statements contained in the previous letter of January 27, 1893, in which it is not stated that the stove-works notes were secured in any manner, and the bank never made any inquiry about any security, collateral or otherwise, but simply took the paper on the strength of the names of the maker and indorser; and therefore it cannot be held that the bank was charged with any knowledge of the actual existence of the chattel mortgages, or that it must be deemed to be one of the beneficiaries of the mortgage security, unless it has consented to assume that position. The mortgages, in terms, are given to secure only indebtedness due the trust company, and while, in equity, creditors may obtain the benefit thereof, they cannot be compelled to recognize the mortgages as existing for their benefit. If the mortgages had been executed to the trust company as a trustee for the common benefit of the Wachusett Bank and the other holders of the notes of the stove works, then there would be very great force in the argument that no one of the common beneficiaries could repudiate the instrument and estop his cobeneficiaries from asserting the validity of the lien created thereby, on the ground that the mortgages had not been duly recorded; but that is not the actual situation. The only parties to the mortgages are the stove works and the trust company, and the security created thereby is expressly declared to be for the protection of the trust company. The creditors now represented by the assignee of the trust company can claim an interest in the security only on the principle of subrogation. The trust company, by indorsing the paper of the stove works, has become liable thereon to the creditors, and therefore has the right to apply the securities to the payment of the stove-works notes. In equity the creditors who have the legal right to look to the assets of both the maker and indorser for payment are entitled to be subrogated to the rights of the trust company in regard to the securities held by it. *Sheld. Subr. § 154.* This is, however, an equity based upon the right of the surety, and to be worked out through it. *Hall v. Railroad Co.*, 13 Wall. 367; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176. In *Sheldon on Subrogation* (section 157) it is said:

"It is generally considered that, while the creditor has the right to be substituted to the place of the surety in a case in which the creditor has given indemnity to the surety, yet the creditor's right must be measured by that of the surety. * * * If the surety holds the property only by a conveyance which is fraudulent as against the general creditors of the principal debtor, the creditors' right can be no better than that of the surety, and will not prevail against the principal's general creditors."

In the agreed statement of facts it is stipulated that the holders of the notes of the stove-works company bought the same without actual knowledge of the existence of the unrecorded mortgages. They did not rely thereon in buying the notes, and therefore the only hold they now have upon the security created thereby is by claiming through and under the trust company, and in so doing they occupy no better position than that of the trust company; and as, against that company, the Wachusett Bank could undoubtedly plead and maintain an estoppel on the grounds already stated, it follows that such estoppel is also good against the assignee of the trust company and the creditors who now seek to avail themselves of the benefit of the mortgage securities.

It further appears that certain portions of the buildings owned by the stove-works company were boarded off and called warehouses A, B, and C, and therein, from time to time, were stored the manufactured products, and warehouse receipts were issued and delivered to the Union Loan & Trust Company; but the real object of so doing is not made clear, and I can see nothing therein that affects the lien, rights, or equities of the Wachusett Bank. It follows, therefore, that the bank is entitled to hold the attached property as against the claim of the assignee of the Union Loan & Trust Company, and as against the claims of the creditors of the stove works based upon the chattel mortgages executed to the trust company, and is entitled to an order directing the receiver to pay the amount due the bank in preference to the assignee and other creditors.

GORRELL v. HOME LIFE INS. CO. OF NEW YORK.
(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 158.

1. NEGOTIABLE INSTRUMENTS—PLEA—ULTRA VIRES—CORPORATIONS.

In an action upon a note payable to an insurance company, a plea that the taking of such a note was an ultra vires act is not good.

2. SAME—PAROL EVIDENCE TO VARY NOTE.

Oral evidence is not admissible to show that a note absolute in its terms is payable only out of a particular fund.

3. SAME—EVIDENCE—LETTER.

A note by which the maker agreed to pay a certain sum of money, and to allow certain commissions accruing to him to be retained by the payee on account of the note, was sent by the payee to the maker for signature in a letter in which the payee wrote that the note, "as you will see, we have made payable from your commissions." *Held*, that the letter merely called attention to the provisions of the note, and did not make it payable only out of the commissions.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Assumpsit by the Home Life Insurance Company of New York against William F. Gorrell. Plaintiff obtained judgment. Defendant brings error.

The circuit court directed a verdict and gave judgment against the plaintiff in error for \$6,088.57. Besides the common counts in assumpsit, the

declaration contained a special count, in support of which the following promissory note was adduced in evidence:

"\$7,500.00.

March 19, 1891.

"On demand, after date, I promise to pay to the order of Home Life Insurance Co. seventy-five hundred dollars, at its office, 254 Broadway, N. Y. City. Value received, with interest at six per cent. per annum. And I further agree to allow all renewal commissions accruing to my account on and after January 1st, 1892, to be retained by said company, to be applied to the liquidation of this obligation.
William F. Gorrell."

Indorsed: "Dec. 14/91, interest paid to Dec. 19/91, \$337.50. Dec. 14/91, paid on account \$112.50. Jan. 4/92, paid \$1,000. Feb. 29/92, paid \$1,000."

To the special count the plaintiff in error presented four special pleas: First (in substance). That the Home Life Insurance Company is a corporation of New York, and does insurance business in Illinois without being organized under her laws or the laws of the United States as a banking institution, and that the note sued on was executed in Illinois for money loaned to the plaintiff in error in Illinois. Second. That the defendant in error was organized in New York as a life insurance corporation, and not as a banking corporation; that by the law of New York no corporation not expressly incorporated for banking purposes possesses the power to discount bills, notes, or other evidences of debt; and that this cause of action arises out of the fact of the defendant in error having discounted the note in suit. Third. That the defendant in error, organized under the laws of New York for the purpose of insuring lives, and to grant, purchase, or dispose of annuities, giving policy holders an interest in the profits of the company, was authorized to loan to policy holders a sum not exceeding one-third of the annual premium of the policies held by each, and to secure the loan by the pledge of the policy and the profits accruing thereon, and to invest other funds and accumulations in such manner as then was or might be thereafter prescribed by law; that when the note in suit was made it was the law of New York that life insurance companies might loan surplus moneys upon the security of mortgages of real estate in New York, or within fifty miles of the boundary thereof; that the note sued on was never secured by mortgage on realty, or in any manner except as shown upon its face; and that the money so loaned exceeded by more than one hundred times the one-third amount of the annual premium of any policy of the company held by the plaintiff in error. Fourth. That the note was without consideration because the plaintiff in error was the general agent of the defendant in error, and received the money upon an agreement that it should be expended in soliciting business for the company; that it was so expended; and that the note was to be paid only out of renewals which should accrue to the credit of the plaintiff in error. To these pleas a general demurrer was interposed and sustained, whereupon the plaintiff in error pleaded the general issue. The evidence in the case consisted of the note described in the declaration, and a verified computation of the amount due upon it, and of the following correspondence offered in defense:

"New York, March 11, 1891.

"W. F. Gorrell, Chicago—Dear Sir: We do not wish to make loans on farm lands. If we were to do so, we could soon place all the money we have in that class of securities. We will loan you to the extent of \$7,500 at 6 per cent., taking your note secured by your renewal interest, leaving you free to use the money as may appear advantageous to you. This is the same offer as was made to you on January 26, last, when you proposed getting an application for \$10,000 insurance, which afterwards fell through; and, if you should now succeed in getting some applications by those means, we wish to remind you of the conditions then named as to the necessity of a full and rigid examination by some allopathic physician of high standing.

"Yours, truly,

Charles A. Townsend, President."

"March 16, 1891.

"Mr. W. F. Gorrell, Chicago—Dear Sir: We had expected that the money asked for would only be required as you gave us the specific amounts of

the mortgages you might from time to time think it desirable for yourself to invest in, but nevertheless will send the \$7,500, on your signing and returning us the inclosed note, which, as you will see, we have made payable from your renewal commissions maturing from and after the first of January next. As a matter of record, we ask you to furnish us a statement of location and description of the property in which you invest.

"Yours, truly,

Charles A. Townsend, President.

"The date is to be filled in before signature."

"August 19, 1891.

"W. F. Gorrell, Chicago, Illinois—Dear Sir: As to the payment of interest on your note, we will receive it at any time you choose to send it, but can make no conditions as to its payment before it is due. We have so much money to invest that we can make no discounts for prepayment of any funds due us. * * *

George H. Ripley, Vice President."

"Chicago, Illinois, December 16, 1891.

"C. A. Townsend, President, New York—Dear Sir: According to the terms of my note for \$7,500, most of which I have loaned at six per cent. interest, I am to pay it out of the renewals after January 1st, 1892. I have given the matter considerable thought the last few days, and it does seem to me that this will cause a good deal of extra clerical work both here and there. I would like to pay it a thousand dollars at a time, if it would suit you just as well. That is, every time I get a thousand dollars I will send you check for same, and it would not take long this way to pay it off entirely. I will have a thousand dollars in a very few days, and will be glad to hand it to you, if you will accept it. Please advise me. I can now place \$3,000, at 6 per cent., on a good farm in Champaign county; but I do not have the fund to do it myself, and I wish you would furnish that, as I will be responsible for every dollar. * * *

"Respectfully,

William F. Gorrell."

"New York, December 18, 1891.

"Mr. W. F. Gorrell, Chicago—Dear Sir: With regard to your personal note for \$7,500, you can, if you prefer, send us, as you propose, the \$1,000 on account of it; and we will then take a new note for \$6,500, putting the clause as to its reimbursement from renewals further ahead, as suits your convenience. For the present this is all we can do in this direction.

"Yours, truly,

Charles A. Townsend, President."

"December 21, 1891.

"C. A. Townsend, President, New York—Dear Sir: I note what you say in your kind favor of the 18th, and I thank you, indeed, for the favor. I will send you a thousand dollars in a short time, and will then advise you what to do.

"Respectfully,

W. F. Gorrell."

"January 2, 1892.

"Mr. C. A. Townsend, New York—Dear Sir: I enclose you check for \$1,000, for which please give me credit on my note, and please let it stand just as it is now. I will have it paid in a very short time, and it will save making any new note, as I don't want to do that.

"Respectfully,

W. F. Gorrell."

It was also shown that Gorrell had been the agent at Chicago of the Home Life Insurance Company, and that on the 27th of June, 1892, his agency ceased; that the note in suit was sent him by the president of the company with the letter of March 16th, and was signed by him on the 19th,—the date having been inserted by him in a blank left for that purpose; and that the amount of the credits indorsed on the note, \$2,112.50, contained all his renewal commissions received from January 1, 1892, until he ceased to be the agent of the company. The court refused to admit proof of conversations between Gorrell and the president of the insurance company, had on January 26, 1891, and in February following, to the effect and to show "that it was agreed that Mr. Gorrell should borrow \$7,500 of the defendant in

error, and invest the same in the west in such manner as to procure policy holders for the company; that Gorrell expressly stated to the president that he would not take the money unless it should be repaid out of renewals collected by him as agent out of the business; that the president agreed to this condition; and that the plaintiff in error would not have made investments which he did with this money, excepting upon the faith of this agreement."

W. A. Shaw, John Stirlen, Samuel B. King, and C. M. Hardy, for plaintiff in error.

Weigley, Bulkley & Gray, for defendant in error.

Before HARLAN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge (after stating the case). It is insisted that the court below erred in three particulars: First, "in sustaining demurrers to defendant's special pleas;" second, "in refusing to permit petitioner to prove, on the trial of the cause, conversations and correspondence between plaintiff in error and C. A. Townsend, the president of the Home Life Insurance Company, in relation to the note in controversy;" third, "in directing the jury to find for the defendant in error." Waiving any question of these specifications meeting the requirements of our tenth and twenty-fourth rules, that "an assignment of error shall set out separately and particularly each error asserted and intended to be urged," and that when the error alleged is to the admission or rejection of evidence the assignment "shall quote the full substance of the evidence admitted or rejected," we are of opinion that the rulings of the circuit court were correct. Of the special pleas referred to in the first assignment of error, the fourth is distinctly different from the others, but has not been supported by argument or citation of authority, and will not be considered.

"The major proposition of the first three special pleas," says the brief in support of them, "is that a person cannot obtain advantage in a court of law of a contract made or an act done in violation of law. *Ex turpi causa*, etc. Each of the pleas sets forth a separate ground to sustain the proposition that the cause of action sought to be enforced in this suit grows out of a transaction forbidden by law." A plea, which, without denying the receipt and full enjoyment of the consideration, is designed to defeat an obligation to repay money loaned because the corporation which made the loan had exceeded its powers, or contravened some express or implied provision of statute, should be strictly construed, and, unless the illegality is shown by averments so unequivocal and complete as to exclude any reasonable intendment to the contrary, the contract should be upheld. By the theory upon which these pleas were drawn, neither the second nor third of them excludes the possibility or a fair presumption that the note in suit was lawfully made. The theory of the second plea is that it was a violation of the law of New York for an insurance company not organized as a banking corporation to discount bills, notes, or other evidences of debt, and so it is alleged that this

cause of action arose out of the fact of the defendant in error having discounted the note in suit. But it is not alleged that the note was given for money loaned, nor what was the consideration. If the consideration was the price of property sold, or an indebtedness of the plaintiff in error which had accrued in connection with an agency for the company or otherwise, or the accumulated amount of credits allowed him by the company for the one-third of annual premiums on policies of the company which he held, the taking or discounting of the note by the company was not a banking transaction. The third plea shows that the note was made in consideration of a loan, and concedes the power of the company to loan to holders of its policies "a sum not exceeding one-third of the annual premium of the policies held by such policy holders respectively," but alleges that the money loaned on this note exceeded by more than a hundred times the amount of the annual premium of any (one) policy of the company held by the plaintiff in error. There is in the plea no averment that the loan for which the note was given was or was not intended to be for the one-third amount of premiums accumulated upon policies of the company which were held by the maker of the note, and were pledged as security for the debt. He may, for all that is averred, have held policies upon his own life sufficient for the purpose, or may have held them upon the lives of others, in whom he had insurable interests.

But there is a more radical objection to all three of the pleas. The theory of them all is that the insurance company was forbidden to do a banking business either in New York or in Illinois, and that in discounting the note in suit it violated the law of both states. It is not claimed that the law of Illinois on the subject is express, but that by implication all corporations not organized under the general banking law of 1888 (chapter 16a, Hurd's Rev. St.) are forbidden to carry on a banking business in that state. In support of the general proposition that courts will not give effect to contracts forbidden expressly or by implication, a number of cases are cited, but they do not go to the extent necessary to sustain the pleas. Of the cases in New York, for instance, the latest cited is *Trust Co. v. Helmer*, 77 N. Y. 64. The answers in that case contained averments to the effect that the plaintiff kept a regular office for discount and deposit, and carried on a regular banking business, so that upon the facts alleged, as the court said, the question for determination was whether the plaintiff possessed authority under its charter to discount notes the same as any other banking institution, credit the proceeds, and pay out the same upon the checks of one of the parties, and not whether the plaintiff could lawfully buy and receive promissory notes, and advance money on the same. The distinction was declared to be, as manifestly it was, a plain one. In *New Hope, etc., Bridge Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648, a foreign corporation, in violation of an express prohibition, kept in New York an office for receiving deposits and discounting notes, and a contract of loan which was found to have grown out of the prohibited act was held to be illegal and void. It is not alleged in any of these pleas that the Home Life Insurance

Company kept an office for discount and deposit, or in any sense carried on a regular banking business, but simply that it made a loan of money upon the note in suit. Conceding, as was said in *Insurance Co. v. Ely*, 5 Conn. 560, that "the discount of money on a note" is an exercise of "the most important power of a bank," it does not follow that a single loan of money upon the note of the borrower by an insurance company—it may be supposed to have been, as the proof in this instance shows it was, to an agent of the company to enable him to prosecute the company's business of insurance more successfully—must be deemed to have been made in violation of the statute. At most the pleas show that in making the loan and taking the note in suit the company exceeded its powers,—did a thing which was ultra vires, but not otherwise in violation of law. In New York, however, as elsewhere, the rule is established "that the contracts of corporations, made in excess of their rightful powers, but free from any other vice, are not illegal, in the sense of the maxim 'Ex turpi causa,' etc." It was so declared by one of the judges in *Bissell v. Railroad Co.*, 22 N. Y. 258, and has since been there and generally the recognized rule. *Arms Co. v. Barlow*, 63 N. Y. 62; *Woodruff v. Railway Co.*, 93 N. Y. 609; *Bank v. Jones*, 95 N. Y. 115, 123; *Raft Co. v. Roach*, 97 N. Y. 378; *Bank v. Porter*, 125 Mass. 333; *Woollen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823; *Farnham v. Canal Co.*, 61 Pa. St. 265, 271; *Grant v. Coal Co.*, 80 Pa. St. 208, 218; *Darst v. Gale*, 83 Ill. 136; *Alexander v. Tolleston Club*, 110 Ill. 65, 73; *Brown v. Mortgage Co.*, Id. 235; *Gold-Mining Co. v. National Bank*, 96 U. S. 640; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Bank*, 112 U. S. 408, 5 Sup. Ct. 213; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66; *McBroom v. Investment Co.*, 153 U. S. 318, 14 Sup. Ct. 852; *State Board of Agriculture v. Citizens' Street Ry. Co.*, 47 Ind. 407; *Driftwood Valley Turnpike Co. v. Board of Com'rs*, 72 Ind. 226; *Platter v. County of Elkhart*, 103 Ind. 360, 381, 2 N. E. 544. Contracts of national banks made in violation of express prohibitions have been upheld by the supreme court of the United States in the cases cited upon the principle, as declared in *Thompson v. Bank*, "that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." In *Brown v. Mortgage Co.*, supra (decided in June, 1884), the supreme court of Illinois, speaking of a foreign company which was organized for the purpose of loaning money on mortgage security, said: "There is nothing in the character of such a corporation contrary to public policy in this state (*Stevens v. Pratt*, 101 Ill. 206), and to allow the plea of ultra vires here would be to work a wrong. It would be contrary to natural right and justice." The loan involved in that suit was probably made before the banking law of 1887-88 took effect, but if a new rule or policy had been introduced by force of that act, the fact would doubtless have been mentioned by the supreme court of the state, or, to say the least,

the unqualified statement quoted of the present law or policy on the subject would not have been made.

Under the second assignment of error the only question can be of the admissibility of the oral testimony which was offered and rejected. There was no exclusion of correspondence between the parties. In so far as the oral testimony which was offered is identical with the contents of the letter of March 16, 1891, its exclusion was harmless, because the letter itself is in evidence, and oral proof to the same effect was needless; and, in so far as the proposed testimony goes beyond the letter, it was properly rejected. *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.*, 18 U. S. App. —, 7 C. C. A. 660, 59 Fed. 49. Its admission would have been in plain violation of the familiar rule "which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." In *Renner v. Bank*, 9 Wheat. 581, 587, quoted in *Martin v. Cole*, 104 U. S. 30, 38, it is said that "there is no rule of law better settled or more salutary in its application to contracts." The contract before us—the note in suit—is complete in its terms. It contains an absolute promise to pay on demand a stated sum, and the consent of the maker is expressed that renewal commissions accruing to his account may be retained by the company and applied in liquidation of the obligation. The rule that where an oral agreement has been but partially reduced to writing the whole agreement is open to proof is not applicable. The proof proposed here was of an agreement inconsistent with the writing, which in itself is complete and unambiguous. The written promise to pay is absolute. By the proposed proof that promise would have been nullified, and the note converted into an agreement that the sum named should be paid out of accruing commissions, and not otherwise. The case is clearly distinguishable from *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, where evidence was admitted to show a parol agreement that a note should not become operative as a note until the maker could examine the property for which it was given. That attack was upon the delivery, and not, as in this case, upon the meaning of the terms of a note, of the delivery of which no question has been made either in the pleadings or proofs.

The remaining question is whether the court erred in directing a verdict, and that depends upon the force of the correspondence between the parties which was admitted in evidence. In support of the contention of the plaintiff in this respect four propositions are advanced, and authorities cited to establish them:

(1) That all the writings between the parties must be construed together. *Bish. Cont.* § 165; *Crop v. Norton*, 2 Atk. 74, 75; *Colbourn v. Dawson*, 4 Eng. Law & Eq. 378; *Stacy v. Randall*, 17 Ill. 467; *Fort v. Richey*, 128 Ill. 502, 21 N. E. 498; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584, 21 N. E. 483.

(2) That a promissory note payable from a designated source or fund is contingent upon the existence and quantity of the source or fund. *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162; *Bradley v. Marshall*, 54 Ill. 173; *Bailey v. Cromwell*, 4 Ill. 71;

Josselyn v. Lacier, 10 Mod. 294; Worden v. Dodge, 4 Denio, 159; Cook v. Satterlee, 6 Cow. 108.

(3) That where parties thereto have placed a construction upon their contract the courts will adopt their construction. 2 Kent, Comm. 557; Insurance Co. v. Dutcher, 95 U. S. 269; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585; Reissner v. Oxley, 80 Ind. 580; Willcuts v. Insurance Co., 81 Ind. 300.

(4) That where a complete oral agreement has been but partially reduced to writing the whole agreement may be proved by parol evidence. Bish. Cont. § 164; Board v. Shipley, 77 Ind. 553, 556; Tomlinson v. Briles, 101 Ind. 538, 1 N. E. 63; Wood v. Williams, 142 Ill. 269, 276, 31 N. E. 681; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Magill v. Stoddard, 70 Wis. 75, 35 N. W. 346; Chapin v. Dobson, 78 N. Y. 74; Juillard v. Chaffee, 92 N. Y. 529; Schmittler v. Simon, supra; Bradshaw v. Combs, 102 Ill. 428; Lafitte v. Shawcross, 12 Fed. 519.

The last proposition is pertinent only to evidence which was not admitted, and which we have already considered. Conceding the general soundness and relevancy of the other propositions, we find nothing in the letters which passed between these parties which can properly be said to modify the meaning of the terms used in the note. The contention is that the clause in the note which authorized the company to retain all renewal commissions, and apply them to the liquidation of the obligation, should be given the meaning of the clause in the letter of March 16, 1891, where, referring to the unsigned note, which was inclosed in the letter, it is said, "Which, as you will see, we have made payable from your renewal commissions maturing from," etc. That, however, was intended, manifestly, not to put upon the note a construction which would make of it a contract distinctly different from the one evidenced by its terms, but simply to call attention to the provision as it is found in the note for the retention and application of renewal premiums to the discharge of the demand. That this was the intention would be the fair inference if the expression of the letter were unqualified, and it is put beyond doubt by the use of the phrase "as you will see," which means "as you will see by reading the note." With that letter in his hand the plaintiff in error was bound to scrutinize the note, and had no right to execute it on the assumption or supposition that it did not mean what it said. If he was misled by the letter and by statements of the president of the company, so as to be entitled to relief on the ground of mistake, and had sought a correction of the note in order to bring it into conformity with the supposed intention of the parties, a court of equity, on proper application and proof, could have given him relief; but as presented here, in a suit at law, there is in the evidence, and there was offered in evidence, nothing to affect the validity and force of the note as it reads, and the court did right in directing a verdict. The judgment is affirmed, with costs.

WILSON v. BREYFOGLE.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 98.

1. VENDOR AND VENDEE—RESCISSION BY VENDEE—RECONVEYANCE.

Where the purchaser of land has accepted and recorded his deed relying on the vendor's representation that the title was perfect, he cannot, on discovering the title to be defective, sue for a return of the consideration without first reconveying or offering to reconvey.

2. PRACTICE—NONSUIT.

Where the court sustains a motion to exclude the plaintiff's evidence from the jury, the proper judgment is one of nonsuit, and not a general judgment for the defendant.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by Harriet A. Wilson against William A. Breyfogle. Defendant obtained judgment. Plaintiff brings error.

The plaintiff in error, the wife of William G. Wilson, sued in assumpsit to recover damages for the failure of the defendant to convey to her by good and sufficient title 30,000 acres of land in Tennessee. The plaintiff and her husband were possessed of certain real estate in Cook county, Ill., known as the "Grand Crossing Property," which they agreed to convey to the defendant at the price of \$200,000, receiving in payment therefor, to the husband, \$20,000 in cash; \$105,000 in deferred payments, secured by mortgage upon the property to be conveyed; the balance, \$75,000, to be paid by the conveyance by good and sufficient title to the plaintiff of 30,000 acres of land in Cumberland county, Tenn., of which it is charged the defendant represented himself to be the owner.

The defendant pleaded the general issue and three special pleas: (1) The statute of frauds; (2) a conveyance by warranty deed to the plaintiff by the Cumberland Lumber & Transportation Company of the Tennessee lands described, dated October 21, 1889, accepted and received by the plaintiff in full performance of the agreement; (3) an oral agreement to convey as stated, except that the Tennessee lands should be conveyed by the Cumberland Lumber & Transportation Company by warranty deed, and the defendant and wife should execute and deliver a quitclaim deed, and alleging performance by the defendant, and acceptance by the plaintiff of the deeds. To these pleas there were replications, upon which the defendant joined issue. The cause was tried before the court without a jury. The evidence disclosed that the parties met at Chicago on August 15, 1889, to consummate the arrangement. The plaintiff and her husband executed and delivered to the defendant a deed of the Grand Crossing property, which was accepted, and he in turn made the cash payment, and executed the mortgage upon that property to the satisfaction of Mr. and Mrs. Wilson. It is charged that he failed to convey to the plaintiff the 30,000 acres of Tennessee land by good and sufficient title, as agreed. The defendant at the time produced a warranty deed of the lands executed by the Cumberland Lumber & Transportation Company, which contained an error in the description, which error was, at the request of the plaintiff, subsequently rectified, and the deed sent to the plaintiff, and by her sent for record. There was also produced a quitclaim deed from the defendant and his wife, which was not at the time handed over to the plaintiff because of a want of, or a defective, acknowledgment, which was subsequently supplied, and the deed sent to the plaintiff.

The case below turned largely upon the question whether and under what circumstances the deeds of the Tennessee lands had been accepted by the plaintiff as a fulfillment of the contract. It appeared that certain papers for which the defendant had sent to assure Mr. Wilson of the title to

the land had not reached him. Mr. Wilson thus states the occurrence: "He [Breyfogle] said at the time that, inasmuch as the papers had not arrived that he sent for at Louisville to be sent to me, to be examined by my attorney, as to the title of this property, that if I would go ahead, and conclude the contract, why he was willing to do it, and I could rely implicitly upon his statement that he had a good title, and that he had investigated the matter very thoroughly through attorneys, and that he would not have taken the property at all unless he was satisfied that his title was good, and he could assure me on his honor that his title was perfect; and, inasmuch as these papers were locked up in somebody's desk in Louisville, and he could not be here, and my wife was going away, that the trade may as well be concluded then, and that I need not fear anything about the title, and that he would certify to the abstract that he had already furnished me—which had not been accepted—as a proper abstract of title, and that he would certify to it, and guaranty to the best of his ability, in writing, that that title was all right; and I said to him, and also to Judge Leaming, that inasmuch as the doctor [the defendant] was responsible, and that his assurance that he had the title and could convey a good title, that I would accept the deed under the circumstances. The Court: In other words, you accepted the deed on the faith of what he said to you? A. Yes, sir. Q. Relying on it? A. Yes, sir."

The record does not state the consideration expressed in the warranty deed of the Cumberland Lumber & Transportation Company which the plaintiff first had. In October following, Mr. Wilson, upon attempting to have the deed recorded, ascertained that the recording fee was graduated by the consideration expressed in the deed,—in this case, presumably, \$75,000. He thereupon sent the deed to the defendant, requesting him to have the consideration changed to \$1, to avoid payment of a large recording fee, and a new warranty deed executed by the company was sent him in accordance with his request, which was recorded. Afterwards, and during the year 1890, the Wilsons dealt with the Tennessee lands as their own, and sought to sell the same. There was evidence tending to show that the title to the Tennessee lands was not good in the defendant or the Cumberland Lumber & Transportation Company; that the lands were known as wild lands, and were in part occupied adversely to the grantors of the Wilsons. There had never been any reconveyance by the Wilsons to either the Cumberland Transportation Company or to the defendant of the lands in question, or any offer so to do, or any tender of a deed. At the conclusion of the plaintiff's evidence the defendant moved the court to rule out and exclude all the evidence introduced by the plaintiff, upon the following grounds: First. That sufficient evidence had not been offered showing or tending to establish a written contract for the sale of the lands. Second. That the plaintiff had not shown her right by any of the testimony offered on her behalf to bring this suit. Third. That the evidence offered by the plaintiff disproves her right to maintain any action on the contract sued on, because it appears from the deeds offered by her in evidence that they were delivered to her by the defendant in consummation and execution of the supposed contract sued on, and that no action could be maintained upon said supposed contract, but could only be maintained upon said deeds so delivered by said defendant, as alleged in his plea for breach of covenant of title or seisin. And "thereupon, and upon said motion, said defendant asked the ruling of the court before being required to tender or offer any evidence on his behalf, and, said motion having been duly argued by counsel, and the court having duly and fully considered the same, it is adjudged by the court that said motion be, and the same is hereby, sustained, and that the evidence so offered and introduced by the plaintiff be, and the same hereby is, excluded, and, said plaintiff having failed to offer or introduce any other or further evidence in the premises, and to maintain her issues in the cause, the court makes this its general finding of the issues in said cause against the plaintiff and in favor of the defendant upon his pleas, and thereon it is adjudged by the court that said defendant be discharged, and go hence without day, and that he have and recover of the plaintiff herein his costs to be taxed, and that execution issue therefor."

Lyman Trumbull and Perry Trumbull, for plaintiff in error.
Geo. W. Kretzinger, J. T. Kretzinger, and John S. Cooper, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge (after stating the facts). The plaintiff, by her action in assumpsit, sought to recover the unpaid balance due for the Grand Crossing property upon the ground that, although by the contract that balance was to be paid by the conveyance to her of a good and sufficient title to the Tennessee lands, the defendant had therein failed. There was delivered to her the warranty deed of the Cumberland Lumber & Transportation Company and the quitclaim deed of the defendant for the land in question. She unquestionably accepted the deeds in execution by the defendant of his contract, relying upon his assurance that the title thereto was perfect in the grantors. She seeks to avoid the effect of the acceptance of the deeds upon the ground that she was induced to accept them by the false representations of the defendant with respect to the title. While it is true that in many cases a tort may be waived and assumpsit sustained against one who has wrongfully obtained the property of another (*Burton v. Driggs*, 20 Wall. 125), we still think that the suit here cannot be maintained. She has never conveyed or offered to reconvey the title or claim of title which was vested in her by those deeds. The title of the grantors so conveyed to her rested upon certain judicial sales which the plaintiff claims were invalid, but they were sufficient as a foundation for a claim of title, and the plaintiff accepted covenants of warranty of the Cumberland Lumber & Transportation Company with respect to that title. The deed of the company presumably stated the correct consideration of \$75,000, and to that extent the company was responsible to the plaintiff upon its covenant if the title should fail. If she was induced to accept the deeds by any false representations of the defendant, it still remains true that, in order to avoid the transaction, she must return that which she has received. The acceptance of the deed was not a void act by reason of the alleged fraud, but was voidable at her election. She cannot, however, hold the fruits of the transaction, and at the same time repudiate it. She cannot retain the covenants of the lumber company, and the title or claim of title vested by its deed, and at the same time pursue the defendant upon the ground that she accepted the deed by reason of his false representations. Nor do we think it any answer to say that that deed of the lumber company was afterwards returned, and another warranty deed substituted with an expressed consideration of one dollar. That was done at her request, to avoid payment of the legal fee for recording, and not in repudiation, but in affirmance, of her acceptance of the original deed.

We do not stop to consider the questions presented by the statute of frauds, or of the right of the plaintiff to maintain the action

because the contract was made with her husband, since, if these questions should be resolved in her favor, it would still remain that, unless she should restore or offer to restore that which she has received, namely, the title or claim of title acquired from the defendant and the Cumberland Lumber & Transportation Company, she cannot avoid the effect of the acceptance of the deeds as fulfillment by defendant of his contract.

The judgment, however, was erroneous in form. The court should have entered a judgment of nonsuit, whereas it found generally in favor of the defendant upon his pleas; so that, as we take it, the judgment is a bar to any further action by the plaintiff. The judgment will therefore be reversed, with costs, and the cause remanded, with direction to the court below to enter judgment of nonsuit without prejudice to such further proceedings as the plaintiff may be advised to take.

POTTER et al. v. PHENIX INS. CO.

(Circuit Court, W. D. Missouri. May 21, 1894.)

1. FIRE INSURANCE—VERBAL CONTRACT—ISSUANCE OF POLICY.

The issuance of a policy is not necessary to a valid contract of insurance; and if a verbal contract to issue is made with an authorized agent of the company, without mentioning any date for the insurance to take effect, the risk commences immediately.

2. SAME—WAIVER OF IMMEDIATE PAYMENT OF PREMIUMS—CUSTOM.

A custom existing between the agents of the parties, respectively, of collecting premiums on the 1st of each month for insurance effected during the previous month, operates as a waiver of immediate payment, when no special demand is made.

3. INTERPRETATION OF CONTRACT—WORDS USED IN SPECIAL SENSE—CUSTOM.

Plain, ordinary, unambiguous words used in a conversation, by which one party claims that a contract was effected, must, as a general rule, be applied according to their ordinary signification; and if it is claimed that they had acquired a special and technical meaning in the particular locality, and among the class of business men concerned, this fact must be established by a preponderance of the evidence, and it must further be made to appear the person using them understood, and intended to use them in, the technical sense. But the fact of his knowledge may be presumed from the generality of the understanding among men engaged in the same business.

4. SAME—EVIDENCE—SUBSEQUENT CONDUCT AND STATEMENTS.

Statements and conduct of the parties subsequent to a conversation during which it is claimed that a contract was made are competent only as they tend to show what was their real understanding as to that transaction, and not for the purpose of controlling or in any way changing the effect of the conversation.

5. FIRE INSURANCE—AUTHORITY OF AGENTS—PRESUMPTIONS.

When an insurance company appoints an agent in a large city, and sends a commission to him to solicit applications, the public is warranted, in the absence of any notice of limitations on his authority, in assuming that he is clothed with power to receive and act on applications, and bind the company.

6. SAME.

An agent doing business in Kansas City, Mo., was asked to insure property located in the state of Kansas. It is the statutory policy of Kansas to require foreign companies desiring to do business in the state to have

established agents therein, who must comply with certain conditions, and to prevent other agents from taking any insurance there. The company whose agent received the application in Kansas City had an established agent in Kansas, which fact was known to both parties. *Held* that, if the applicant knew of the statutory policy of Kansas, there could be no presumption in his favor that the agent was authorized to insure property in that state.

This was an action by Anna Potter and others against the Phenix Insurance Company to recover under an alleged contract of fire insurance.

Warner, Dean, Gibson & McLeod and I. J. Ketchum, for plaintiffs.
Karnes, Holmes & Krauthoff, for defendant.

PHILIPS, District Judge (charging jury). The court will first give you in charge some instructions which have been conceded to the parties in the case, that they may be gotten out of the court's way before it proceeds to the further charge in the case. On behalf of the plaintiff the court concedes these declarations of law:

"The court instructs the jury that the plaintiff in this case seeks to recover upon a contract of insurance, no policy having been issued to her by the defendant. The issuance of a policy is not necessary to render a contract of insurance valid. It may be effected by a verbal agreement between the parties, and if you believe from the evidence that the agents of defendant on the 26th day of August, 1892, entered into a parol agreement with the agents of the plaintiff for the insurance of her dwelling house in the sum of \$2,500, then such agreement took effect immediately, although you may further believe from the evidence that no time was mentioned in which it was to take effect; and, if you find that such agreement was entered into, then it was the duty of the defendant to deliver to the plaintiff the policy of writing in the usual form issued by it, and that such verbal agreement remained in full force, although no policy was delivered."

The court then adds to this instruction. "provided the jury find from the evidence that said agents had authority to make such contract."

"The court instructs the jury that if you believe from the evidence that one Van Guilder, a member of the firm of Walter J. Bales & Co., while acting as the agent of the plaintiff Mrs. Anna Potter, went to the office of Hunter & Whitaker, the agents of the defendant, the Phenix Insurance Company, and then and there informed Mr. Whitaker, one of the defendant's agents, of the property of the plaintiff described in the petition, on which he desired to secure insurance, and at that time gave the amount of insurance required, and if you further believe that the rate of premium was then and there agreed upon for insuring plaintiff's property in the defendant's company, and that Whitaker, the agent of defendant, then and there said he 'would try it on in the Phenix,' and if the jury find from the evidence that such words were the customary words used among insurance agents in Kansas City, Mo., to express an acceptance of the application for insurance, and that the plaintiff's agents, with the consent of the defendant, left the description of the property to be insured with instructions as to the delivery of the policy of insurance when written, the court instructs the jury that this constituted a contract of insurance of the plaintiff's property, to take effect from 12 o'clock noon of the day that such contract was made."

The court observes, for your consideration in that connection, that his recollection of the evidence is that nothing was said in

the interview between Whitaker and Van Guilder with respect to the delivery of the policy of insurance when written. That is a matter, however, for the jury.

"When the interpretation of words constituting a contract depend upon the sense in which they are used in view of the subject to which they relate, the relation of the parties, and the surrounding circumstances properly applicable to it, then the intention of the parties becomes a matter of inquiry for the jury, and the interpretation of the language is a question for your determination under the restrictions and modifications given you by the court. The rule of interpretation in such cases is that when two interpretations, equally fair, may be given to the words used, that which gives the greater indemnity shall prevail. The words used by the insurer to the insured will be deemed to contain, not only all the language expressed, but all that can be fairly deducible therefrom, in the light of the circumstances under which they were made.

"The court instructs the jury that although no premium was paid in this case, or tendered, before the destruction of plaintiff's property by fire, yet if you should further find from the evidence that it was the custom between the agents of the defendant and Walter J. Bales & Co., acting as the agents of the plaintiff, to collect premiums from each other on the 1st of each month for insurance placed the preceding month, then this constituted a waiver of the payment or tender of premium, unless you shall further believe from the evidence that the agents of defendant demanded such premium.

"If you find for the plaintiff, you will assess her damages at \$2,500, with six per cent. interest thereon from the 1st day of December, 1892, and the form of your verdict, if you so find, will be, 'We, the jury, find the issues for the plaintiff Anna Potter, and assess her damages at \$—.'"

On the part of the defendant:

"Before the jury can find for the plaintiff they must believe that Whitaker was the agent of the defendant, authorized to insure property in the state of Kansas, and that on August 26, 1892, as such agent, he entered into a contract by which he agreed that the property of plaintiff should be insured from that date.

"The court instructs the jury that the burden of proof is on the plaintiff to show—First, that Whitaker was authorized to bind the defendant by entering into a contract of insurance; and, second, that as such agent he did make such a contract,—and that it is not sufficient for plaintiff to show that the insuring of plaintiff's property was considered by Whitaker, but you must further believe and find that the minds of both Van Guilder and Whitaker agreed that from that date the property should stand insured.

"If the jury believe that Whitaker received the proposition from Van Guilder to insure said property, and in doing so stated that he could not insure the same from his office, but that he would submit it to G. A. Bailey, agent for the defendant in the state of Kansas, then this constituted no contract of insurance, so as to bind the defendant, and your verdict will be for the defendant.

"Any knowledge possessed by Van Guilder at the time of the alleged agency for her will affect the plaintiff to the same extent as if she had possessed it herself."

Gentlemen of the jury, you doubtless have observed from the pleadings and from the evidence and arguments in this case that the single and decisive question for your determination is whether or not on the 26th day of August, 1892, a contract of insurance was entered into between Whitaker, representing the defendant company, and the witness Van Guilder, representing the plaintiff in this case. The determination of that question turns and depends entirely upon the construction to be placed upon the interview that occurred between the two parties on the 26th day of August, 1892. That conversation is the predicate, the basis,

or sole foundation for the imputed contract in this case. What transpired there, what the real conversation was between the parties, you are the sole judges of that question of fact, and are at liberty to draw your own conclusions and inferences. It is the province of the court to direct your attention to some of the salient features in the case, and the law as applicable thereto.

There seems to be little dispute or controversy between the contending parties here that in the course of, or at some point in, the interview that occurred between Van Guilder and Whitaker on that day, the expression was used by the agent Whitaker, "I will try it on in the Phenix," and the question is what construction is to be applied to those words? The statute of this state (section 6570), among its rules for the construction of statutes, says:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

So the general rule of the common law is that words are to be considered and understood according to their usual and ordinary import, in their common acceptance among men in the community. So where the words employed in a conversation between two persons are plain, ordinary words, without any ambiguity about them, they must, as a general rule, speak for themselves, and the jury are left to consider and apply them according to their ordinary signification. The law recognizes an exception to this rule, as where certain terms and phrases acquire a technical or a particular meaning among certain trades, professions, or special classes of business men, and they are so employed in such technical sense by and among such classes of men, then such technical or special import and meaning may be imputed to them; but before such special or technical meaning can thus be applied to words and terms, which ordinarily would not attach to them, the jury must find and believe from the evidence that such words and phrases as "I will try it on," "I will try it on in the Phenix," as applied to insurance companies, had acquired a special meaning and import among insurance agents at Kansas City at the time in question. Nor would this alone be sufficient to bind the defendant company in this instance, but the evidence must go further, and satisfy you that such special or technical purport of the language used was known to and understood by Whitaker, defendant's agent, at the time he was employed by it, and that fact you would have to ascertain from the evidence in the case as to what his knowledge was, or from the generality of the understanding of such meaning, as being generally known, and thereby create a presumption that what was generally known to others might be known to a particular individual. If he was ignorant of any such usage, or technical or special significance to the words in question, and did not intend to use them in that particular sense, then it is not sufficient to bind the defendant company that Van Guilder may or did so understand them in such technical sense. The language, "I will try it on in the Phenix," in their grammatical sense,

would seem to imply a future act. "I will try it on in the Phenix,"—a thing to be tested, experimentally ascertained, as if he would see what the Phenix Company would say and do about it, and the like. And this is a matter for the jury,—for your own judgment, common sense, and observation. And if the words, in their ordinary sense, do not imply what the plaintiff contends for, then the burden of proof devolves upon the plaintiff to satisfy you by a preponderance of evidence that such expression had at the time and place acquired generally among insurance agents at Kansas City the special significance contended for on the part of the plaintiff. And the jury should be careful, in the consideration of this question, to distinguish between the statement of some of the witnesses as to how he might or would have understood such language, and the fact as to whether or not it had acquired the special meaning generally among insurance agents, for the understanding of one man, or a few men out of a large number of men, may not make a usage or custom or general understanding. Again, gentlemen, in construing the particular language in question, you should consider it in its context, in its connection with other conversation between the parties, if any had, at the same time, with all the facts and circumstances in evidence. If, for instance, at the time or in connection with the words, "I will try it on in the Phenix," the attention of Whitaker and Van Guilder was called to the fact by the witness Miss Holmes that the defendant company had hitherto declined to take a risk upon that property, and Whitaker thereat said in substance that he would write that evening, and refer the matter to Bailey, the general agent in Kansas, then it is for you to say whether it is reasonable or presumable to infer from the whole conversation that Whitaker intended to be understood, or that Van Guilder could have reasonably understood him to intend, to make a binding contract for the application prior to the action on the risk by Mr. Bailey.

The real issue in this case, as already stated to you, gentlemen of the jury, is, was there a contract made on the 26th day of August, 1892, by which the defendant became bound from that day for any loss that might arise after that time, unless notified that the risk was not accepted by the company? Such contract is to be found alone, if found, from what transpired in that interview between Van Guilder and Whitaker; and if you cannot find such contract in that conversation, taking it as a whole, it never existed, and you should in that event return a verdict for the defendant.

Much evidence, some relevant and some otherwise, has been heard as to prior and subsequent conduct and conversations between the parties to the transaction. No subsequent statements made or acts done by either of these parties can affect or control the effect of the conversation had between Van Guilder and Whitaker, relied on by plaintiff as the basis of the alleged contract of insurance. They are only competent as they may tend to show what was the real understanding by the parties as to that transaction. For instance, Van Guilder testified about calling at Hunter & Whitaker's office the morning after the fire, and chiding him or speaking to them

about not sending the policy: "You are nice fellows. Have to come around for policies,"—something to that effect. In the first place there was nothing apparent from the alleged conversation on Friday, the 26th of August, which would indicate that it was the duty of Hunter & Whitaker to take the policy to Van Guilder, and the jury have a right to consider the fact that when Van Guilder went around to Hunter & Whitaker he had heard of the fire. He also testified that he said to them, "If you had notified me of Bailey's declining to take the risk, I might have placed it elsewhere." Such statement by him was apparently argumentative, and cannot affect the question as to whether or not there was a binding contract made on the preceding Friday.

Evidence has been heard and argument has been made respecting the action of Hunter in tearing up the letter from Bailey on Monday, and not advising Van Guilder of its receipt. Of course, gentlemen, if there was a valid contract or understanding made or had on Friday that the risk was taken pending an answer from Bailey, their failure on Monday to communicate to Van Guilder the information of Bailey's declinature would not release the defendant company; but if, on the other hand, the jury should find from the evidence, as heretofore charged, that Whitaker stated to Van Guilder that all he could do was to send the matter to Bailey (or that in substance), there was no obligation on Hunter & Whitaker to notify Van Guilder of Bailey's refusal, as in such case the risk would not attach until Bailey accepted the offer, and if Van Guilder wished to learn of the action of Bailey he should have called on or communicated with Hunter & Whitaker. And it is a matter of consideration for the jury whether it is not a circumstance in favor of Whitaker's understanding of the legal effect of the conversation of Friday that he did not notify Van Guilder of Bailey's rejection of the offer, as indicating his understanding that no risk was assumed unless Bailey accepted the proposition.

The next aspect of this case to which your attention is now respectfully and earnestly invited, gentlemen of the jury, is the matter of agency,—of power, of authority, on the part of Whitaker to bind the company on that occasion. The general rule of law is that a person who deals with an agent, knowing him to be an agent, must take notice of the extent of the powers and authority of that agent. He should make inquiry, and inform himself of the limitation, if any, upon the authority of the agent; and if he neglects this, and it transpires that the agent had not the authority delegated to him to do the thing or make the contract, the person for whom he assumes to act would not be bound. An exception to this general rule is found in the dealings of insurance agents. As, for instance, when an insurance company appoints an agent, and sends a commission to him to solicit applications in a city like this for insurance, and he has thus been held out to the community as such agent, then the public, in dealing with him, in the absence of any knowledge or notice of any special instructions limiting his authority, have the right to assume that such agent is clothed with all the power neces-

sary to enable him to receive and act on such applications, and to bind the company; but, notwithstanding this recognized and established exception, yet, if the party dealing with such agent knows or is advised of the fact that certain restrictions theretofore were imposed by the company or a public statute upon the powers and acts of the agent, then the company is not bound by any act done or contract made by the agent with such person within the terms of such restrictions and instructions. In this connection your attention is called, as no doubt it has already been evoked, to the alleged conversation between Whitaker and Van Guilder, some two weeks beforehand, with respect to the Fredonia transaction, and the conversation that the witness Pinkney testified to having had with Bales and Van Guilder some time prior thereto. The recollection of the court is that the witness Van Guilder said he did not recollect the interview with regard to Fredonia to which the witness Whitaker testified. I don't remember that their attention was called to the testimony, or the interview that Pinkney testified about. That is a matter for the recollection, however, of the jury. So if you find from the evidence that Pinkney, who was acting general agent of the Phenix Insurance Company of Brooklyn, N. Y., for the state of Missouri, with supervisory jurisdiction over the local agencies, instructed such agents, including Hunter & Whitaker, in substance, that in no event were they to take risks or undertake to make contracts to bind the company on property situate in the state of Kansas, and that in a conversation with the firm of Bales & Co.,—that is, with Bales and Van Guilder,—before the transaction in question, of August 26, 1892, he notified them of the fact of said injunction upon said agents, and that conversation had with them, in the language of the supreme court in the case of *The Distilled Spirits*, 11 Wall. 356, was "so recently as to make it incredible that he should have forgotten it, his principal will be bound by such information thus communicated to him." In other words, if these conversations were in fact had between Whitaker and Van Guilder and Pinkney and Van Guilder and Bales at a time so comparatively recent before the 26th of August, 1892, that it would be incredible to believe it had passed from their mind, or was not then present in their mind, then Van Guilder had notice of the limitations placed by the Phenix Insurance Company upon Hunter & Whitaker; and the company would not be bound, even though the jury should believe that Whitaker undertook to make a binding contract, as testified to by Van Guilder. And in this connection, gentlemen of the jury, on the question of notice, the court begs to call your attention to the statutes of the state of Kansas, as they bear upon and are related to the matters here at issue. The state of Kansas, in the exercise of its unquestioned sovereign right to legislate upon such questions, has declared that it shall be unlawful for any person, company, or corporation in this state either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company.

That pertains to companies in that state. Then the next respects foreign companies:

"Any insurance company not organized under the laws of this state, may appoint one or more general agents in this state, with authority to appoint other agents of said company in this state. A certified copy of such appointment shall be filed with the superintendent of insurance, and agents of such company, appointed by such general agent, shall be held to be the agents of such company as fully, to all intents and purposes, as if they were appointed directly by the company. Agents for any such company in this state may be appointed by the president, vice-president, chief manager or secretary thereof, in writing, with or without the seal of the company; and when so appointed, shall be held to be the agents of such company as fully as if appointed by the board of directors or managers in the most formal mode."

Section 3354 of the Kansas statutes provides:

"It shall not be lawful for any insurance company, association or partnership, incorporated, organized or associated under the laws of any other state of the United States, or any foreign government, for any of the purposes mentioned in this act, directly or indirectly to transact any business of insurance in this state without first procuring from the superintendent of insurance a certificate of authority so to do; stating also that said company has complied with all the requisitions of this act applicable to such company; nor shall it be lawful for any insurance company, association or partnership mentioned in this section, directly or indirectly to take risks, or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies, organized under the laws of this state."

The statute proceeds further to require them to establish agents on whom process can be served in case of litigation. Then section 3381 provides that:

"The superintendent of insurance is prohibited from issuing a license or authority to write policies of fire insurance, or to solicit and obtain and transact fire insurance business, to any person, agent, firm or corporation, unless such person, agent, firm or corporation is a legal resident of the state of Kansas at the time such authority is issued. And whenever any person, agent or corporation so authorized to issue policies of fire insurance and solicit and transact fire insurance business shall remove from the state of Kansas, the authority issued to such person, agent, firm or corporation shall be revoked, and the same shall be null and void." "Any fire insurance company authorized to do business by the superintendent of insurance is hereby prohibited from authorizing or allowing any person, agent, firm or corporation, who is a non-resident of the state of Kansas from issuing or causing to be issued any policy or policies of insurance on property located in the state of Kansas."

Now, gentlemen of the jury, it appears clearly enough—or at least so to the mind of the court, whatever you may think about it—that Van Guilder, as well as Whitaker, and in fact most if not all the insurance agents in this city, knew of the Kansas statute, and that it was the policy of the state that insurance companies wishing to transact business in that state must have established agents in the state, as has already been indicated to you, and they must do certain things to prevent being expelled for transacting business in that state. It was further known to Van Guilder that where an insurance company had an established agency in Kansas the agent here could not write policies on property situate in Kansas. In fact he gave that as a reason for not writing the policy on the property of Mrs. Potter in the companies which he

represented here, as they had agencies over there, or in those companies that had agencies over there. From this fact, gentlemen of the jury, you may infer that Van Guilder knew that an agent of the Phenix Company located in Kansas City, Mo., when it had a local agent in Kansas, was not authorized, as a rule, to write policies on property in Kansas. He knew it was against the statutory policy of that state. And although you may believe from the evidence that some of the agents in Kansas City, Mo., did do business through what they termed "dummies" in Kansas, such habit or method by any number of companies could not bind this defendant. It would be necessary for plaintiff's evidence to go further, and make it appear to the satisfaction of the jury that Hunter & Whitaker, or Whitaker, as defendant's agents, or either one of them, in Kansas City, Mo., were in the habit of doing that thing, and that Van Guilder dealt with them on the faith of that custom, practiced by them. Now, gentlemen of the jury, there is no evidence in this case that Hunter & Whitaker did any such thing. There is no evidence in this case that they, in any instance the court recalls, took applications here, and undertook to bind the company, prior to the acceptance of the risk by the Kansas agent, when the company had an agent in that state. On the contrary their direct testimony is that they did not do business in that way. So that if you should find from this evidence that, as a matter of fact, Whitaker & Hunter did not undertake, or had not theretofore undertaken, to so bind the Phenix Insurance Company by taking any risks here before it was submitted to Mr. Bailey, then there was no custom or usage upon their part upon which Van Guilder could establish his claim in the action in thus dealing with them. So it would follow that if Van Guilder had notice of the legal statutory policy of the state of Kansas, as above indicated, and that the defendant company had an agency in Kansas, then there was no presumption of law that the local agents in Kansas City, Mo., had authority to accept an application, and make a binding contract of insurance on property situate in Kansas, and in such a case it would devolve on the plaintiff to show that Hunter & Whitaker had special authority from the defendant company to make the contract relied on by plaintiff. The plaintiff has undertaken to supply this evidence through the testimony of Van Guilder, who testified that when he went to Whitaker, on the 26th of August, he asked him, in substance, if he insured property over in Kansas, and that he answered in the affirmative. Now, whether that occurred or not you are to determine from the weight of evidence between the witnesses on that subject. Even though you should accept his statement as true, that would not be sufficient to bind the defendant company, as a party cannot establish the existence of an agency to do a particular thing by the mere declarations of the alleged agent. He would have to go further, and show that the company, with knowledge of the agent's declaration or act in similar cases, or under other circumstances, had recognized it,—that is, ratified it in some way, as that the defendant had received the benefit of the agent's act, or had acknowledged that the agent

was acting in its behalf, and did not repudiate his conduct. In other words, gentlemen of the jury, that the court may be more explicit, and that you may not possibly misunderstand the court's meaning, if, as a matter of fact, these parties, in dealing with each other, were advised of the statutory policy of the state of Kansas, and that where there was an agent of a company here, which company did business in Kansas through an agent there, or that the defendant company here, through its agents Hunter & Whitaker, had never undertaken to take risks over there, as the plaintiff contends in this case, and that Van Guilder had notice through Pinkney and through Whitaker, by conversation before that, of the restrictions and injunctions placed upon their agents here, if he went there with that knowledge and dealt with them, then no mere statement made by this agent outside of the authority delegated to him by the company, as known to Van Guilder, could bind this company. Otherwise, it would be utterly useless for any company to place limitations upon the authority of its agent, if he could go on binding them, outside of his authority, with a party who was advised of the existence of the limitation placed upon his authority.

These are the salient points and the real issues in this case, and you are asked, gentlemen, to decide it according to the law as given you in charge, and according to the evidence as you understand it. The court, with its observation and experience with this jury during this term, hardly deems it necessary to enjoin upon you to do justice between these parties, and to decide this case according to the law and the evidence, regardless of the person of the plaintiff, or the fact that the defendant is an insurance company. You may take the case.

The jury returned a verdict for defendant, and no appeal was taken.

WALTERS et al. v. WESTERN & A. R. CO. (CAPITAL CITY BANK,
Intervener).

(Circuit Court, N. D. Georgia. May 8, 1894.)

CARRIER OF GOODS—LIABILITY TO ASSIGNEE OF BILL OF LADING.

Where the consignor's sight draft is attached to the bill of lading, and the carrier delivers the goods to a purchaser from the consignee without requiring the bill of lading to be delivered up, such carrier is liable to a bank which advances the money to the consignee to pay the draft, and takes the bill of lading as security therefor.

This was a suit by William T. Walters and others against the Western & Atlantic Railroad Company, in which the Capital City Bank intervened. The receivers of defendant excepted to the master's report.

Goodwyn & Westmoreland and John C. Reed, for intervener.
Julius L. Brown, for defendant.

NEWMAN, District Judge. The authorities cited by counsel for the receivers seem undoubtedly to establish the proposition that

where a time draft is drawn by the consignor of goods, and attached to a bill of lading for the goods, and the draft is sent to a bank for collection at the place to which the goods are consigned, an acceptance by the drawee entitles him to have the bill of lading delivered to him; the reason given for this ruling being that the consignee is expected to sell the consigned goods in order to realize funds with which to take up the draft by the time it matures. *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92; *Woolen v. Bank*, 12 Blatchf. 359, Fed. Cas. No. 18,026; *Bank v. Wright*, 48 N. Y. 1; *Bank v. Luttgren* (Minn.) 13 N. W. 151; *Erwin v. Harris*, 87 Ga. 335, 13 S. E. 513. The difficulty about the application of that proposition to the present case is that the drafts here are sight drafts, and the reason upon which those cases rest does not apply; second, the facts of the transaction here are otherwise entirely different from those in the cases which have been cited as authority for the proposition above referred to. In the case at bar the draft was drawn on G. B. Everett & Co., and was paid by the intervener, the Capital City Bank, at the request of G. B. Everett & Co., and the money charged to their account. At the time of the payment of these drafts by the intervener, the goods seem to have been sold by Everett & Co. to Akers & Bros., and what is called on the one hand a promissory note, and on the other a mere agreement to purchase, was given by Akers & Bros. The following is a copy of one of the papers, all of the others being of the same character, except as to amounts, number of cars, and dates:

"\$542.26.

Due Dec. 16.

"Atlanta, Ga., Oct. 6th, 1889.

"Forty-eight days after date, we will pay to G. B. Everett & Co., on presentation of bills of lading for cars 18x12624, five hundred and forty-two 28-100 dollars.

"Net, ———. Int., 7.05.

"[Signed]

Akers & Bros."

The method of proceeding of the bank was to take this paper made by Akers & Bros., attach it to the bill of lading which covered the same cars of grain, and hold the same as security for Akers & Bros.' obligation. It appears, also, that Everett & Co. continued to be bound to the bank, or at least that firm so considered itself from other evidence in the case, which it is not deemed material to go into now. At all events, it is clear that the bank held the bills of lading as security for money advanced on the faith of the consignment covered by the various bills of lading.

It is said, applying the rule to be adduced from the authorities which have been referred to above as cited by counsel for the receivers, that, if an acceptor of a time draft is entitled to the bill of lading, equally so is the drawee when he pays off the bill of lading; and it is urged that when the Capital City Bank paid the drafts, and sent the money on to the drawer, charging the same to Everett & Co., Everett & Co. were entitled to receive the bills of lading. Then it is said that, Everett & Co. having sold the grain to Akers & Bros., the latter firm were entitled to have the bills of lading turned over to them; and if the railroad company delivered the cars

of grain to the persons who, in law, really had the bills of lading, or ought to have had them, they should be acquitted of any liability in the matter of injury to other persons. If the bank in this case had been paid the amount of the draft, and there had been no other transactions with them, then there might be some force in the position assumed for the receivers, but the additional facts appear which have just been stated. The bank paid the draft for Everett & Co., holding the bills of lading for the advance thus made, in connection with the paper made by Akers & Bros., copied above.

The whole question comes back to this: that the railroad company should have required the bills of lading to be given up before delivering the goods, and, when they allowed Akers & Bros. to receive these goods without at the same time receiving from them the bills of lading, they did so in violation of the rights of this intervener, who seems in the utmost good faith to have advanced the money upon the credit of the goods covered by the bills of lading, and of their being in possession of the railroad company. While it is conceded that bills of lading are not "negotiable instruments," in the full sense of that term, still they do represent the goods which they cover, and may be taken as security for money advanced while the consignment is in the hands of the railroad company. Among the cases which might be referred to, the following are named, because they are supreme court decisions, and the doctrine they enunciate controlling: *Conrad v. Insurance Co.*, 1 Pet. 386; *The Thames*, 14 Wall. 98; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. 266, and cases therein cited. It is apparent that the bank would have been fully protected if the railroad company had required the bills of lading to be delivered, or had exercised any reasonable degree of diligence in ascertaining the person entitled to receive the goods before releasing possession.

The *Friedlander Case*, 130 U. S. 416, 9 Sup. Ct. 570, can have no application here. There is no claim whatever that these bills of lading were accomplished. In the case of *Inman*, intervener, against these same receivers (56 Fed. 369), the contention was that the bills of lading had been delivered up and reissued by the agent. No claim of that kind can, of course, be interposed here. What the *Friedlander Case* decided was that where the agent of a railroad company fraudulently issued bills of lading for goods, when no goods had, in fact, been delivered, such agent goes entirely beyond the scope of his authority, and his principal (the railroad company) is not bound. It is held that his authority from the company is to issue bills of lading for goods delivered, and that that is the scope and extent of his agency, and, when he goes beyond that, he cannot bind the company by his actions. It is unnecessary here to go into the facts of the agency at *McIvors*, at which point these goods were delivered, and the method of Akers, as agent, and of Akers & Bros., in transacting their business, as they were fully discussed in the *Case of Inman*, *supra*, and further reference to the matter here would be a mere repetition.

As to the question of demand, and as to whether or not Mr. Dickey, the general freight agent, was the proper official on whom

to make demand, it is sufficient to say that he seems to have undertaken to represent the railroad company in the matter, and made no question whatever as to his authority to act in the premises. He was the general freight agent of the company, and from this designation it would seem that he had general supervision over all its freight business, and really appears to have been the proper person, of all others, upon whom demand should have been made. If not, he at least should have referred the representative of the intervenor to some one else who had authority to act in the matter. The exceptions must be overruled, and the report of the master be confirmed.

CHICAGO, R. I. & P. RY. CO. v. SUTTON.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 429.

CONCURRENT NEGLIGENCE.

One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by Fred. Sutton against the Chicago, Rock Island & Pacific Railway Company to recover damages for personal injuries.

W. F. Evans (M. A. Low and J. E. Dolman, on the brief), for plaintiff in error.

Thomas P. Fenlon, Jr. (T. P. Fenlon, on the brief), for defendant in error.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. On October 23, 1892, while Fred Sutton, the defendant in error, was performing his duties as a brakeman on one of the trains of the Chicago, Burlington & Quincy Railroad Company at a railroad crossing near Reynolds, in the state of Nebraska, an engine and train of cars of the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, collided with the train of the Burlington Company, and injured him. He sued the Rock Island Company for damages for this injury, which he alleged was caused by its negligence. That company denied any negligence on its part, and alleged that the negligence of the Burlington Company caused the injury, and that the defendant in error was guilty of contributory negligence. There was no evidence of any contributory negligence on the part of the defendant in error upon the trial, and the court, without objection, so charged the jury. The question whether or not the Rock Island Company was guilty of negligence that was the proximate cause of the injury was submitted to the jury under instructions to which

no objection is made, and the jury found that it was, and returned a verdict for the defendant in error.

Complaint is made of but a single supposed error in the trial of this case. It is in effect that the court below refused to charge the jury that, under a certain statute of the state of Nebraska, the conductor and engineer of the Burlington train were negligent in running it upon the crossing without stopping it as they approached, and that it did charge the jury that these employés were permitted to run the train over the crossing without stopping it if the signals the company there maintained indicated no danger in so crossing. But whether this instruction was right or wrong is entirely immaterial to the decision of this case. The only defenses the Rock Island Company had were that it was not guilty of any negligence that was the proximate cause of the injury, and that the negligence of the defendant in error contributed to it. If the injury was not caused by the negligence of the Rock Island Company, it was entirely immaterial in this suit whose negligence did cause it. If the negligence of the Rock Island Company was the proximate cause of the injury, it was equally immaterial that the negligence of a third party contributed to it. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. In the case at bar it is conceded that the defendant in error was guilty of no contributory negligence. The verdict of the jury established the fact that the negligence of the Rock Island Company was the proximate cause of the injury. That the negligence of the Burlington Company, or of any other third party, contributed to this injury, can in no way affect the result in this action, and hence it is not important to determine whether the charge of the court as to the negligence of the Burlington Company was right or wrong. If it was right it could have done no harm, and if it was wrong it was error without prejudice. *Railway Co. v. Cummings*, 106 U. S. 700, 702, 1 Sup. Ct. 493; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 206, 56 Fed. 988; *Harriman v. Railway Co.*, 45 Ohio St. 11, 32, 12 N. E. 451; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145, 19 N. E. 166; *Cayzer v. Taylor*, 10 Gray, 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206. The judgment must be affirmed, with costs, and it is so ordered.

CHICAGO, R. I. & P. RY. CO. v. CAULFIELD.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 415.

1. **RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—DEGREE OF CARE REQUIRED.**
A locomotive engineer, approaching a place where a footpath crosses the track, is bound to exercise only ordinary care and watchfulness to discover and warn people and avoid injuring them; and an instruction which requires "all the care possible,"—the "highest possible care,"—and the amount of watchfulness necessary to discover a person on the track, is erroneous.
2. **APPEAL—PREJUDICIAL ERROR—ERRONEOUS CHARGE.**
It is sufficient to warrant a reversal that the charge was erroneous; that it may have misled the jury; and that it does not affirmatively appear that the misdirection was harmless. *Railroad Co. v. McClurg*, 8 O. C. A. 322, 59 Fed. 860.
3. **DAMAGES FOR PERSONAL INJURIES—MENTAL SUFFERING.**
Mental suffering induced by plaintiff's crippled condition, such as feelings of mortification because he is not sound in body and limb, cannot be considered in fixing the damages.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This was an action by John J. Caulfield, by his next friend, Michael J. Caulfield, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for personal injuries. Verdict and judgment were rendered for plaintiff, and defendant brought the case on error to this court.

Stephen S. Brown (J. E. Dolman, on the brief), for plaintiff in error.

O. A. Mosman and James C. Davis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries, which originated in the city of St. Joseph, Mo. The action was brought by John J. Caulfield, the defendant in error, against the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, in the circuit court for Buchanan county, state of Missouri, from whence it was removed to the United States circuit court for the western district of Missouri. It was tried in the latter court, and resulted in a verdict and judgment against the railway company. The errors that have been assigned relate to the instructions that were given by the trial court. A brief statement of the circumstances under which the injuries were sustained is essential to a correct understanding of the questions that we have to determine.

The accident occurred in a railroad yard in the city of St. Joseph, which appears to have been used in common by several railroad companies, about 6 o'clock p. m., on the evening of the 29th day of May, 1890. At that hour, one of the defendant company's engineers, who had charge of a switch engine, was taking the engine

to the roundhouse at the conclusion of the day's labor. At a certain point on the way to the roundhouse, where there were three tracks belonging to as many different railroads, which were laid side by side, was a footpath across these tracks, which was used by many people, especially in the morning and in the evening, when they were going to or returning from their place of work. Where this path led across the track, the plaintiff, John J. Caulfield, who was a boy between eight and nine years old, was run over by the switch engine in question, and was severely injured. Some distance to the north of the point where the accident occurred, the track on which the switch engine was moving on its way to the roundhouse was crossed obliquely by three other railroad tracks, and before going over that crossing, just prior to the accident, the switch engine stopped and whistled, as it was its duty to do, and then moved south over the crossing to the place where the plaintiff was run over and injured.

The engineer, with respect to his own conduct on that occasion, gave evidence tending to show that when he reached the aforesaid railroad crossing, and stopped to whistle, he saw a boy standing about $3\frac{1}{2}$ rail lengths south of the above-mentioned footpath; that the boy was standing at the time on the end of one of the ties of the Rock Island road, so near to the rail that he would be struck by the engine; that he kept his eye on the boy, and rang the engine bell, but that he seemed to pay no attention to the warning, whereupon an alarm whistle was sounded; that the boy then turned around, and looked at the engineer, who motioned to him with one hand, and that he then stepped off from the tie, and to a sufficient distance from the track to allow the engine to pass in safety; that he then started his engine forward, going at the rate of from three to four miles per hour; and that, when he came within ten or twelve feet of the boy, the latter started to run across the track immediately in front of the engine, whereupon, according to the engineer's statement, he reversed his engine, put on the vacuum brake, and stopped it as soon as possible, but not in time to avoid the injury. On the other hand, there was evidence in behalf of the plaintiff below which tended to show that the switch engine was running at the rate of from five to eight miles per hour, and that as it moved south over the railroad crossing above mentioned, and until it reached the footpath where the boy was hurt, the engineer in charge of the same was looking west at an excursion train, moving north on an adjoining track, and was not looking down the track in the direction in which the switch engine was moving, and that he did not give any proper signal to warn people who might be on the footpath of impending danger. The evidence for the plaintiff further tended to show that, at the same time, the boy was standing in the center of the Rock Island track, immediately in front of the approaching switch engine, and that he was also looking west in the direction of the excursion train, and was apparently unaware of the approach of the switch engine until it was too late to get off the track. It will thus be seen that the

evidence was conflicting, and that the case made by the plaintiff differed essentially from the case made by the defendant company.

We have not thought it necessary to quote the charge of the court in full, as very much that was said is unexceptionable, and has not been challenged. The following excerpts therefrom embody the alleged errors which have been assigned. Speaking of the degree of care which the engineer of the switch engine was bound to exercise, the trial judge said: "If that was a passageway of that kind, and this plaintiff was upon that passageway, or near it, at the time of the injury, and the engineer in charge of that engine saw him, and he saw him in time to have prevented any injury to him by the exercise of that amount of care required by the law to be exercised, and that is the highest possible care under the circumstances he could exercise in the management of his engine. We are to bear in mind that these engines are dangerous, and when they are so, and there is danger of their killing and maiming, the man in charge has to exercise all the care possible for him to exercise under the circumstances to prevent that calamity. Then, if he saw the plaintiff in time to have stopped his engine, in time to have prevented the injury by the exercise of that reasonable care which he is called upon to exercise in a case of that kind,—the highest possible care he could exercise under the circumstances,—that is exactly what a reasonable man would do when surrounded by such a condition, and it is that reasonable care which he is required to exercise." Furthermore, the court directed the jury that it was the duty of the engineer "to use the most effective means to prevent injury." It also said that, "if he failed of his duty by failing to exercise the amount of care necessary to discover the presence of the party, there would be a liability on the part of the company." For obvious reasons, we have not been able to approve the foregoing portions of the charge, which clearly imposed upon the defendant's engineer the duty of exercising "all the care possible * * * to prevent the calamity," and "the highest possible care he could exercise under the circumstances," and which also seem to declare that the railway company was in any event liable if it failed to exercise the amount of watchfulness necessary to discover the presence of a party on its track. It does not seem to be seriously claimed by counsel for the defendant in error that the defendant company was bound to exercise that high degree of care which is indicated by the foregoing extracts from the charge, and it may be safely asserted that the authorities cited do not support such a contention. According to the great weight of authority, the engineer in charge of the switch engine was bound to exercise ordinary care and watchfulness, both in looking out for people who might be on the track at the place in question and in giving them timely warning of the approach of the engine, and in taking other reasonable precautions to avoid injuring them. In other words, the engineer was required to exercise that degree of care and skill which a person of ordinary prudence would have exercised at the time and place of the accident, having reference to the age and size of the boy who was seen in proximity to the

track. *Guenther v. Railway Co.*, 108 Mo. 18, 18 S. W. 846; *Prewitt v. Eddy*, 115 Mo. 283, 21 S. W. 742; and cases cited; *Railway Co. v. McElmurray* (Tex. Civ. App.) 25 S. W. 324; *Railway Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860.

In the respects above indicated, the charge of the trial court was undoubtedly erroneous, and we are unable to say that the error in question did not mislead the jury to the prejudice of the defendant company. Inasmuch as the court directed the jury that the defendant's engineer was bound to exercise the "highest possible care he could exercise under the circumstances," and inasmuch as the engineer testified that he saw the plaintiff when the switch engine must have been from 300 to 400 feet distant from where the accident occurred, it may have been that the jury found against the defendant because the engineer failed to take some precaution which, in the exercise of ordinary care, he was under no obligation to take. The jury may have thought that the engineer had no right to proceed with his engine, no matter how slowly, after discovering the boy in proximity to the track, until he had left that neighborhood and was entirely out of danger; or it may have been that the jury believed the engineer to have been guilty of some other slight error of judgment, which rendered him culpable within the stringent rule of liability announced by the trial court. But it is unnecessary to indulge in speculations of this nature. It is sufficient to warrant a reversal of the case that the charge was erroneous; that it may have misled the jury; and that it does not affirmatively appear that the misdirection was a harmless error. *Railroad Co. v. McClurg*, 8 C. C. A. 322, 59 Fed. 860.

As the case must be remanded for a new trial for the reasons heretofore indicated, it will be well to call attention to another exception taken to the charge of the trial court touching the assessment of damages, which also appears to us to be well taken. The court instructed the jury that, in assessing the plaintiff's damages, they had a right "to take into consideration his mental suffering because of his crippled condition, and to take into consideration his physical suffering endured by him while his wounds were healing." The allusion thus made to "mental suffering" induced by the plaintiff's crippled condition, as distinguished from "physical suffering," appears to have been to those feelings of mortification which the plaintiff might experience in after life because he was not sound in body and limb. If such was the idea intended to be conveyed by the instruction, then we think that the court erred in allowing the jury to assess damages of that nature. *Bovee v. Danville*, 53 Vt. 190. The judgment of the circuit court is reversed, and the cause is remanded, with directions to grant a new trial.

GOODLANDER MILL CO. v. STANDARD OIL CO.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 60.

NEGLIGENCE—REMOTE AND PROXIMATE CAUSE.

Defendant shipped a car load of crude petroleum in a car which had no valve regulating the outflow of the oil. The consignee had the car removed to a side track, and then, with knowledge that the car was leaking, attempted to draw off the oil near plaintiff's mill, the engine room of which was lower than the track. Owing to the absence of the valve, the oil ran out so rapidly that it flowed into plaintiff's engine room, exploded, and destroyed the mill. *Held*, that defendant was not liable therefor, since its negligence was not the proximate cause of the injury.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action on the case by the Goodlander Mill Company against the Standard Oil Company. Defendant obtained judgment. Plaintiff brings error.

In November, 1887, the defendant shipped in a tank car from Lima, Ohio, to the Ft. Scott Gas Company, at Ft. Scott, Kan., some 6,000 gallons of crude petroleum, deliverable to that company at East St. Louis. The tank car had a discharge pipe in the bottom and about the center of the tank, some four inches in diameter, and projecting about six inches below the bottom. The projection was threaded to receive a heavy cap screw. Within the tank the discharge pipe is fitted with a heavy valve to prevent the escape of oil. The valve rests upon a shoulder in the upper part of the discharge pipe. Below the shoulder there are four concaves made in the valve, to permit the flow of oil upon raising the valve. An inflexible iron rod is attached to the valve, extending through the dome on the top of the tank, and projecting a foot or more above it. Within the tank at the top there is a coiled wire spring, arranged to hold the rod down, and keep the valve in position, closing the outlet. To discharge the contents of the car through the lower discharge pipe, the cap is unscrewed and the pipe coupling attached. The valve, by means of the rod, is then lifted, and the oil permitted to flow through the outlet into the pipe, and conducted to the reservoir provided for its reception. The tank car arrived at Ft. Scott on the 17th of November, and was received by the consignee on the next day. The gas company caused the car to be removed from the yard of the railroad company, where it was delivered, and to be placed upon the switch track of another company located in a street a half mile away, between the property of the gas company and the steam flour mill of the plaintiff in error. This was done for the purpose of piping the petroleum contained in the tank into the reservoir of the gas company, located beyond the mill, and upon the further side of an intercepting street. The railroad track upon which the tank car stood was three feet distant from the furnace room of the mill, the latter being three feet below the level of the railroad track at that point. The car was placed directly opposite the window of the furnace room of the mill. On the afternoon of the 18th of November, and before or at the time of the removal of the car on that day it was observed by the engineer of the switch engine that the tank was leaking, the oil dripping at the outlet under the car, and forming a pool upon the ground. On the morning of the 19th of November, two servants of the gas company undertook to discharge the oil into the reservoir of the gas company, through a pipe laid from the reservoir to the tank car. One of them examined the rod at the top of the car, and reported to the other that it was pushed down, indicating the valve to be in proper position. The other went under the car with a wrench to remove the cap, and attach the pipe leading to the reservoir. He observed that the cap was loose, and re-

moved it with his hand; and it is stated in the brief of counsel for plaintiff in error—without reference to the record for verification of the statement—that this man observed, as he went under the car for the purpose of removing the cap and attaching the coupling, that the oil was leaking some, but that he did not deem the fact of moment, supposing that the valve was in its proper position, and would prevent the discharge of the petroleum until it was raised. Upon removing the cap, the oil flowed out before the coupling could be attached; and despite the efforts made to prevent, and before the car could be removed from its position, the oil flowed down the descent, through an open window, into the boiler room, and also upon some hot ashes located at the rear of the engine room and boiler house, and some eight feet distant from the car, and caught fire, whereby the mill and its contents were destroyed, and property of the value of about \$107,000 consumed. After the fire and upon examination of the tank, it was discovered that it contained no valve; that it had been removed, but how or when is not disclosed by the evidence, but presumably before the tank car was filled with the oil for shipment. The evidence established that crude petroleum oil will give off a vapor or gas which will flash at a temperature of 90°, igniting by contact with fire, and explosive in its ignition; that it is in common use for fuel purposes; and that it is about as volatile as turpentine. The action against the Standard Oil Company by the mill owner is predicated upon negligence in omitting to have a proper valve in the outlet of the tank. At the trial of the cause, and upon the conclusion of the evidence for the plaintiff, the court directed the jury to find a verdict in favor of the defendant.

Myron H. Beach, for plaintiff in error.

W. G. Ewing and Virgil P. Kline, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge (after stating the facts). Without doubt, whether a given act or omission is the proximate cause of an injury is ordinarily a question for a jury. *Railway Co. v. Kellogg*, 94 U. S. 469. This, however, is subject to the well-settled rule that the court should withdraw a case from the jury, and direct a verdict, when the undisputed evidence is so conclusive that the court should set aside a verdict in opposition thereto. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266; *Railroad Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. Ct. 569; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619. The ruling directing a verdict upon the evidence presented by the plaintiff sanctions a review of that evidence here, to enable us to determine whether, as matter of law, upon the testimony adduced, a verdict for the plaintiff could have been sustained. *Bag Co. v. Van Nortwick*, 9 U. S. App. 25, 3 C. C. A. 274, 52 Fed. 752.

We are confronted, therefore, with certain questions, always interesting and often perplexing, touching the law of negligence,—whether, upon the facts stated, the defendant stood in breach of duty to the plaintiff, and whether the omission to provide a valve for the discharge pipe of the tank was the proximate cause of the destruction of the plaintiff's mill.

It is not every one who suffers loss from another's negligence that may recover therefor. Negligence, to be actionable, must occur in breach of a legal duty, arising out of contract or otherwise,

owing to the person sustaining the loss. *Kahl v. Love*, 37 N. J. Law, 5; *Bank v. Ward*, 100 U. S. 195. Mr. Wharton defines "legal duty" to be "that which the law requires to be done or forborne to a determinate person, or to the public at large, and as correlative to a right vested in such determinate person or in the public." Whart. Neg. § 24. There was here no contractual relation between the parties. Any duty arising out of the contract was due to the gas company, not to the plaintiff. If, by reason of the shipment of the petroleum, a legal duty arose in favor of the plaintiff, it was a duty distinct and apart from the contract,—a duty implied by law. The duty, then, upon which the plaintiff must rely, was a duty owing by the defendant to the public. The law imposes the obligation that one should so use one's property that injury should not result therefrom to another. This duty, however, is not absolute; but one is responsible for negligent use, for failure to do or forbear that which the law requires to be done or forborne in respect of the use. If the failure to provide a valve was in breach of a duty owing to the public, it must be because the character of the shipment was such and so dangerous that the defendant owed the duty to all who might in any way be brought in contact with it, to so protect and guard it that harm therefrom should come to no one. One who uses a dangerous agency does so at his peril, and must respond to the injuries thereby occasioned, not caused by extraordinary natural occurrences, or by the interposition of strangers. *Fletcher v. Rylands*, L. R. 1 Exch. 265, 279, affirmed L. R. 3 H. L. 330. The books are replete with cases falling within and illustrating this principle. Thus, in *Thomas v. Winchester*, 6 N. Y. 397, an apothecary carelessly labeled a poison as a harmless medicine, and sent it so labeled into the market. He was held liable to all who, without fault on their part, and in consequence of the false label, were injured by its use. *Norton v. Sewall*, 106 Mass. 143; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350,—are like cases.

The rule is limited, however, and justly so, to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger; to acts that are ordinarily dangerous to life or property. *Loop v. Litchfield*, 42 N. Y. 351, 357. And so, where the wrongful act is not immediately dangerous to the life or property of others, the negligent party is liable only to the party with whom he contracted. *Collis v. Selden*, L. R. 3 C. P. 496, cited with approval in *Bank v. Ward*, 100 U. S. 195, 204. Thus, in *Davidson v. Nichols*, 11 Allen, 514, the defendant, a wholesale druggist, negligently delivered to a customer sulphide of antimony for black oxide of manganese. The purchaser, a retail druggist, delivered the package unopened to the plaintiff, both supposing the substance to be black oxide of manganese. In that belief the plaintiff proceeded to use the same in combination with chloride of potassium,—a substance with which the oxide may be safely and properly used, but from the combination of which with sulphide of antimony a dangerous explosion follows. The plaintiff was injured by the resulting explosion, and brought suit.

The court held the defendant not liable; and, after declaring that there existed no privity of contract between the parties, says:

"We think it equally clear that the plaintiff shows no cause of action *ex delicto* against the defendant. The insuperable difficulty is that the averments in the declaration do not disclose any duty or obligation which rested on the defendants towards the plaintiff in the sale of the article to the person from whom the plaintiff purchased. As has been already stated, it was an innocuous substance, which became dangerous only when used in composition with another chemical agent. It was not sold by them with any knowledge or understanding of the purpose for which it was intended to use it, nor did they know that it was to be resold to the plaintiff. There being no duty imposed on the defendants towards the plaintiff arising out of any contract, this action is to be maintained, if at all, by showing a breach of some duty or obligation imposed on them by law. They have been guilty of no actionable carelessness or negligence, unless it can be shown that they were bound to use some care or caution upon which the plaintiff has right to rely. Failing to show this, or to aver a state of facts from which the law would imply it, the gist of this action, which is founded on alleged negligence and want of due care, is wholly wanting. We know of no rule or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of an article arising from his carelessness and negligence, which causes loss or injury to other persons than his immediate vendee, where there has been no fraudulent or false representation in the sale, and the article sold was in itself harmless; especially where the sale is made without any notice to the vendor that the article was bought for a third person, or that it was intended to be used in combination with other substances which may make it dangerous or injurious to person or property. In such case a vendor assumes no responsibility, and incurs no liability beyond that which results from his contract with his vendee. With remote vendees of the article, who purchase it by subsales from those to whom it was originally sold, he enters into no contract, either express or implied, and takes on himself no obligation or duty whatever. Nor has he done any wrongful or illegal act towards third persons for the consequences of which he is liable. The general principle applicable to this class of cases is that a vendor takes upon himself no duty or obligation other than that which results from his contract. For breach of this, he is liable only to those with whom he contracted. All others are strangers. The law fastens on him no general or public duty arising out of his contract for the breach of which he can be held liable to those not in privity with him."

And so in *Losee v. Clute*, 51 N. Y. 494, the manufacturer of a steam boiler constructed it improperly and of poor iron, knowing that it was to be used in the vicinity of and adjacent to dwelling houses and stores; so that, in case of an explosion while in use, there would be likely to be destruction to human life and adjacent property. After delivery and acceptance by the purchaser, and while in use by him, an explosion occurred, in consequence of such defective construction, to the injury of a third person. It was held that the latter had no cause of action against the manufacturer.

In *Bailey v. Gas Co.*, 4 Ohio Cir. Ct. R. 471, the defendant, under contract with another, put in fixtures for using natural gas for heating a steam boiler connected with an engine in the electric plant of that other. By reason of negligence and imperfect construction of the fixtures, an explosion ensued, and the engineer in charge of the boiler and engine was injured, and brought suit. It was held that there was no contract relation between the plaintiff and the defendant, and that the defendant owed him no duty. It was there conceded that gas, under certain circumstances, might

be a dangerous article; that it was explosive when allowed to escape so as to come in contact with flame. It was not in and of itself dangerous. And the defendant was acquitted, although the imperfect fixtures were placed by it for the purpose of being used in connection with the use of gas as fuel. See, also, *Blakemore v. Railway Co.*, 8 El. & Bl. 1035; *Burdick v. Cheadle*, 26 Ohio St. 393; *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112; *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244.

There is a class of cases of which *Heaven v. Pender*, 11 Q. B. Div. 506, and *Devlin v. Smith*, 89 N. Y. 470, are examples, holding the builder of a scaffolding to be used by workmen, and negligently constructed, rendering it unsafe, liable for an injury occurring from its use. These cases recognize the rule that the liability of the builder is in general only to the person with whom he contracted, but rest liability to third persons upon the ground that the defect was such that it rendered the article in itself immediately dangerous, and that serious injury was the natural and probable consequence of its use. Of the same character is the case of *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503, holding the constructor of an elevator, while in possession of and operating it, liable to a stranger for injuries arising from its negligent and unsafe construction; otherwise, if possession had been surrendered.

We are thus brought to the question whether crude petroleum may properly be classified as a "dangerous agency," within the meaning of the rule. It is an extensive article of commerce, transported by rail to all parts of the land, shipped in steamers and sail vessels to all parts of the world. It is innocuous of itself. It is dangerous only when in considerable quantity it is brought in contact with fire. It is in general use for fuel and other purposes. It is no more volatile than turpentine, no more explosive than gas; does not necessarily, in its handling, involve imminent danger to any one. It is not a dangerous agency of itself, but becomes such by subjection to a high degree of heat, or from actual contact with fire. The shipment of such an article of commerce casts upon the shipper a certain duty to the public,—that of providing a suitable vehicle for the petroleum in all respects adapted to the purposes of carriage, and able to encounter the usual risks of transportation, so that the petroleum in its transit should not be exposed to danger of ignition from causes incident to its transportation, reasonably to be anticipated. We think that to be the true limit of the shipper's duty, and that duty, as it appears to us in this case, was properly discharged. The petroleum was contained in a tank impervious to fire. The shipment reached its destination in safety. The case is not like that of the shipment of explosives, the character of the shipments being concealed. *Brass v. Maitland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *The Nitro-Glycerine Case*, 15 Wall. 524. Here the contents of the tank were declared by the peculiar construction of the car. The properties of the petroleum were known to the consignee and to the public equally with the defendant. They are matter of common knowledge. There was here no disguise and no concealment.

It may be said that it was the duty of the shipper so to equip the car that its contents might be safely discharged in ordinary methods and by the exercise of due care. This we may concede. It was a duty, however, growing out of the contract, and owing to the consignee; and, for failure therein, the shipper would be liable to the consignee for the damages naturally and proximately flowing from such failure. That duty, however, was not owing to the plaintiff, the material shipped not being in and of itself essentially dangerous.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

In *Insurance Co. v. Boon*, 95 U. S. 117, 130, the court says:

"The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones."

The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, a cause of the injury,—an antecedent cause; but, where the negligent act is not wanton or malum in se, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, "the intervener acts as a nonconductor, and insulates the negligence." The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction. If but for such interposition the defendant's negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury. The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances. *Railway Co. v. Kellogg*, 94 U. S. 469. There the court says:

"The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the *Boon* Case, above referred to, the incidental cause, or the instrument of a superior and controlling agency, and was therefore not the proximate and responsible one. If the owner of a magazine in which

gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion? So here the gas company had received this oil into its possession. It was entirely harmless in and of itself. The natural and probable consequence of the negligent act of omission charged upon the defendant was the leakage and loss of the oil. The omission of the valve did not render it dangerous. If not interfered with, the omission of the valve had no tendency whatever to produce the injury complained of. The petroleum was subject to ignition, and its ignition at the time and place produced the injury. That was caused by subjecting it to contact with heat and fire. That was done by the gas company, which had possession and control of the oil, and acted independently, and not under the direction of the defendant. The company was chargeable with knowledge of the properties of petroleum, and had actual knowledge, through its servants, that the oil was leaking from the discharge pipe, and this prior to the removal of the car from the yards of the carrier. With this knowledge, the company placed the car within three feet of the engine and boilers of a mill located below the grade of the railway, and with knowledge of the leakage, sufficient, in view of the dangerous proximity of fire, to place a careful person upon diligent inquiry, undertook to discharge the oil in close proximity to hot ashes, and near an open window of the boiler room. We cannot say that the negligent omission of the valve "necessarily set the other causes in operation;" nor can we say that the injury was the natural and probable consequence of the negligent act. In marshaling the probable consequences which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and abnormal that this injury should result. We are of opinion that the intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered effective to an injury that was not the probable and natural consequence of the act. *Hoag v. Railway Co.*, 85 Pa. St. 293; *Carter v. Towne*, 98 Mass. 567; *Scheffer v. Railroad Co.*, 105 U. S. 249; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554.

The cases to which we are referred are not in conflict with the principles asserted, and are quite distinguishable in the facts from the case at bar. In *Railway Co. v. Keighron*, 74 Pa. St. 316, the negligent act of the company's servant caused a collision which set fire to the cars of a train, which fire directly communicated to and destroyed plaintiff's house, situated within 20 feet of the track. There the negligent act was immediately dangerous, and there was no intervening cause between the negligence and the injury. In *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, a fire occurred in the wire tower of the plaintiff's building, through which the wires for electric lighting were

carried from the building. The fire was extinguished without contact with other parts of the building, and with slight damage to the tower or its contents. By reason of the fire, a connection was made between the lightning arresters, causing a short circuit; and the short circuit resulted in an extra strain upon the belt through the action of electricity, thereby causing, in a part of the building remote from the fire and untouched thereby, a disruption of the fly wheel of the engine and other damage. It was held, and justly so, that there was unbroken connection between the fire and the injury, and without the intervention of a new cause acting from an independent source.

We are of opinion that if, upon the facts presented, a jury had rendered a verdict for the plaintiff, it would have been the duty of the court to have set aside the verdict, and that, therefore, the court below rightly directed a verdict for the defendant, and that the judgment must be affirmed.

LOUISVILLE & N. R. CO. v. KELLY.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 156.

1. MASTER AND SERVANT—NEGLIGENCE—RISKS OF EMPLOYMENT.

In an action by a brakeman against a railroad company for injuries received by him while coupling cars in its service, an instruction to the effect that if the plaintiff knew that the cars were out of repair, that there were holes in the roadbed, and that the fireman in charge of the engine was incompetent, and, if he made no objection on that account, he was not entitled to relief, *held* properly refused.

2. SAME—NEGLIGENCE IN SELECTING FELLOW SERVANTS—INSTRUCTIONS.

An instruction that in determining whether the fireman in charge of the engine was competent to handle it the jury should consider "that firemen, after a certain period of service as firemen, are promoted to engineers," is objectionable, as assuming that promotion of firemen to be engineers takes place as a matter of course, regardless of the capacity, habits, or temper of particular individuals.

3. SAME.

It was error to refuse to instruct the jury that the fireman and brakeman were fellow servants, and that, if the latter was injured by the carelessness or unskillfulness of the former, the company was not liable if it had used due care in employing the fireman, and did not know, and could not by ordinary diligence have learned, of his incompetency or want of skill.

4. SAME—DANGEROUS MACHINERY.

It was error to refuse to instruct the jury to the effect that if the cars were reasonably and ordinarily safe, and the plaintiff was injured by reason of the deadwoods on them, he cannot recover.

5. WITNESS—CREDIBILITY—IMPEACHMENT—INSTRUCTIONS.

A request for an instruction that if a witness "has been successfully contradicted or impeached his entire testimony, except as corroborated, may be disregarded," was objectionable, since even the truthful testimony of an honest witness may be successfully contradicted.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action on the case by John W. Kelly against the Louisville & Nashville Railroad Company. Plaintiff obtained judgment. Defendant brings error.

J. M. Hamill, for plaintiff in error.

Seth F. Crews and George B. Leonard, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. The case is briefly but sufficiently stated in the court's charge to the jury, as follows:

"The plaintiff, a former brakeman in the service of the defendant railroad company, has brought this suit to recover damages for alleged negligence of the defendant, resulting in crushing the plaintiff's right hand, and causing permanent injury. In the declaration divers specific acts of negligence are imputed to the defendant, including—First, the want of ordinary care in the employment of an incompetent locomotive engineer, whose unskillfulness, it is alleged in one portion of the declaration, caused the injury; second, the receiving by defendant, in the course of business, cars belonging to other companies, improperly constructed, and out of repair, and in a dangerous condition, thereby greatly increasing the hazard of the plaintiff in coupling the same, and that, in consequence of the drawheads or coupling apparatus of said cars being out of repair, the injury occurred; and, third, that its roadbed and yard at Mascoutah, the place of the accident, had holes and pitfalls, which prevented the plaintiff from obtaining a foothold and making the coupling of cars."

The trial resulted in a verdict and judgment for the defendant in error in the sum of \$2,250. Error is assigned upon rulings of the court in giving and refusing instructions, and in admitting and excluding evidence.

The recitals in the court's charge of the acts of negligence alleged in the declaration, it is insisted, had a tendency to mislead the jury in respect to what certain particulars constituted negligence on the part of the plaintiff in error, but, the accuracy of the recitals not being questioned, the objection is necessarily untenable.

The concluding portion of the charge, it is contended, is objectionable, because it did not require the jury to consider whether the plaintiff had knowledge of the supposed incompetency of the fireman and defective condition of the cars and track. The court said:

"If you believe from the weight of the evidence that the plaintiff's injury resulted from the incompetency of the person handling the locomotive at the time, and that due care had not been exercised by the defendant in its selection, or that the cars the plaintiff may have been attempting to couple were out of repair and the risk of coupling thereby materially increased, and the defendant knew of the condition of such cars before the accident, or should have known it, or that the roadbed, where the switching by plaintiff was required to be made, had holes or pitfalls, by reason of which the injury occurred when he was attempting to make such coupling, then your verdict should be for the plaintiff."

This seems to have been intended, and probably was understood by the jury, to be a summing up of the law and facts of the case, and, in order to be in itself complete and fair, needed the qualification that the plaintiff himself was without fault, or was exercising due care, when he was injured; but the court had already charged quite

explicitly that to be entitled to a verdict the plaintiff must have proven his averment "that at the time of the accident he was in the exercise of due care and diligence," and as that proposition, by its terms, embraces every possible ground of recovery, the jury must have regarded it as applicable to the grounds restated and summed up in the last part of the charge. Otherwise it had no application whatever. Whether or not the plaintiff had knowledge of the danger he was incurring is a matter which is embraced in the question whether he was in the exercise of due care, and therefore needed not to be stated separately. If an instruction limited to the significance of such knowledge alone was desired, it should have been embodied in a special request.

While the issues in the case are few and simple, and the evidence of correspondingly limited scope, there are before us, if our count is correct,—covering 13 printed pages of the record,—28 requests for special instructions, which the bill of exceptions shows to have been separately and severally presented, considered, and refused, and the errors assigned upon most of the rulings are insisted upon. Intending no reflection upon counsel, we are constrained to suggest that there must be a point—it may be difficult to locate—where in sheer self-defense, as well as out of regard for the due administration of justice, a court may refuse to entertain such requests merely because of their excessive number or quantity. Those before us contain frequent repetitions, varied only by references to different details of evidence. Together they constitute an elaborate argument of the case, rather than a clear and succinct presentation of principles in their proper application under the issues to the controlling phases of the evidence. Considered separately, some of them are embraced in the general charge; some of them are unsound throughout, or in minor particulars, which justified their rejection; while others, we find, ought to have been given.

In the order of presentation in the briefs, the first request was to the effect that if the plaintiff knew that the deadwoods of the cars he was attempting to couple were out of repair, that there were holes and pitfalls in the roadbed, and that the fireman in charge of the engine was incompetent, and remained in the service of the company without making objection, and without receiving any promise that the causes of danger mentioned should be removed, he was not entitled to relief. This was properly refused. If the defendant in error knew that the deadwoods were out of repair, he must, in all probability, have acquired the knowledge on the spot; and, consistently with the terms of the instruction, his supposed knowledge of the condition of the track and of the incompetency of the fireman as an engineer may have come to him so recently as to have afforded him no opportunity to make objection or complaint. Besides, even if he had the supposed knowledge, it was a question for the jury whether or not, under the circumstances, he ought to have attempted to make the coupling, and in so doing was himself negligent, or to be considered as having voluntarily assumed the risk of his act. The question was essentially one of contributory negligence, and the instruction should have been so framed

as to leave it to the jury. *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321. Of course, there may be cases so clear as to justify the taking of the question from the jury. *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Bunt v. Mining Co.*, 138 U. S. 485, 11 Sup. Ct. 464.

The next request contains the objectionable proposition that "if the plaintiff knew, or had the same means of knowing," the fireman's incompetency "as the defendant, then he cannot recover for his injuries." The railroad company owed to the defendant in error the duty to use due care in selecting firemen, engineers, and others with whom he was required to work, and to that end was bound to a diligent use of its means of knowledge; but the defendant in error was under no duty in that respect, and therefore could be affected only by the knowledge which he had,—including what was within his observation at the time of the injury. But, as already stated, if he had actually known the fireman's incompetency, the question would have been one for the jury.

The next request was to the effect that in determining whether the fireman was competent to handle an engine to switch cars at a station the jury should consider how long he had been engaged as a locomotive fireman, what were his capacity and aptness for learning to handle an engine, how often before he had handled an engine on similar occasions, whether firemen frequently do switching before being promoted to engineers, "that firemen after a certain period of service as firemen are promoted to engineers," etc. The last expression is objectionable. It assumes it to be a fact that promotions from the place of fireman to that of engineer were of uniform, or at least customary, occurrence "after a certain period of service as fireman," without regard to the capacity, habits, and temper of particular individuals. There was no proof of such custom; none such, of course, has ever prevailed; and doubtless the jury would have apprehended the intended meaning. But error assigned upon the refusal of an inaccurate statement cannot be allowed to prevail on the assumption that the proposition would have been understood by the jury in the proper, rather than in the literal and erroneous, sense. This entire request, indeed, while not irrelevant or technically objectionable except in the particular stated, has only a collateral bearing upon the ultimate and controlling point of inquiry, which was not so much whether the fireman was in fact incompetent as whether the company was to blame for his being in charge of the engine at the time in question,—assuming that the injury complained of was attributable to his unskillful management. Who put the fireman in charge of the engine? If the engineer, was he, in respect to that act, a representative of the company, as vice principal, or was he only a fellow servant of the fireman and Kelly? If a vice principal, did he know or have reason to believe, from past experience or otherwise, that the fireman was not fit to be in charge of an engine when employed in switching? If the engineer was only a fellow servant of the fireman and brakeman (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914), had he been authorized by the master mechanic to

leave his engine in charge of the fireman, as he did in this instance? And, that being so, was the master mechanic guilty of negligence in giving that authority, in view of the general practice, if such was the practice, of railroad management to permit firemen to do that kind of work, and in view of the knowledge which he had or ought to have had of the character and ability of this fireman? Railroad companies are certainly not required to employ skilled engineers as firemen, and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen, and when the fact of unfitness was known, or ought reasonably to have been known, to the master mechanic, or other like representative, of the company.

The court was asked to instruct in substance that the fireman and brakeman were fellow servants, and that, if the latter was injured, either by the carelessness or unskillfulness of the former, the company was not liable if it had used due care in employing, and did not know, or by ordinary diligence would not have learned, of his incompetency or want of skill. The only objection made to this is that it assumes that Kelly knew of the fireman's want of skill before he was injured. We do not perceive that to be so, or, if it were, that it would be a tenable objection. That the two men were fellow servants is beyond dispute, and that the company, being itself free from negligence as supposed, was not liable to either for an injury, whether caused by the unskillful or negligent conduct of the other, is no less certain. The instruction should have been given.

The court refused to instruct to the effect that if the cars in the coupling of which the plaintiff was hurt were received by the defendant from other railroads, and were "ordinarily and reasonably safe for the purposes for which they were used," the defendant, as a common carrier, was bound to receive and transport them over its line, and, if the plaintiff was injured solely on account of the deadwoods on the cars, he cannot recover. This, it is objected, would have exacted of the defendant only ordinary care, "while the law requires that proper care should be exercised." But by the instruction the cars were to be reasonably as well as ordinarily safe, and that clearly implies good repair or proper condition. Anything less than reasonable is not good or proper. The refusal to give this instruction or an equivalent was error.

Another request was to the effect that, if the cars were reasonably and ordinarily safe, the plaintiff cannot recover on account of the deadwoods or bumpers on them; or, if there were defects in the cars which did not contribute to the injury, he could not recover on that account. We perceive no valid objection to either of these propositions. It may be that they are embraced by im-

plication in some of the expressions of the general charge, but neither proposition is distinctly stated. Jurors are not trained lawyers, and, notwithstanding a general charge covering the issues of a case, it is the duty of the court, on proper request, to give to the jury a statement of any distinct doctrine or proposition which is fairly and justly applicable to the issues or to an important phase of the case.

An instruction asked in respect to the failure of the plaintiff to use a coupling pin was framed upon the theory that he had been furnished with that implement, but his testimony was to the contrary, and uncontradicted.

The court might well have given the instruction asked to the effect that, if the plaintiff's injury was purely accidental, he could not recover, but that proposition is so clearly implied in the general charge that this refusal by itself could hardly be deemed essential error.

In the last request, after mention of considerations which should properly affect the credit of witnesses, the court was asked to instruct that, if a witness "has been successfully contradicted or impeached, his entire testimony, except as corroborated, may be disregarded." If taken literally, this would be misleading. It does not express correctly the meaning of the maxim, "false in one thing, false in everything." The truthful testimony of an honest witness may be "successfully contradicted." The maxim or rule deduced from it applies only when the witness is shown to have been false in a material part of his testimony, though it is of course to the discredit of a witness if his testimony has been in any respect intentionally untrue.

We are of opinion that the court erred in permitting witnesses to testify what they had heard said concerning the incompetency of the fireman who was in charge of the engine when the defendant in error was injured. It is insisted that the testimony was not offered for the purpose of proving the fact of incompetency, but in order to show notice of the fact to the master mechanic of the plaintiff in error, to whom was intrusted the duty of employing the operatives of the road, including the engineers and firemen. But the contrary is apparent. It was only incidentally and upon cross-examination that the conversation of which proof was made was shown to have occurred in the presence of the company's master mechanic; and, having occurred six months, and probably more than a year, before the time of the injury, it did not constitute or fairly tend to prove notice of incompetency at that time.

Other points have been discussed, but we do not deem it necessary to consider or state them. The judgment of the circuit court is reversed at the cost of the defendant in error, and the cause remanded, with instruction to grant a new trial.

DIETRICH v. ELY et al.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 146.

LANDLORD AND TENANT—ACTION FOR RENT—SET-OFF—RECOUPMENT.

Damages for malicious prosecution of suits for unlawful detainer cannot be set off or recouped in an action for rent, since such damages do not arise out of contract, and are not connected with the subject-matter of the suit.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by Sumner S. Ely and William H. Ely against Rosa Dietrich to recover rent. Plaintiffs obtained judgment. Defendant brings error.

Under a certain indenture of lease bearing date the 28th day of May, 1888, between the parties to this action, the plaintiff in error held possession of the demised premises from May 1, 1889, to April 30, 1890. Prior to the latter date, the defendants in error demanded new terms and additional rent, which the plaintiff in error declined, but continued in possession after the term against the will of the landlord, claiming right so to do under an alleged agreement, which the court below found not to be sustained by the evidence. The landlord, during the year following, brought some four or five suits against the plaintiff in error in unlawful detainer, which resulted in voluntary dismissal of some of the suits, and in favor of the plaintiff in error with respect to the others. Subsequently, possession of the demised premises was regained, and the defendants in error brought suit in the court below to recover rent under the lease for the year ending April 30, 1890, and for the use and occupation of the property against the will of the landlord for the year ending April 30, 1891. The plaintiff in error pleaded the general issue, and gave notice thereunder of set-off for damages and injuries by her suffered by reason of the willful, malicious, and wrongful institution and prosecution of the suits of unlawful detainer referred to, which damages she prayed might be offset against any sum found due the defendants in error.

Henry M. Coburn, for plaintiff in error.

Charles E. Pope (Kirk Hawes, of counsel), for defendants in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge (after stating the facts). The tenant, having failed to accept the terms demanded, and holding over after the expiration of the lease, could be treated by the landlord as a trespasser, and is liable for the value of the use of the premises during the time they were withheld. *Keegan v. Kinnare*, 123 Ill. 280, 288, 14 N. E. 14; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477; *Schuyler v. Smith*, 51 N. Y. 309.

The only question in the case which we deem necessary to be considered is whether damages for malicious prosecution can be set off or recouped in an action for rent and for use and occupation. The court below held against the proposition, and in that ruling we fully concur. A set-off is a distinct cause of action arising upon contract. In recoupment, both the cause of action in the plaintiff and the right to recoup in the defendant grow out of the same subject-matter and

are correlative. The matters averred by the plaintiff in error would form the subject of an action *ex delicto*. The claim cannot therefore be sustained as a set-off; nor can it be recouped, unless it is connected with the subject-matter of the suit in which it is sought to be established.

In *Winder v. Caldwell*, 14 How. 434, 443, the court say, through Mr. Justice Grier:

"For, although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped, not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action."

See, also, *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696.

We do not think that the claim here presents matters immediately connected with the cause of action, or constitutes an equitable defense arising out of the same transaction, or is so related to or connected with the subject-matter of the suit that it may be brought within the rule declared. The suit was for rental, use, and occupation. The plaintiff in error had the use and enjoyment of the premises during the time for which the value of the use is demanded. The suits in unlawful detainer—willful, malicious, and wrongful, as, under the pleadings, we must assume them to have been—may give her a right of action for malicious prosecution, but they did not impair the value of the use of the premises, or in any legal sense affect her enjoyment of them. The bringing of the suits did not amount to an eviction. The plaintiff in error was not deprived of the possession of the property; and, if the institution and prosecution of the suits could be construed to be such acts as would have justified her in leaving the premises, she did not abandon them, but continued in possession, and must respond for the value of their use. The acts charged were not such as would work a breach of the covenant of quiet enjoyment, because there was neither actual nor constructive physical disturbance of the possession. Undoubtedly, she could recoup against the rent or the value of the use and occupation the damages sustained by any acts which impaired the value of the use, but not for acts personal in their nature, and which did not interfere with the beneficial use and enjoyment of the premises. And the reason is well stated by the supreme court of Illinois in *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, that, the object of the inquiry being to ascertain the amount of rent due, "if the acts of the landlord impaired the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." There it was held that where the landlord, in breach of his covenant, obstructed the passage of air and light, the tenant might recoup in reduction of the rent the diminished value of the use of the premises occasioned by such breach.

We do not think that the demands of the parties litigant grew out of the same subject-matter, or that the plaintiff in error can be per-

mitted to abate the value of the use and occupation of the premises which she has enjoyed by recouping damages sustained by malicious prosecution. The judgment will be affirmed.

CITY OF PLANKINTON v. GRAY et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 392.

1. DEMURRER—WAIVER BY ANSWER.

A demurrer to a complaint as not stating sufficient facts to constitute a cause of action is waived if, after it is overruled, an answer is filed to the merits.

2. ANSWER—ADMISSIONS.

An answer to a complaint against a town on a contract, admitting that the town made the contract, and not suggesting want of authority to make it, admits its power to make it.

3. COMPLAINT—CURE BY VERDICT.

Failure of the complaint in an action against a town on a contract, which it had authority to make only on petition of taxpayers, to allege presentation of the petition, is cured by the verdict, even if the complaint should make such allegation.

In Error to the Circuit Court of the United States for the District of South Dakota.

Action by Frank M. Gray and another, partners as Gray Bros., against the city of Plankinton, on a contract. Judgment for plaintiffs. Defendant brings error. Affirmed.

Robert J. Gamble and R. B. Tripp (Mr. W. M. Smith was with them on the brief), for plaintiff in error.

O. T. Williams (Mr. Friend was with him on the brief), for defendants in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. This action was instituted in the territorial court of Dakota, and transferred to the circuit court of the United States for the district of South Dakota upon the admission of that state into the Union. The action is founded on a contract entered into between Gray Bros., the defendants in error, and the town (now the city) of Plankinton, the plaintiff in error, whereby the former agreed, for a consideration named in the contract, to be paid by the town, to bore, within the corporate limits of the town, an artesian well for the purpose of furnishing water to the town and its inhabitants. The well was bored, and, the city failing to pay therefor, this suit was brought to recover the contract price for the work. A demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was overruled by the territorial court, and renewed in the circuit court, and overruled by that court, whereupon the defendant filed an answer and an amended answer to the merits. By filing an answer to the merits after the demurrer was overruled, the defendant

waived the demurrer. *Railroad Co. v. Washington*, 1 C. C. A. 286, 49 Fed. 347; *Stanton v. Embrey*, 93 U. S. 548; *Campbell v. Wilcox*, 10 Wall. 421; *Evans v. Gee*, 11 Pet. 80, 85; *Asbach v. Railway Co.* (Iowa) 53 N. W. 90; *West v. McMullen*, 112 Mo. 405, 20 S. W. 628; *Richardson v. O'Brien*, 44 Ill. App. 243; *Ganceart v. Henry* (Cal.) 33 Pac. 92; *San Diego Co. v. Siefert* (Cal.) 32 Pac. 644; *Jones v. Terry*, 43 Ark. 230; *Anderson v. Lumber Co.* (Or.) 28 Pac. 5; *McFadden v. Fortier*, 20 Ill. 509; *Foltz v. Hardin* (Ill. Sup.) 28 N. E. 786; *Newman v. Moody*, 19 Fed. 858; *Elliott's App. Proc.* 683.

Upon the trial the defendant objected to the introduction of any evidence in support of the plaintiffs' action, upon the same ground it had demurred to the complaint, and the objection was overruled, and this ruling is assigned for error. The Code of the territory, in force at the date of the contract, prescribing the duties and powers of incorporated towns, provided:

"The board of trustees shall have the following powers, viz.: * * * (3) To organize fire companies, hook and ladder companies, to regulate their government, and the times and manner of their exercise, to provide all necessary apparatus for the extinguishment of fires; * * * to construct and preserve reservoirs, wells, pumps, and other water works, and to regulate the use thereof, and generally to establish other measures of prudence for the prevention or extinguishment of fires as they shall deem proper." Pol. Code Dak. c. 24, § 22; *Comp. Laws Dak.* 1887, § 1043.

A further provision of the same Code declared that:

"No incorporated town under this act, shall have power to borrow money or incur any debt or liability unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year petition the board of trustees to contract such debt or loan * * *." Pol. Code, c. 24, § 27.

The particular ground alleged against the sufficiency of the complaint is that it does not aver that before the making of the contract the citizen owners of five-eighths of the taxable property of the town had petitioned the board of trustees to contract the debt thereby incurred, as required by section 27, above quoted. The complaint alleged the town made and entered into the contract, and made a copy thereof a part of the complaint. The amended answer admitted that the town made and entered into the contract set out in the complaint, and set up various special defenses, and, among them, that the well did not furnish a satisfactory flow of water, as provided by the contract, "and was not such a well as was required by the terms of said contract," and that the well was improperly drilled and cased, by reason of which water flowed outside of the casing and pipes, and made the place in the street miry and unsafe, and the well a public nuisance; but nowhere in the answer or amended answer is there any suggestion of any want of authority on the part of the trustees to make the contract, or that it was invalid for any reason. The unqualified admission in the answer that the defendant made and entered into the contract sued on was an admission of its power and capacity to make the contract, and relieved the plaintiffs from the necessity of proving the execution of the contract, or the performance of any condition precedent to its valid execution. *Monson v. Railway Co.*, 34 Minn. 269, 25 N. W. 595; *Mill*

Co. v. Bennewitz, 28 Minn. 62, 9 N. W. 80; Bank v. Pfeiffer, 108 N. Y. 242, 252, 15 N. E. 311. Moreover, assuming, but not deciding, that the contract in suit falls within the provisions of section 27 of the Code, and that good pleading would require that the plaintiff should aver the presentation to the trustees of the petition required by that section before they entered into the contract, the defect was amendable, and after verdict and judgment the appellate court will treat it as amended. Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158; Elliott's App. Proc. §§ 471, 473, 640.

After answer filed, an objection that the complaint does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege the substance or groundwork of a good cause of action, and is not good when the allegations are simply incomplete, indefinite, or statements or conclusions of law. *Id.*; Laithe v. McDonald, 7 Kan. 261; Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203. This rule is in entire accordance with the common-law rule on the subject of aid by verdict. By that rule, where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict. Jackson v. Pesked, 1 Maule & S. 234; 1 Saund. Pl. & Ev. 228; Steph. Pl. 148.

The remaining assignments of error relate to the ruling of the court in admitting and rejecting evidence. A separate statement and consideration of these exceptions is not necessary, as none of them is of any general importance. They have all been examined very carefully, and we are satisfied that none of them has any merit. The evidence admitted or excluded by the rulings was too unimportant and trivial to have had any possible influence upon the verdict, and, if the ruling in any instance was technically erroneous, it was an error which worked no prejudice. The judgment of the circuit court is affirmed.

BELL et al. v. ATLANTIC & P. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 377.

RAILROAD COMPANY—RIGHT OF WAY—STATIONS IN CHEROKEE NATION.

The treaty between the United States and the Cherokee Nation of July 19, 1866 (14 Stat. 799), art. 11, grants to any corporation authorized by congress to build a railroad north and south, and east and west, through the Nation, a right of way not exceeding 200 feet wide, except at stations, etc., where "more may be indispensable to the full enjoyment of the franchise herein granted, and then only 200 additional feet shall be taken, and only for such length as may be necessary." By the act of the national council of the Cherokee Nation of December 14, 1870, there was reserved to the Nation at every railroad station one mile square, to include such station, for town sites, to be located by commissioners, whose duty it should be also to sell the lots, and report to the principal chief the locations, surveys, and sales of lots, etc. *Held*, that where such commissioners,

In 1871, surveyed and laid off a town, pursuant to such act, and set off to a railroad company authorized by congress to build through the Nation a strip of land in the town 400 feet wide, the company was entitled to the whole of such strip, as against a citizen of the Nation, or any other person entering thereon after the passage of the act reserving the town site to the use of the Nation, and a part of it not actually occupied or needed for present use by the company was not subject to appropriation by a citizen of the Nation as part of the public domain thereof.

In Error to the United States Court in the Indian Territory.

This was an action by the Atlantic & Pacific Railroad Company and the St. Louis & San Francisco Railway Company against L. B. Bell and H. H. Trott to recover possession of certain real estate. There was a judgment for plaintiffs, and defendants bring error.

S. S. Fears and W. T. Huthings, for plaintiffs in error.

L. F. Parker (E. D. Kenna, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the United States court for the first division of the Indian Territory by the defendants in error, the Atlantic & Pacific Railroad Company and the St. Louis & San Francisco Railway Company, to recover the possession of a small parcel of ground, particularly described in the complaint, with the improvements thereon, situated in Vinita, Cherokee Nation, Indian Territory, the plaintiffs alleging that the land claimed constituted a part of the right of way of the plaintiff the Atlantic & Pacific Railroad Company. There was judgment for the plaintiffs in the lower court, and the defendants sued out this writ of error. It is assigned for error that the court refused to instruct the jury to return a verdict for the defendants, and instructed them to return a verdict for the plaintiffs.

Article 11 of the treaty between the United States and the Cherokee Nation of July 19, 1866 (14 Stat. 799), provides that:

"The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water-stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through the Cherokee Nation. Said company or corporation, and their employees and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water-tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation."

The plaintiff the Atlantic & Pacific Railroad Company was incorporated by act of congress of July 27, 1866 (14 Stat. 292), and authorized to construct a railroad through the Cherokee Nation upon a line and in a direction that entitled it to the benefits of the provisions of article 11 of the treaty above quoted. The road was constructed through the Nation, and the parties have filed a stipula-

tion to the effect that the plaintiff the St. Louis & San Francisco Railway Company was operating the road for the Atlantic & Pacific Railroad Company, and that the two companies were jointly entitled to the possession of all the property of the Atlantic & Pacific Railroad Company in the Indian Territory. By an act of the national council of the Cherokee Nation, approved December 14, 1870, there was "reserved to the Cherokee Nation at each and every station along the line of any railroad through the lands of the Cherokee Nation one mile square, to include such station, in such manner as may be deemed advisable," for town sites. Provision was made for the appointment of three commissioners, "whose duty it shall be to locate and survey said town sites and sell the lots thereof * * * and report to the principal chief, the locations, surveys and sales of lots" on the 1st day of October of each year. Under this act, three commissioners were appointed in 1871, and proceeded to locate and lay off the towns at the railroad stations. Among the towns so surveyed and laid off was Downingville, now called Vinita. The Atlantic & Pacific Railroad Company had constructed its road to and through this place where it crossed the Missouri, Kansas & Texas Railway, the north and south railroad constructed under the treaty. The commissioners located and surveyed the mile square at Vinita station, and laid it off into lots, blocks, streets, alleys, parks, and railroad rights of way. They made a plat of the town as laid out, which, together with their report, they filed with the principal chief of the Nation, as required by law, and from that time this plat has been accepted as an official plat of the town by the Nation and the public. The Nation sold the lots in the town, and the purchasers bought them according to this plat, and in reliance upon it. It has become a muniment of title to every property holder in the town. This plat shows that the commissioners surveyed and set off to the Atlantic & Pacific Railroad Company a strip of land 400 feet in width through that portion of the town lying west of the Missouri, Kansas & Texas Railroad; 100 feet of this strip being on the north side, and the remaining 300 feet on the south side, of the railroad track. The testimony shows that this strip of land was surveyed and set off by the commissioners to the railroad company, at its request, for right of way, depot grounds, side tracks, stock yards, and other railroad purposes, under the provisions of the treaty of 1866. Upon these facts, the plaintiffs below were clearly entitled to the full and exclusive possession and use of this strip of land as against a citizen of the nation or any other person entering thereon, after the passage of the act reserving the town site to the use of the Nation, and after the survey and dedication by the commissioners of the right of way to the railroad company.

The plaintiffs in error assert that, under the laws of the Nation, a citizen has the right to occupy any part of the public domain of the Nation not already taken up by another citizen; and that as the parcel of land in controversy was not actually occupied by the tracks or other structures of the railroad company, and as it was, in their opinion, not necessary for such purposes, they had the right to appropriate it to their own use. But the land had been previously dedi-

cated and appropriated under the treaty and by the act of the council to the use of the railroad company. The fee of lands in the Cherokee Nation is in the Nation. Whatever right a citizen has to occupy any particular parcel of the public lands of the Nation he must acquire under and in pursuance of the laws of the Nation, and not in defiance of them. He cannot enter upon land previously dedicated or appropriated to some other person or to some specific use. By act of the national council, this mile square was segregated from the public domain of the Nation, and reserved to the Nation for a special use, and to be disposed of in a particular manner. It was believed the land in proximity to the railroad stations would have a special value for town sites. A mile square at each station was therefore reserved to the Nation to be laid out in lots and blocks, not to be settled upon by the first comer, as is the case with the public domain generally, but the lots to be sold to the highest bidder, and the purchase money paid into the treasury of the Nation, as was done. The authority of the commissioners to lay out the town necessarily made it their duty to lay out and fix the boundaries of the land in the town set off to the railroad company for its station, side tracks, stock yards, and other like purposes. This was done, and their action has been acquiesced in and approved by the authorities of the Nation, legislative and executive. Whether there was any necessity for making the right of way 400 feet wide was a question between the Nation and the railroad company. Under the treaty, the railroad company had a right to demand 400 feet when that much was indispensable to the full enjoyment of its franchise. The citizen cannot settle on the right of way, and, when his right to do so is challenged, reply that the right of way set off to the company was in excess of its needs, and claim the right to settle upon it as a part of the public domain of the Nation. It is clear that it was never contemplated that there should be within the limits of these towns any unappropriated public domain subject to settlement under the general law on that subject. The disposition of the land within the limits of these town sites is regulated by laws specially applicable to them. It is not material to inquire whether the railroad company acquired the fee in this ground, or only an easement. In either case it acquired a right to the exclusive possession and use of it, as against the defendants. The judgment of the lower court is affirmed.

THOMAS et al. v. EAST TENNESSEE, V. & G. RY. CO. (AUGUST et al., Interveners).

(Circuit Court, N. D. Georgia. May 9, 1894.)

DEATH BY WRONGFUL ACT—ACTION BY WIFE—EFFECT OF SUBSEQUENT MARRIAGE.

M. and F., after a marriage ceremony while slaves, lived together in Georgia as husband and wife, and continued to do so until after Act Ga. March 9, 1866 (Code, § 1667), confirming for all civil purposes the marriage of persons of color. In 1867 they separated, and each married another person. *Held*, that F. was the lawful wife of M., and could recover for

his death by defendant's wrongful act in 1893, under the statute of Georgia giving to the wife the right to recover for the homicide of her husband.

In an action by Samuel Thomas and others against the East Tennessee, Virginia & Georgia Railway Company, Frances and Joseph August intervened, and claimed to be entitled to recover against the receivers of the railroad for the death of Moses August while a passenger on defendant's road, and caused by its negligence, and the case was referred to Benj. H. Hill, Esq., special master. The receivers excepted to the master's report.

McCutcheon & Shumate, for defendant.
Dean & Smith, for interveners.

NEWMAN, Circuit Judge. The following is the report of the special master to whom the above-stated case was referred:

"To the Honorable, the Judges of the Circuit Court of the United States for the Northern District of Georgia: The intervention of Frances and Joseph August in the above-stated cause was referred to me as special master, with directions to hear and determine the facts and report the same to the court. In pursuance of said order, and after due notice, I have caused all parties to appear before me, and, after an examination of the witnesses and hearing of argument of counsel, have prepared my report. The evidence taken before me is herewith submitted, and approved by me as correct. I find as follows:

"(1) That the East Tennessee, Virginia & Georgia Railway Company was on February 11, 1893, operated by Henry Fink and Charles M. McGhee, as receivers appointed by this court.

"(2) That on February 11, 1893, Moses August was a passenger on cars of said railway, and was killed in a collision in Floyd county on said date; said collision occurring at a point six or eight miles from Rome, Georgia.

"(3) I find that said Moses August was without fault himself, and that said killing was the result solely of the negligence of the defendant, its employees and agents.

"(4) I find that said Moses August, at the time of his death, was between the age of fifty and fifty-five years, and was earning one dollar a day.

"Taking into consideration his expectation, under the mortality tables; his reduced capacity, affected by increased age; the further fact that he had no steady employment, but was working according as he could get jobs,—I think, a fair estimate as to the value of his life at the time of the killing, would be the sum of twelve hundred (\$1,200.00) dollars.

"(5) I find that at the time of his death, the plaintiff Frances August was his lawful wife.

"On this point the master has had great difficulty in arriving at a conclusion. Plaintiffs set up a statutory marriage under the act of March 9, 1866 (Code Ga. § 1667). *King v. State*, 40 Ga. 244; *Johnson v. State*, 61 Ga. 306. The evidence establishing this marriage is conflicting, but, after a careful consideration of all of it, the master finds that Frances and Moses August, after a marriage ceremony between them when slaves, continued to live as husband and wife until some time in the year 1867, and that on the 9th day of March, 1866, they were so living together as husband and wife; and by that act they were made lawfully husband and wife, said act confirming, for all civil purposes, the marriage of persons of color. *King v. State*, 40 Ga. 244. It is contended by the defendant that said Frances and Moses were slaves, and that their marriage as slaves was illegal, and that such relation was not possible to slaves. This is true, but that was one of the very evils that the act of March 9, 1866, was intended to cure. That act, in the opinion of the master, was intended to make legal the relations of persons of color which before that time were illegal; and if, after the passage of this act, such persons were living together as man and wife, and continued to live together after the passage of the act, they were declared to be husband and wife. To avoid this rela-

relationship, which the law, in the interest of morality, cast upon them, such relationship should have been immediately dissolved after the publication of said act. The evidence is clear that in 1867 both Frances and Moses disregarded the relationship of husband and wife which the law cast upon them, and they separated, and each married again. The master is of the opinion, however, that the subsequent marriage of both parties simply made them guilty of the crime of bigamy, and could not affect their legal status, which had been fixed by the act of March 9, 1866.

"It is contended further by the defendant that the plaintiff Frances had not for at least 25 years before the death of said Moses claimed or received or derived any support or assistance from said Moses, and that his death was not any pecuniary loss to her or the said Joseph, or any loss of any kind, and that neither had any thoughts of ever deriving any benefits from his life, and that it would be illegal and unjust and inequitable to mulct this defendant on account of the death of the said Moses. The master, in rendering his decision, while fully sympathizing with this view, as matter of morality, yet is obliged to decide this point under principles of strict law, and where such principles are well established equity will follow the law. The master therefore holds that, it being shown that on March 9, 1866, the plaintiff and the deceased were living together as husband and wife, and continued to live in such relation until 1867, that she is entitled, as a matter of law, to recover for his killing. The master therefore finds, and so reports, that she is entitled to recover the sum of twelve hundred (\$1,200.00) dollars. It was conceded that said Joseph, the son, was not entitled to recover, but that the suit could only be in the name of the wife. All of which is respectfully reported.

Benj. H. Hill, Special Master.

"Filed in the Clerk's Office, 7th day of Feby., 1894. O. C. Fuller, Clerk."

Exceptions were filed by the receivers to the foregoing report, and the same were argued. Since the hearing, I have given considerable thought to the question involved. There is very little authority upon the question, and it is probably true, as stated by counsel for the receivers, that no such case has ever arisen before, or will ever arise again. No question is made as to the liability of the receivers, and very little as to the amount of the recovery. The evidence was conflicting, as stated by the master, as to whether the deceased and Frances August were living together as husband and wife at the time of the passage of the act of the legislature of Georgia in March, 1866; but the special master finds this in favor of the intervener, and it is conceded that there is sufficient evidence to justify the finding. The contention for the receivers here is that Frances August, having married another man, and having lived with him since 1884 as his wife, and having renounced in this way the former relationship with the deceased, she cannot now come in and take the benefit of that relationship for the purpose of recovering for his homicide. By the finding of the special master, under the provisions of the act of March, 1866, the intervener became the lawful wife of the deceased, and the fact of her subsequent marriage could not change the legal status of the parties by the relationship created by the act referred to. The statute of the state gives to the wife the right to recover for the homicide of the husband. Unquestionably she is his lawful wife. Therefore, controlled by what seems to be the law of the case, the report of the special master must be confirmed.

UNITED STATES v. CONVERSE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 140.

CLERK OF COURT—FEES.

Clerks of district courts are not entitled to fees for filing certificates of discharge of witnesses, nor for filing duplicate abstracts and vouchers; but they are entitled to fees for entering orders of court for the marshal to pay witnesses and jurors, for making certificates to such orders, and for taking and entering of record separate recognizances of witnesses where it is shown that the witnesses could not recognize together without hardship.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Petition by Mervin B. Converse against the United States for fees as clerk of the district court. Petitioner obtained judgment. Defendant brings error.

Wm. E. Shutt, Dist. Atty., for the United States.

Mervin B. Converse, pro se.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. The defendant in error was appointed clerk of the district court of the United States for the southern district of Illinois, on March 13, 1880, and has continued to hold that office until the present time. Between the 1st day of July, 1887, and the 30th day of September, 1891, his accounts, 17 in number, were duly presented to and approved by the court, in the presence of the United States district attorney. The accounting officers disallowed some of the items charged therein. He made up an account for these disallowances between the 1st day of July, 1887, and the 30th day of September, 1891, which was duly presented and sworn to in open court, for the purpose of bringing this suit. These disallowances comprise the following items: (1) Filing 2,765 certificates of discharge of witnesses by the district attorney, at 10 cents each, \$276.50; (2) entering 2,574 orders for marshal to pay witnesses and jurors, at 15 cents each, \$386.10; (3) copies of such orders for the marshal, at 10 cents each, \$257.40; (4) certificates to 2,990 of such orders, at 15 cents each, \$448.50; (5) writing 2,803 folios of complete record, at 15 cents each, \$420.45; (6) affixing certificate and seal to 473 copies of sentences in criminal cases, at 20 cents each, and 61 certificates to copies of sentences, at 15 cents each, \$103.75; (7) entering judgments of the court, \$6.60; (8) docket fees in attachment cases, \$4.00; (9) taking 365 recognizances of United States witnesses and defendants at 25 cents each, and entering of record the separate recognizances of 221 United States witnesses and defendants, of two folios each, at 15 cents per folio, \$157.55; (10) filing 8 praecipes, and issuing and filing 8 subpoenas for government witnesses in the case of United States v. Grimes, \$3.60; (11) filing duplicate abstracts and vouchers, \$4.90; (12) for 103 oaths

administered to United States witnesses, at 10 cents each, \$10.30; (13) complete record and docket fee in the case of United States v. Bruss, \$2.95. The court below entered judgment for the full amount claimed, except that the item for entering judgments of the court amounting to \$6.60 was reduced to \$3.75. Counsel for the government has assigned error in respect to each item so allowed; but in argument he has abandoned his assignments of error, except those relating to the following items: (1) Filing 2,765 certificates of discharge of witnesses by the district attorney, \$276.50; (2) entering orders for marshal to pay witnesses and jurors, \$386.10; (4) certificates to the same, \$448.50; (9) taking and recording recognizances, \$157.55; (11) filing duplicate abstracts and vouchers, \$4.90. We will proceed to consider these items in the order of their statement.

(1) This item embraces the fees charged for filing 2,765 certificates or orders of discharge issued to witnesses by the United States district attorney. In the case of U. S. v. Taylor, 147 U. S. 695, 13 Sup. Ct. 479, it is expressly decided that the clerk is not entitled to charge or receive any fee for filing certificates or orders of the district attorney discharging witnesses. The court below, therefore, erred in allowing the defendant in error therefor.

(2) This item embraces fees charged for entering of record orders for the marshal to pay witnesses and jurors. In the opinion of the court below, it is stated that it finds as matter of fact, established by the evidence on the trial, that the plaintiff, as clerk, did enter upon the minutes or record of the court 2,574 separate orders for the payment of United States witnesses and petit jurors, of one folio each. It is also found by the court, and stated therein, that for many years it has been the practice of the court to enter a separate order for the payment of witnesses and jurors as a measure of public convenience. There is no dispute in regard to these facts, nor in regard to the practice of the court in causing a separate order for the payment of each witness and juror to be entered of record on its minutes. The "several circuit and district courts" have the right, under section 918, Rev. St., to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." In the case of U. S. v. Van Duzee, 140 U. S. 199, 11 Sup. Ct. 941, it is held that, when a clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of the statute authorizing compensation for such services. Section 855, Rev. St., requires the entry of orders on the minutes of the court for the payment of jurors and witnesses in all cases where the United States is a party; section 828, Id., allows a fee of 15 cents per folio for the entry of all orders; and section 854, Id., defines a "folio." These orders having been entered of record on the minutes of the court in accordance with its practice, which it is expressly authorized by law to regulate, as well as under the express provisions of the statute, we can perceive no reason why the government should refuse to pay the compensation fixed by law for the services of the clerk in entering them. No au-

thority is cited by the plaintiff in error which supports its contention. The court committed no error in allowing this item.

(4) This item embraces charges for certificates to orders for the payment of jurors and witnesses. In the case of *U. S. v. Taylor*, 147 U. S. 695, 13 Sup. Ct. 479, it is said: "Charges for copies of orders and certificates thereto are allowable, but the charge for seals is disallowed, upon the authority of *U. S. v. Van Duzee*, 140 U. S. 169, 174, par. 6, 11 Sup. Ct. 758." As this item embraces charges for certificates only, and makes no claim for seals, the court properly allowed it, upon the authority of the above case.

(9) This item embraces charges for taking recognizances, and entering the same of record. These recognizances were separately taken and entered of record. It appears from the record to be the practice of the court for the clerk to take the acknowledgment of recognizances, and enter them upon the records. Only one acknowledgment was charged for each recognizance. The contention of the government is that more witnesses might have been included in a single recognizance; but it is not alleged in any pleading, nor is it shown by any evidence, that more witnesses might or ought to have been included in a single recognizance than were included. The charge is for a gross amount for taking and recording a stated number of recognizances, which were separately taken and entered of record. The court below found that to join them would often work a hardship to the witnesses, compelling all to wait until the last was discharged. The charge, in view of the findings of the court, seems to be a proper one, and the principle on which it is sustainable is not in conflict with, but is supported by, the case of *U. S. v. Barber*, 140 U. S. 164, 11 Sup. Ct. 749. In the case of *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, it is held that a charge for taking separate recognizances is not allowable, "unless it be made to appear that the witnesses could not conveniently have recognized together." In this case the court found that the witnesses could not recognize together without working a hardship, which is equivalent to finding that they could not conveniently recognize together. It follows that the charge for taking these separate recognizances was a proper one; and, if so, the charge for entering them of record was also proper, as such recognizances, by law and by the practice of the court, are required to be spread of record. This item was properly allowed.

(11) This charge is for filing duplicate abstracts and vouchers. The defendant in error concedes, upon the authority of the case of *U. S. v. Jones*, 147 U. S. 672, 13 Sup. Ct. 437, that this item was improperly allowed. We are of opinion, upon the authority of this case, that this item is not allowable. The judgment of the court below is therefore reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

MacDONALD et al. v. UNITED STATES.¹

(Circuit Court of Appeals, Seventh Circuit. March 22, 1894.)

No. 149.

1. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—INDICTMENT.

Where an indictment contains three counts, to the first of which a motion to quash is overruled, and afterwards a bill of particulars is filed with the first count, which practically confines the prosecution to the more specific charges contained in the other counts, overruling the motion cannot be assigned as error.

2. SAME—EXCEPTIONS TO CHARGE.

If a bill of exceptions states that an exception to the court's charge was taken when the charge was given, but discloses that it was not in fact taken until afterwards, the exception is not available.

3. SAME.

Where the court instructs the jury that the issue is not whether the defendants' business was a cheat, but whether it was a lottery, the fact that the charge also states that the defendants' business was a cheat no better than highway robbery is not ground for reversal.

4. SAME—SENTENCE—JOINT ASSIGNMENT OF ERRORS.

Where three defendants, who are jointly indicted, but separately sentenced to different punishments, join in a writ of error, and assign as error that "the court erred in the sentence which it passed upon the defendants," the assignment is too indefinite to present any question.

5. OFFENSES AGAINST POSTAL LAWS—LOTTERY—INDICTMENT—EVIDENCE.

Where an indictment charges the defendants with sending through the mails circulars concerning a lottery, the prosecution may show by evidence outside the circulars that the business advertised therein was in effect a lottery.

6. LOTTERIES—GUARANTEE INVESTMENT COMPANIES.

Where the value of bonds in an investment company depends upon their number, and the numbering is done by the secretary according to the order in which the applications happen to reach him, the result of a purchase of such bonds is so dependent on chance as to render their sale a lottery.

Error to the District Court of the United States for the Northern District of Illinois.

Indictment of George M. MacDonald, Francis M. Swearingen, and W. H. Stevenson for sending through the mails matter concerning a lottery. Defendants were convicted, and they bring error.

The appellants, George M. MacDonald, Francis M. Swearingen, and W. H. Stevenson, were indicted, with others, tried, convicted, and sentenced, for sending through the mails matter concerning a lottery. Rev. St. U. S. § 3894, as amended (26 Stat. 465). The indictment was returned October 14, 1893. The first count is general, and, formal parts omitted, charges that at Chicago the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the United States there, and send and cause to be sent through the same, to be conveyed and delivered by mail, divers letters and circulars concerning a lottery, that is to say, ten letters and ten circulars, directed respectively to divers persons and addresses to the said grand jurors as yet unknown, and concerning a lottery in the same letters and circulars called the Guarantee Investment Company." The second count charges that the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the said United States there, and send and cause to be sent through the same post office, to be conveyed and delivered by mail of the said United States, a certain envelope, then and there bearing

¹ Rehearing denied October 27, 1894.

the address of Mr. J. J. McIntosh, Box 448, Chicago, Ill., which said envelope then and there contained a certain pamphlet concerning a lottery in the same pamphlet mentioned, and purporting to give, amongst other things, the plan of said lottery; which said pamphlet was and is of the tenor following, that is to say." The pamphlet, as set out in the indictment, contains, with other things, the following matter:

"Copy of Bond.

"Know all men by these presents, that the Guarantee Investment Company of Nevada hereby promises to pay to — or order, at its office in St. Louis, Mo., one thousand dollars, lawful money, at the time and on the conditions following, to wit: This is one of a series of bonds of like tenor, numbered consecutively from No. 1 to the number borne by this bond, sold and issued to the purchasers of the maker hereof. The holder hereof has paid for this bond ten dollars, and by accepting it agrees to pay the maker, at its home office in St. Louis, Mo., on the first day of each successive month hereafter, an installment of one dollar and twenty-five cents until this bond matures. A failure for fifteen days to pay said installment subjects the holder or owner of the same to a fine of one dollar, which, together with the omitted installment, must be paid within the next fifteen days in order to reinstate the said bond. And if the same is not done within the said time this bond becomes null and void and of no effect, and the said holder forfeits all payments and fines assessed thereon to the fund for the payment of this series of bonds. It is hereby guaranteed by the maker of this bond that one dollar of all the monthly installments and all fines paid on the bonds of this series shall constitute a trust fund for the payment of the bonds of this company in the order and manner following: The first bond paid shall be bond No. 1, the second bond paid shall be bond No. 5, the third bond paid shall be bond No. 2, the fourth bond paid shall be bond No. 10, and so on, reverting back to the first issued unforfeited unpaid bond in this series, and alternating with the multiple 5 until all the bonds issued are paid; and said fund shall be honestly guarded and applied to such purpose, and shall not be impaired, used, or diminished for any other purpose whatever; and this bond, if unforfeited, becomes and is due and payable immediately after there are sufficient funds in said trust fund to pay it, all subsisting and uncanceled bonds issued and numbered prior to this having been paid.

"In witness whereof, the officers have hereunto subscribed their names and affixed the seal of the company thereto at its home office in St. Louis, Mo., this — day —, 18—, —, President.

"[Seal.]

—, Secretary.

"Table for Payment of Bonds.

"Copyrighted 1891, by J. G. Talbot.

1 then 5	12 then 60	23 then 115
2 then 10	13 then 65	24 then 120
3 then 15	14 then 70	then 125
4 then 20	then 75	26 then 130
then 25	16 then 80	27 then 135
6 then 30	17 then 85	28 then 140
7 then 35	18 then 90	29 then 145
8 then 40	19 then 95	then 150
9 then 45	then 100	31 then 155
then 50	21 then 105	32 then 160
11 then 55	22 then 110	33 then 165

—"And continuing until the multiple extends beyond the number of bonds sold, when payment will revert back, and bonds will be paid in the numerical order, until, by additional sales of bonds, the suspended multiple is reached, when that number will be paid, and this manner of payment shall continue until all unforfeited uncanceled bonds issued are paid."

"Issuing of Bonds. We issue an investment bond on the following conditions: At the time application is made for a bond, the purchase price of \$10.00 is paid to the agent taking the application, and a monthly installment of \$1.25 is payable on the first day of the month following the date of said

application. If the installment is not so paid when due, a fine of \$1.00 is levied against the holder of such bond, unless the same is paid within fifteen days; and if not paid in the next fifteen days then the said bond will be canceled on the books of the company for nonpayment. The company pledges the bondholder that out of the monthly installment of \$1.25 paid, that 25 cents only shall be used for the payment of bonds in the order of their issue as follows: As soon as there is \$1,000 paid into said trust fund, it shall be paid to the person holding bond entitled thereto by the table issued by this company (providing said bond has not been canceled for nonpayment), as follows: Bond No. 1 will be entitled to the first \$1,000 paid into the trust fund, and bond No. 5 to the second \$1,000; bond No. 2 to the third \$1,000; bond No. 10 to fourth \$1,000, etc., etc."

Thereupon the indictment proceeds: "And which said envelope also then and there contained a certain other circular, entitled 'The Guarantee Investment Company, Incorporated; September Bulletin, 1893,' concerning the same lottery, and purporting to give, amongst other things, a list of the prizes drawn at divers drawings of the same lottery theretofore held; and which said envelope also then and there contained a certain other circular entitled 'Application to The Guarantee Investment Co., of Nevada, Mo.,' and concerning the same lottery, and which said envelope also then and there contained a certain letter concerning the same lottery, and of the tenor following, that is to say." Then follows a copy of the letter.

The third count charges that the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the United States there, and send and cause to be sent through the same post office, to be conveyed and delivered by mail of the said United States, a circular concerning an enterprise similar to so-called 'gift concerts,' offering prizes dependent upon lot and chance; that is to say, a circular directed to one George Houghton, at Downer's Grove, in the state of Illinois, by the direction and address following, to wit, 'Mr. George Houghton, Downer's Grove, Ill.,' and entitled and bearing on the outside of the cover thereof (amongst other things) the words 'The Guarantee Investment Company, Incorporated; September Bulletin,' and concerning an enterprise of that character in the same circular mentioned."

A motion of the defendants to quash the first count of the indictment was overruled. During the progress of the trial, at the conclusion of the evidence for the government, the district attorney, over the objection and exception of the appellants, was allowed to file a bill of particulars with the first count of the indictment, to the effect that the circulars and letter and envelope mentioned in the second and third counts were or would be relied upon for the support of the first count.

Collins, Goodrich, Darrow & Vincent, Barnum, Humphrey & Barnum, and Elisha Whittlesey, Jr., for plaintiffs in error.

Thomas E. Milchrist, U. S. Atty., and John P. Hand, Asst. U. S. Atty.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the case). The practical effect of the bill of particulars filed with the first count of the indictment was to confine the prosecution to the more specific charges contained in the second and third counts. If, therefore, there was error in overruling the motion to quash the first count, it became an immaterial and harmless error,—as much so as if the count had been formally dismissed or withdrawn before the case was submitted to the jury.

The objection that the printed matter described in the indictment was admitted in evidence without previous proof of re-

sponsibility on the part of the defendants for the mailing of it is not supported by the record. When the offer was first made, it is true, the objection was interposed and overruled, as stated, and an exception taken; but no part of the matter was read to the jury until adequate proof had been made, by admissions and by the testimony of witnesses, that the mailing was done with the knowledge and by the authority of the defendants. In fact, when finally the evidence was given to the jury, the objection was not renewed, and no exception was taken to its introduction; and, even if there had been error in the first instance, it was cured by the proof afterwards made.

It is claimed next that the court erred in admitting evidence of the methods of business of the Guarantee Investment Company for the purpose of showing its scheme to be a lottery. The indictment containing no direct averment of the company's methods of business, it is insisted that the charge that the defendants sent through the mails circulars concerning a lottery means that the circulars, on their face, showed or purported to concern a lottery, and that other evidence of the fact was therefore incompetent. This position is plainly untenable. Any proper evidence upon the point, whether found on the face of the papers or elsewhere, was admissible on behalf of the government, just as it was competent for the defendants, and would have been even if the circulars had purported to concern a lottery, to show that in fact the scheme was not of that character.

It is assigned as error "that the verdict is against the law," and, to make this out, it is insisted that the business of the investment company, "as set forth in the pamphlet in the indictment, is not a lottery, within the meaning of the law." The essential question, as we have seen, is, what was the nature of the business, as shown by the entire evidence, and not merely as set forth in the pamphlet, and, under proper instruction, that was a question of fact concerning which this court, following the well-settled practice of the supreme court, will not review the evidence, when sufficient, as it was in this case, to go to the jury in support of the verdict. *Crumpton v. U. S.*, 138 U. S. 361, 11 Sup. Ct. 355.

This brings us to the court's charge to the jury, and in respect to that we are constrained to observe that no question is properly presented. The record shows that at the conclusion of the charge the defendants gave notice "that they would except to the charge;" and thereupon the court stated the practice of the court to be that objections to the charge should be stated before the jury retired, but that the court would permit the bill of exceptions to show objections to all the substantial portions of the charge, though not then specified, except portions which might have been the result of mere lapse or inadvertence, or which, in view of the whole trial, would have probably been corrected if the court's attention had been called to them before the jury retired, and that, subject to this limitation, counsel might have time to prepare their exceptions. When afterwards the bill of exceptions was presented to the judge for settlement, with various objections to different parts of the charge, some were allowed, and appear in the bill as if stated before the jury had retired.

Other objections the judge refused to allow, because they were not presented in time, and to that refusal "the defendants then and there excepted," and have assigned it as error. We are aware that out of considerations of convenience and accommodation, and by acquiescence of opposing parties, the trial courts sometimes permit bills of exceptions to show objections and exceptions as if they had been announced at the time of the ruling complained of, and on appeal in such cases the record must be accepted as true; but when, as in this instance, the facts are all disclosed, it is impossible to recognize the exceptions as valid. We have, however, considered the principal objections to the charge of the court, and are convinced that there was no error which could have been made available upon proper exception. The court, it is true, employed strong language, to the effect that the Guarantee Investment Company was a cheat, doing things no better than highway robbery; that, by its very constitution, its success depended upon its insolvency, and a wholesale repudiation of its promises,—and used other expressions which, it is claimed, were both inaccurate and unfair, and calculated to inflame the minds of the jurymen against the defendants. It is apparent, however, that these portions of the charge were, in part at least, responsive to the argument and insistence of counsel for the defendants, that the scheme and business of the company were honorable and fair, and the court was careful to explain that the question at issue was not whether the business was a cheat, but was it a lottery? "It may be a cheat," said the court, "but we must ascertain by the legal canons and definitions whether it was a lottery;" upon the whole charge it is impossible to believe that the jury could have misapprehended the issue.

Continuing on the subject, the court said: "What is a lottery? The best definition I can find for it is this: 'When a pecuniary consideration is paid, and it is determined by chance or lot, according to a scheme held out to the public, whether he who pays the money is to have anything for it, and, if so, how much, that is a lottery.'"

Upon this definition, which was inaccurate if at all because it was not as comprehensive as it might have been, the question whether or not the investment company was conducting a lottery was one for the jury; and, if we could be required to review the evidence, we would not disturb the verdict. It is insisted that the element of chance is wanting in the scheme, but its presence is manifest. It is not present primarily in the uncertainty of the time when a bond will be paid, because, once bonds have been issued, the order of payment is governed by a fixed rule, and the time of payment is uncertain only so far as it depends upon the amount of business done by the company, and the number of lapses of bonds of earlier issue. The element of chance which condemns the scheme is incident to the numbering of the bonds before issue, and not directly to their payment afterwards. By the table, which determines the order of payment, bond numbered one is payable first, No. five next, No. two next, and so on, alternating between numerals, so-called, and multiples of five, except it will be observed, that between every

fourth and fifth of the multiples no numeral intervenes. There are four numerals to every multiple, and it follows that a bond (which might as well be called a ticket) bearing a high multiple number will be entitled to payment sooner than three-fourths of the bonds bearing lower numbers among the numerals, and the further the process is carried the greater becomes the disparity between the multiple and numeral numbers next to be paid, and correspondingly the bonds numbered with numerals, except as benefited by lapses, become less and less valuable, because the day of possible payment becomes more and more remote. Now, whether or not a purchaser will obtain a bond of one number or another depends, as the evidence very clearly shows, upon the order in which his application shall reach the hand of the secretary, and that is largely a matter of chance. The secretary receives applications by mail and otherwise, sometimes singly and sometimes a number together, and in the order of receipt, and, as he chances to take up one or another first, passes them through a registering device, and in accordance with the notations thereby made upon the applications the bonds are numbered and issued. But for the purchaser's hope, or, as it may as well be said, for his chance, of getting a multiple number, the business would soon cease. "The multiple system is a new invention," said a witness for the defendants, "a table, copyrighted, to make the inducement for a person to purchase a bond at one time just as great as at another;" and, however disguised in words, it is evident that the inducement consists mainly in the chance of obtaining a multiple number. It was insisted at the hearing that since every bondholder who shall continue to pay his dues will ultimately receive the promised sum, the prizes are equal, and therefore there is no lottery. But it is idle to say that a sum or an obligation for a sum due and payable to-day or at an early day is of no more value than an obligation for an equal amount, without interest, payable at a remote and indefinite time. Reference has been made to *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409, but, in the elaborate presentation there made of the subject, we find nothing which we deem inconsistent with our views of the present case.

The court was asked to instruct the jury that, "if the only element of uncertainty was as to the date at which the bonds matured or were to be paid, it was not sufficient to characterize the business of the defendants as a lottery." This and similar requests were properly refused, because they presented an immaterial question, and ignored the element of chance incident to the numbering of the bonds before they were issued. Only in that phase of the scheme did the court, by its charge, suggest, or leave it to the jury to find, the presence of chance; and of its existence there the proof is so clear that all collateral questions sought to be raised either upon the instructions given and refused, or upon the evidence, may be regarded as immaterial. Indeed, if it were ever permissible in a criminal case that the court should direct a verdict of conviction, it might have been done in this instance. The evidence is without conflict.

It was assigned for error, and is insisted upon, that "the court erred in the sentence which it passed upon the defendants." This is too general and indefinite upon its face to present any question, and when applied to the facts of the case it is still more uncertain. The court passed no sentence upon the defendants, but a separate sentence upon each,—upon Swearingen and Stevenson, each, a fine of \$200, and, upon MacDonald, imprisonment in the county jail for eleven months, and a fine of \$1,000. Which one or what part of these sentences it was intended to question, the assignment does not indicate. In the brief objection is made to the sentence upon MacDonald only, and because the fine is double the amount of the maximum authorized by the statute for each offense. It is said to be "impossible to tell from the record whether the court did this inadvertently, or proceeded upon the theory that MacDonald was indicted and convicted of two separate offenses, and imposed a cumulative sentence," and for this reason, it is contended, the judgment must be reversed, and the case remanded, not for resentencing, but for a new trial. This is a question in which MacDonald alone is interested, and the assignment of error should have been by him or in his behalf only, and should have stated specifically his objection to the sentence. See *Whiting v. Cochran*, 9 Mass. 531; *Porter v. Rummery*, 10 Mass. 64; *Shirley v. Lunenburg*, 11 Mass. 379; *Shaw v. Blair*, 4 Cush. 97; *Jaqueth v. Jackson*, 17 Wend. 436; *Henrickson v. Van Winkle*, 21 Ill. 274. Though indicted and tried together, the defendants were entitled to separate appeals; and, the sentences against them being necessarily individual and several, there can be no necessity for steps to effect a severance, as in civil cases, when the judgment is joint against two or more. *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. 58. If, however, there was error, as now claimed, it was more of form than of substance; and, if we were compelled to remand the case, it would be simply for resentencing. The appellant was convicted by a general verdict upon an indictment which contains at least two distinct charges, which were properly joined. Rev. St. U. S. § 1024; *In re Henry*, 123 U. S. 372, 8 Sup. Ct. 142. The fine does not exceed the sum of the several sentences which might have been awarded, and according to the decision in *Carlton v. Com.*, 5 Metc. (Mass.) 532, that was legal; and in the case of *In re Henry*, supra, the supreme court, referring to the provision in section 5480 of the Revised Statutes, that three distinct offenses may be joined in the same indictment, said:

"In its general effect this provision is not materially different from that of section 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more indictments found in such cases. Under the present statute, three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all."

The general rule seems to be that there should be a separate sentence for each offense. *Bish. Cr. Proc.* §§ 1326, 1327; *Mullinix v. People*, 76 Ill. 211. See, also, *Blitz v. U. S.*, 153 U. S. 308, 14 Sup.

Ct. 924. But, as already explained, the question is one we are not called upon to decide. There is no essential or available error in the record, and the several judgments below are affirmed.

UNITED STATES v. KESSEL.

(District Court, N. D. Iowa, Cedar Rapids Division. October 12, 1894.)

1. DISTRICT COURTS—CRIMINAL CASES—TIME AND PLACE OF TRIAL.

Rev. St. § 563, provides that the district courts shall have jurisdiction of all crimes cognizable under the authority of the United States, committed within their respective districts. Section 581 provides that a special term of any district court may be held at a place where any regular term is held, or at such other place in the district as the nature of the business may require, and any business may be transacted at such special term which might be transacted at a regular term. Act Cong. July 20, 1882 (22 Stat. p. 172), creating the northern district of Iowa, and Act Cong. Feb. 24, 1891 (26 Stat. p. 767), amendatory thereof, and creating the Cedar Rapids division, contain no provision in regard to the place of trial of criminal actions, nor any limitations of the power conferred by Rev. St. § 563. *Held*, that the district court of the northern district of Iowa may name the time and place of trial of criminal cases, whether at a regular or special term, or at the usual places for holding court or otherwise, subject only to the right of defendant to a speedy trial within the district in which the offense was committed.

2. SAME—TRANSFER FROM CEDAR RAPIDS TO DUBUQUE—WHEN ORDERED.

Several indictments against the same person, returned at Cedar Rapids, charged the commission of offenses in the eastern division of the northern district of Iowa, in which division defendant resided. *Held*, that a motion by the district attorney to transfer the cases to Dubuque for trial, to save expense, should be granted, in the absence of any showing that defendant would be prejudiced thereby.

Several indictments were returned at Cedar Rapids against George Kessel, and the district attorney moved to transfer the cases to Dubuque for trial, for the purpose of saving expense. Motion granted.

Cato Sells, Dist. Atty., for the United States.
H. T. Reed, for defendant.

SHIRAS, District Judge. At the present (September) term of this court held at Cedar Rapids, several indictments were returned by the grand jury against the defendant, who resides at Cresco, Howard county, Iowa. Several indictments of the same general character are now pending for trial at Dubuque, having been presented by the grand jury at the December term, 1893, of this court. The district attorney now moves that the indictments returned at Cedar Rapids be set down for trial at Dubuque, the purpose being to save costs and expense. The defendant, appearing by counsel, objects to the transfer, mainly upon the ground that the court does not possess the authority to make the transfer.

By section 2, art. 3, of the constitution of the United States, it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed. * * *". And, v.63F.no.3—28

by article 6 of the amendments to the constitution, it is declared that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. * * *"

In the prosecution of criminal offenses by indictment, there are two material steps to be taken, which, however, are entirely separate and distinct,—the one being the finding and presentation of the indictment; the other, the trial of the accused before a petit jury. The judiciary act of 1789, §§ 2, 3, divided the United States into districts, and created a district court for each district; naming a place for the holding the stated terms in each district, with authority to hold special courts at such times and places within the district as the nature of the business might demand. By section 9, jurisdiction was conferred upon the district courts over all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where the punishment to be inflicted did not exceed certain stated limits. The substance of these provisions, with modifications to suit the development of the country, are re-enacted in sections 530, 551, and 563 of the Revised Statutes. Under the provisions of these sections, there is in each judicial district of the United States a district court, whose jurisdiction is coextensive with the district, it being expressly declared by section 563 that the district courts "shall have jurisdiction as follows: First, of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts. * * *"

By section 581, Rev. St., it is provided that "a special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, * * * and any business may be transacted at such special terms which might be transacted at a regular term." In the progress of time, it has become customary for congress to divide the several judicial districts into two or more divisions, and to provide for holding terms of court in the several divisions. The creation of these divisions does not, however, create new districts, nor establish new or additional district courts. Unless there is some special provision in the act of congress creating such divisions in a given case, the district court, in its jurisdiction over criminal cases, remains unaffected; and that jurisdiction, under section 563, is territorially coextensive with the district. Thus in *Logan v. U. S.*, 144 U. S. 263, 297, 12 Sup. Ct. 617, it was expressly held that a grand jury sitting at any place at which the court is appointed to be held has authority to present indictments for offenses committed anywhere within the district. Thus it is clear that the grand jury which met at Cedar Rapids had full authority to present indictments against the defendant, Kessel, for any offenses he might have committed within the territorial limits of the northern district of Iowa.

These indictments having been thus properly returned, then the question arises of the place and time of trial. The acts of congress

creating the northern district of Iowa, approved July 20, 1882 (22 Stat. 172), and the act amendatory thereof, creating the Cedar Rapids division, approved February 24, 1891 (26 Stat. 767), do not contain any provision in regard to the place of trial of criminal actions, nor do they contain any limitations upon the power conferred by section 563, Rev. St., under which the court may order special terms to be holden at any time and place. The provisions of these acts in regard to civil business is that, if not of a local nature, suits must be brought in the division wherein the defendant resides. The purpose of this enactment is to require the place of trial to be brought as near as possible to the residence of the defendant. If this provision is to have any weight in determining the place of trial in criminal cases, then it would require that such cases should be set down for trial in the division wherein the defendant resides; and in this case the defendant resides in the Dubuque division, and therefore that should be selected as the place for trial. It is urged in argument by counsel for defendant that if the court has the power to order transfers in criminal cases, such as is asked in this case, it may result in imposing upon a defendant an unreasonable burden, in that, for an offense alleged to have been committed in Allamakee county, the trial may be ordered at Sioux City. Unless the power to fix the place of trial at a place other than where the indictment is returned is possessed by the court, then the evil suggested by counsel is bound to arise. An indictment, under the ruling in *Logan v. U. S.*, supra, may be rightfully found by a grand jury sitting at Sioux City for an offense committed in Allamakee county, which is in the eastern division. If the court cannot send such an indictment for trial to the division in which the defendant resides, then he will be compelled to incur the expense of attending court at Sioux City, whereas, if it be true that the court possesses the right to fix the place of trial, regard can always be had to the rights of the defendant in this respect. I therefore hold that as the act of congress creating the northern district of Iowa, and the divisions thereof, does not define where the criminal cases shall be tried, it is within the power of the court, under the provisions of the General Statutes of the United States, to name the time and place of trial, whether at a regular or special term, or at the usual places for holding court, or otherwise, subject only to the right of the defendant to a speedy trial within the district wherein the offense laid at his charge was committed. In the cases wherein indictments were returned at Cedar Rapids, the several offenses therein charged were committed within the eastern division, which is also the division wherein the defendant resides; and as it is not shown that the defendant will be, or can be possibly, prejudiced by setting down these cases for trial at Dubuque, the motion to that effect will be granted.

UNITED STATES v. DEBS et al.

(Circuit Court, N. D. Illinois. July 14, 1894.)

CONSPIRACY—INTERSTATE COMMERCE—STRIKE.

Where two or more men wrongfully and corruptly agree among themselves, either for the purpose of creating sympathy in a threatened strike, or for any other purpose, to cause trains carrying mail or interstate commerce to be stopped, or to discharge their employes or refuse to employ new men, so as to stop such trains, they are guilty of conspiracy.

Supplemental charge to grand jury. For original charge, see 62 Fed. 828.

GROSSCUP, District Judge (orally charging jury). I think it my duty to give you further instructions. No man is above the law. The line of criminality or innocence is not drawn between classes, but only between men who violate the law and men who do not. The fact that a man may occupy a high position does not exempt him from indictment and trial simply because he does occupy a high position. The fact that a man may occupy a lower position does not exempt him from making known his grievances to you, simply because he may occupy such a position. Your door, therefore, ought to be open to all inquiry coming from every source that is founded on something more than mere rumor or conjecture; in other words, on something that has tangible form. It is stated in public print that some of our fellow citizens believe that the interruption of the mails and of interstate commerce, into which you are inquiring, was the result of a conspiracy upon the part of men higher in the railroads than the employes. If two or more men, no matter what their position in the railroad company may have been, wrongfully and corruptly agreed among themselves, either for the purpose of creating public sympathy in a threatened strike, or for any other purpose, that they would cause the mail trains and trains carrying interstate commerce to be stopped, and did acts in pursuance of that agreement, they are guilty of conspiracy. If two or more men agreed wrongfully and corruptly among themselves that, for the purpose of creating public sympathy in this strike, they would discharge men from their employ who otherwise would not have been discharged, intending that such discharge should stop the running of the mail or interstate commerce trains, and thereby raise public indignation, they would be guilty of conspiracy. If two or more men, in view of a threatened strike, agreed wrongfully and corruptly that they would not employ men to take the places of the men who had quitted the service, but would allow the trains to stand still for the sake, merely, of creating public sympathy or indignation against the strikers, they would be guilty of conspiracy, unless the circumstances and situation were such that the employment of new men, reasonably viewed, would lead to danger to those men, or danger to the railroad property, or danger to any public interest. As I said, every man is entitled to bring a complaint of any one of these charges to your attention, if he brings it with tangible evidence,—something that

is not mere hearsay, or rumor, but something upon which you can place your judgment; and it is the duty of the district attorney to submit it to you, and of the members of the grand jury to hear it. If there is anything of that kind to be submitted to you, I trust it will be so submitted in your sessions, either during the balance of the day, or when you return next week. That is all I wish to say to you.

IN RE MARTORELLI.

(Circuit Court, S. D. New York. October 13, 1894.)

ALIEN IMMIGRANTS—EXCLUSION ACTS.

The acts regulating immigration, existing when Act March 3, 1891, was passed, refer to aliens who are imported into or who migrate to this country, and do not exclude a person already resident here, though not naturalized, who temporarily departs, with the intention to return.

Application for discharge of Sebastiano Martorelli, detained, as a contract laborer, for deportation.

Ullo, Ruebsamen & Cochran, for commissioners.
John Palmieri, for relator.

LACOMBE, Circuit Judge. The facts are these: Sebastiano, an alien, came from Italy to this country in 1887, with the intention of making it his home. He remained here five years, working as a laborer in the city of Philadelphia. During this period he declared his intention to become a citizen, and took out his first papers. At the time of his immigration he had a wife and child, whom he left in Italy, intending to send for them when he had saved enough money to support them here. In 1892, having laid up some money and bought some household furniture, he sent for his wife to come; but, as she was too ill to do so, he went to Italy to bring her, leaving his furniture in charge of a friend here. His wife grew worse, and he remained with her in Italy for about two years, in consequence of which he was obliged to spend the money he had laid by in the preceding years. On the 10th of this month, therefore, he returned to this country, having borrowed in Italy the money to pay his passage, in order to resume his work here, and thus secure the money necessary to defray the expense of bringing his wife and child to this country, which he still intends, as he did when he arrived here in 1887, to make his permanent home. These facts being undisputed, and no question raised as to his being an idiot, convict, etc., the relator has affirmatively and satisfactorily shown that on October 10, 1894, he did not belong to any one of the classes of aliens excluded from admission into the United States in accordance with the acts regulating immigration, which existed and were in force when the act of March 3, 1891, was passed. These acts refer to aliens who are imported into or who migrate to this country, not to persons already resident here, who temporarily depart and return. Sebastiano was an alien immigrant when he came here, in 1887. He was not one when, after his temporary absence, he returned, in October, 1894. In re Panzara, 51 Fed. 275. Relator is discharged.

WAUKESHA HYGEIA MINERAL SPRINGS CO. v. HYGEIA SPARKLING DISTILLED WATER CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 116.

1. TRADE-MARKS—RIGHTS DEFINED BY CONTRACT.

Where two parties have been using similar trade-marks, a contract between them whereby one party is to use one form of the trade-mark in connection with certain words, and the other is to use another form of it in connection with other words, followed by the use of such trade-marks for several years in accordance with the terms of the contract, establishes the rights of the parties, and is binding upon their assigns and successors in business.

2. SAME—CONTRACT—RECORD IN PATENT OFFICE.

Such contract is not recordable in the patent office, since it is not a transfer of a right to use a trade-mark.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit for injunction by the Hygeia Sparkling Distilled Water Company against the Waukesha Hygeia Mineral Springs Company. Complainant obtained a decree. Defendant appeals.

The appellee, Hygeia Sparkling Distilled Water Company, filed its bill in equity for an injunction restraining the appellant, Waukesha Hygeia Mineral Springs Company, from using the word "Hygeia" as a trade-mark or name for drinking waters, except in the way specified in a contract entered into August 20, 1886, between the appellee and the appellant's predecessors. The appellant answered, and filed a cross bill; the answer denying the equities of the bill, asserting right in appellant to use the word "Hygeia" broadly as a trade-mark, and claiming that the alleged contract with its predecessor is not binding upon the appellant, for want of record or notice, and is not enforceable in equity for various reasons; the cross bill alleging that the appellant is entitled to exclusive use of the word as a trade-mark, and praying that the appellee be enjoined. The decree is for a perpetual injunction in favor of the appellee in accordance with the allegations and prayer of the original bill. The appellee is a manufacturer of distilled water, to which the trade-name of "Hygeia" had been applied for some time prior to 1886. The appellant is the owner of a spring at Waukesha, Wis. (acquired by it in 1891, under title derived from the Smiths, who made the contract of 1886), to which the name of "Hygeia" had been applied, and its waters were marked with the name "Hygeia" as part of the designation, prior to 1886. The spring was owned and its business conducted by James H. and Charles T. Smith, in and prior to 1886; and to avoid controversy with reference to a trade-name, under threats of prosecution by the appellee, a contract was entered into between the appellee, as first party, and the Smiths, as second parties, August 20, 1886, which recited that the first party was engaged in the manufacture of distilled waters, and "used as the essential feature of its trade-mark the word 'Hygeia' and a figure of the goddess of Hygeia," there shown; that the second parties were owners of a natural mineral spring at Waukesha, called the "Hygeia Natural Mineral Spring," and have used as the essential feature of their trade-mark in the sale of the waters of said spring the words "Waukesha Hygeia Mineral Spring," together with a figure of the goddess of Hygeia," which is also shown in the contract; and that they desire to avoid conflict and infringement in the use by both of their respective trade-marks," and to that end have entered into contract. Thereupon, "in consideration of the premises, and of five hundred dollars" paid by the first party to the second parties, the following provisions are made: "First. And the party of the first part shall have, and is hereby recognized as having, the exclusive right both to use the word 'Hygeia' and the figure of which the first above is

a fac simile, in connection with the distilling of water and the manufacture and sale of carbonated and artificial mineral waters, vichy, seltzer, ginger ale, etc., made by distilled water. The said party of the first part, however, shall not in any way or manner use the said word 'Hygeia' in connection with any natural mineral spring water, and shall not likewise use the words 'Natural' or 'Spring' water in or upon any stamp, cork, label, circular, advertisement, sign, bill head, letter head, etc., in any way or manner calculated to deceive or mislead the public. Second. The said parties of the second part shall have, and are hereby recognized as having, the exclusive right forever in and to the use of the said word 'Hygeia' in combination with 'Waukesha Hygeia Mineral Spring' with or without the word 'Water' super-added, and of the figure of which the second above is a fac simile, including said word 'Hygeia' as now a part thereof, used in any manner or connection with the bottling, putting up, and sale of the waters, whether carbonated or in said spring so situated at Waukesha, Wisconsin, as aforesaid, and of ginger ale the waters for which are from said spring. They shall not, however, use the said figure except in connection on the same label, etc., with said combination 'Waukesha Hygeia Mineral Spring,' and they shall not in any way or manner use the said word 'Hygeia' otherwise than in connection with said figure, and in such combination as above indicated on any stamp, cork, label, circular, advertisement, sign, bill head, letter head, etc. They shall not use the said word, figure, or combination in connection with distilled water, nor in connection with any other water than said spring water." The testimony on the part of the appellee is directed to showing their use of the trade-mark prior to this contract (having registered it in the patent office in December, 1883); and that, for the several years that intervened between the making of the contract and the purchase by the appellant, there was strict compliance with the provisions of the contract by both parties, and the appellee expended large sums in reliance upon it, giving great value to its trade-mark. The testimony of the appellant is mainly directed to showing in contravention of the contract that its predecessors named their spring "Hygeia," and had appropriated and used that as the distinguishing word in the combination of words by which the water was known and put upon the market, prior to any use by the appellee; that the appellant had no notice, actual or constructive, of the contract made by its predecessor in title, and was a bona fide purchaser; that the contract was an imposition upon the Smiths, and was harsh and inequitable; and that the appellant's predecessor was not incorporated at the time of entering into the contract.

Banning, Banning & Payson (William B. Keep and Frank O. Lowden, of counsel), for appellant.

Isham, Lincoln & Beale and Herrick & Allen, for appellee.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge (after stating the facts). The complainant, Hygeia Sparkling Distilled Water Company, seeks to restrain the Waukesha Hygeia Mineral Springs Company from use of the word "Hygeia" as a trade-name for its waters otherwise than specified in a contract entered into August 20, 1886, between complainant and defendant's predecessors. The defendant (appellant here) seeks to ignore or avoid that contract, and claims prior appropriation of the word, as the distinguishing name of its waters, and prays, by cross bill, for an injunction restraining the complainant from using the word in its corporate name or trade-mark.

The controlling question in this controversy is whether or not the contract is operative between these parties for the purpose of establishing and defining their respective trade-mark rights, in con-

nection with the testimony of subsequent conduct. If the contract governs, the proof tending to show priority of use is immaterial, and the complainant is entitled to protection against employment of the word "Hygeia," as a trade-name for waters, without the qualifying words provided by the contract. If the contract is excluded, the complainant fails to establish a case of prior appropriation of the name, on this record at least; and it would remain to inquire whether the defendant was entitled to affirmative relief. The contract of August 20, 1886, was between the complainant, of the one part, and James H. and Charles T. Smith, defendant's predecessors, of the other part, after each had undisputedly employed the word "Hygeia" as a portion of the trade-name of their respective waters. The record shows clearly that the purpose and provisions of the contract were well understood by the original parties; that it was executed deliberately, after considerable negotiation, and was followed by constant and (apparently) satisfactory compliance by both parties for several years, without dissent or disturbance, until after the defendant purchased and commenced operations. There is no foundation for the objection that the contract was obtained unfairly, and the adequacy of the consideration paid the Smiths is not here open to question. The agreement recited that the complainant was engaged in the manufacture or preparation of distilled waters, for which it had used as the essential feature of its trade-mark the word "Hygeia" and a figure of the goddess Hygeia; that the Smiths owned a spring at Waukesha, called the "Hygeia Natural Mineral Spring," and had used as the essential feature of their trade-mark, in the sale of the waters, the words "Waukesha Hygeia Mineral Spring," together with another figure of the goddess Hygeia. It does not assert priority for either, and, if its statement of the existing trade-mark of the Smiths be taken as true, the use of the word "Hygeia" in the combination there shown, prior to any use by the other party, was not conclusive of a right to the single word as a trade-mark. Whether it or the word "Waukesha" was the distinguishing word was at least open to question, and dependent upon circumstances. In that view, and, as the contract states, "to avoid conflict and infringement in the use of both of their respective trade-marks," an agreement between the users would seem commendable, and for the best interest of the parties and the public, if it could be reached and made effective for mutual protection. This contract was thereupon made, and it provides, in clear and unequivocal terms, for recognition and preservation of the then existing forms of trade-mark which are there recited as the exclusive right of each respectively, viz.: (1) The first party to use the word "Hygeia" and its figure of the goddess, in connection only with its "distilling of water and the manufacture and sale of carbonated and artificial mineral waters, vichy, seltzer, ginger ale, etc., made of distilled water," and not to use the word "Hygeia" in connection with natural mineral or spring water, or the words "Natural" or "Spring" water upon any label, etc., calculated to deceive the public; and (2) the second parties to use "the word 'Hygeia' in the combination 'Waukesha Hygeia

Mineral Spring,' with or without the word 'Water' superadded," and its figure of the goddess, "including said word 'Hygeia' as now a part thereof," in connection with "the bottling, putting up, and sale of the waters, whether carbonated or not, of said spring," and of ginger ale made of said waters; but the figure was only to be used in connection and upon the same label with the combination "Waukesha Hygeia Mineral Springs," and "they shall not in any way or manner use the word 'Hygeia' otherwise than in connection with said figure, and in such combination as above indicated," on any stamp, label, etc., and shall not use either in connection with any other than said spring water. It is not an attempt to transfer or license the use of a trade-mark, or any rights therein, or in any word thereof, but fixes and defines the existing trade-mark of each, that confusion and infringement may be prevented. If the word "Hygeia" had been used by the second party, at any time, otherwise than in the combination named, such use was thereupon and thereafter abandoned,—declared without right, and of no effect. The contract operates by way of estoppel upon each of the contracting parties, precluding each from "saying that that which by the intervention of himself or his has once become accredited for truth is false." 2 Best, Ev. (Morgan's Ed.) § 534. Between the parties and those claiming under them, it may well constitute the fundamental evidence of what was adopted by each as a trade-mark; while trade-mark rights are established by the testimony of subsequent exclusive use, respectively, in accordance therewith. The contract does not create the trade-mark, but it is clear evidence of its purpose and elements. Its provisions tend directly to the end for which the law of trade-marks has been evolved, viz. for protection of the public as well as the owner from imposition,—“that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity.” *McLean v. Fleming*, 96 U. S. 245. This is the view in which complainant's bill sets up the contract; and the action is not in the nature of specific performance, as the defendant's contention would have it treated, but is clearly for the enforcement of alleged trade-mark rights.

Infringement in this case is undisputed. The single word "Hygeia" is used by the defendant for the Waukesha water, upon labels and advertisements, without any of the other words designated therefor by the contract, and duplicating the complainant's trade-name. If the Smiths were thus infringing, the relief prayed for would be granted as a matter of course, under the operation of the contract above expressed; and the only question which remains for consideration is whether the same rule is enforceable against the defendant, a purchaser, in 1891, of the property and rights of the Smiths in the Waukesha water. The claim is made in behalf of the defendant that the contract is not operative against it (1) because of a bona fide purchase without actual or constructive notice of its terms; (2) that it should have been recorded in the patent office, under the trade-mark act of 1881, to make it effective against an innocent purchaser. Neither of these propositions is tenable.

(1) The purchase was not of the character which protects the buyer from equities existing against the seller. Only such trade-mark rights were obtained as were then vested in the Smiths and their assigns, viz.: in 1891, five years after the contract was entered into, when the trade-mark of each had become established in accordance with the definitions of the contract. The purchaser found its trade-name, "Waukesha Hygeia Mineral Spring Water," in constant and well-settled use; and found the complainant using the word "Hygeia" for its distilled waters. This was, at least, notice of the conditions existing under the contract. The defendant can assert no monopoly in the name "Hygeia" unless it can show right through the Smiths. No larger claim can be maintained than was possessed by the source of title, and the right is subject to the same equities, abandonment, or estoppel which could be asserted against the vendor. (2) The contract was not recordable under the trade-mark act. Section 12 is cited as applicable, but it does not provide for record of any instrument except transfers of the right to use trade-marks. As this contract is not a transfer or assignment, and does not purport to give benefits to one which were claimed to be vested in the other, or to confer any new rights, it is not within the act. The fact that complainant had recorded its trade-mark in the patent office would therefore neither require nor permit record of the contract which effected no change in it. That which was entered of record was the same which was specified and retained in the contract. The trade-mark, when established, is valid and entitled to protection, whether registered or not. If the fact of registry confers any benefits, it is only those which are specially provided in the act of congress, and not covered by the common law rule.

The appellant urges as a further objection to the decree that the appellee must be barred from any relief because it is disclosed that at some time during its inception the trade-mark was employed by parties in the name of a corporation, when there was no corporation in fact, violating a criminal statute of the state of Illinois (section 220 of the Criminal Code), which imposes a fine "if any company, association or person puts forth any sign or advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated." This statute has no application here, even if it bears the construction for which appellant contends, for the reason that the fact is undisputed that the complainant was duly incorporated, under the laws of the state of New York, in the year 1885, prior to the execution of the contract in question, and therefore the alleged premature illegal assumption of corporate existence was beyond the scope of inquiry in this case; and for the further reason that the acts do not appear to have been committed in the state of Illinois, or after the commencement of business therein, and were lawful in the state of New York. There is entire absence of any showing of fraud, and we find no ground for this objection, either under the statute referred to or any rules of equity.

As stated in *Canal Co. v. Clark*, 13 Wall. 311: "The office of a trade-mark is to point out distinctively the origin or ownership of

the article to which it is affixed; or, in other words, to give notice who was the producer." The word "Hygeia" has no original signification which would point out the distilled water of complainant, or any other water or article; but it has, by association at least since the making of the contract, become identified with that water in the markets; so that the word used alone is an emblem of the complainant's production, and so used would not be associated with the defendant's water, in the general market, where it had become well known by the combination name, in which the name of its spring and its local designation are preserved. The distinction made in pursuance of the contract is well marked, and is well maintained in the practice which followed under it. It is the duty of the court to protect both the public and the parties from imposition and confusion which would arise from indiscriminate use of these trade-names; and, to the end that each should be distinctive of the origin and ownership by association, the defendant was properly enjoined from infringement, and the decree is affirmed.

WAUKESHA HYGEIA MINERAL SPRINGS CO. v. HYGEIA SPARKLING DISTILLED WATER CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 144.

TRADE-MARKS—WHAT CONSTITUTES INFRINGEMENT.

Defendant had the right to use the words "Waukesha Hygeia Mineral Springs" as a trade-mark, and complainant had the exclusive right to the use of the word "Hygeia" as a trade-mark, except in the form used by defendant. *Held*, that the fact that defendant made the word "Hygeia" more conspicuous than the rest of his trade-mark did not constitute an infringement of complainant's rights.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit for injunction by the Hygeia Sparkling Distilled Water Company against the Waukesha Hygeia Mineral Springs Company. Complainant obtained a decree. Defendant appeals.

This bill in equity is filed by way of supplement to an original bill between the same parties, on which there was a decree in favor of the complainant, restraining the defendant (appellant here) from using the word "Hygeia" as a trade-name otherwise than in the combination "Waukesha Hygeia Mineral Spring," with or without the word "Water" superadded; or, in effect, according to the definitions of the respective trade-marks contained in a certain contract, bearing date August 20, 1886. The present bill seeks further injunctive relief by preventing the defendant from using the word "Hygeia" in the combination allowed by the former decree "in more conspicuous letters than the other words in said combination," by using the same in "larger or different colored letters than the other words in said combination, or in any other manner." A copy of the bill, record and proofs in the original case is annexed as an exhibit, and made a part of this bill; and certain signs, advertisements, labels, etc., referred to as the infringing devices, were before the court as exhibits with the bill. The defendant filed a general demurrer, which was overruled. Upon its election to stand by the demurrer, a decree for perpetual injunction was entered, in accordance with the prayer of the bill; and the defendant appeals from the decree.

Banning & Banning, for appellant.
Herrick, Allen & Boyesen, for appellee.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge (after stating the facts). In an opinion filed herewith (63 Fed. 438), the court has affirmed the decree entered upon the original bill against the appellant, who was defendant in both actions. It is there held that the trade-marks of the respective parties were established in pursuance of the definitions contained in the contract of August 20, 1886, between the complainant and the defendant's predecessors in title, and that the defendant was restricted to use the word "Hygeia" only in the combination and with the qualifications so established. The record in that case, adopted by this bill, shows that the contract referred to was made in recognition of the fact that the name "Hygeia" had attached to the spring at Waukesha, now owned by the defendant, from which its supply of water is furnished for the market. The word "Hygeia" was not taken or obtained as the exclusive right or property of either party. It is only by association that it has become distinctive of the origin or ownership of the water, and has become applicable to the complainant's production when used alone, and to the water of the Waukesha spring when used in the prescribed combination. The whole extent of infringement alleged here is that the name "Hygeia" is made too prominent in the advertisements and labels of defendant, by placing it in larger type or differently colored letters from the other words which compose the trade-name. The only ground upon which the court could interfere in this use would be that of clear liability to mislead the public. We have carefully examined and considered each of the exhibits which were placed before the court to demonstrate the alleged infringement, and each of them contains the words "Waukesha" and "Mineral Spring" or "Mineral Spring Water" in the proper connection with the word "Hygeia," and in such form that they are clearly legible and noticeable, although not so prominent as the latter word. There was no effort at concealment, but it is evident that distinction was sought for the name "Hygeia." This is justified by the fact disclosed by the record that there are several rival springs at Waukesha, each having a separate name, and all advertising and marketing their product as Waukesha Mineral Spring Water, under the name of each spring respectively. To maintain any benefit it may have or claim in the reputation of its spring, in competition with its Waukesha rivals, the defendant makes the reasonable claim that there should be opportunity for making distinction, in its advertisements, labels, etc., of the name which is conceded to identify the spring. Display of this name should be allowed to the extent that the other words of the combination trade-name are not so minimized that purchasers or the public will be misled. The bill, read in connection with the exhibits which enter into its allegations, does not present a case of simulation or device to impose

upon the unwary public or defraud the complainant. If the value of complainant's trade-name is impaired by the fact that the word "Hygeia" also enters into and is conspicuous in the trade-name of the defendant, the conditions are of its own selection, and produced by the concurrent acts of the parties. Adopting a name which was, with at least equal right, the adoption of the Waukesha parties for a portion of their name, the complainant obtained the largest measure of protection which could be claimed for it by the adjustment which placed the word "Hygeia," when used alone, as its trade-name, while the other claimant must use it in connection with other words indicating the different origin of the water.

In the absence of allegation or showing that the defendant so employed the trade-name that the word "Hygeia" only was apparent, and the qualifying words were not noticeable to the ordinary observer, and in the absence of any appearance of attempt to defraud the complainant or impose upon the public, by similitude, or by so placing or minimizing the qualifying words that they are not fairly observable, there is no occasion for interference by the court. Jurisdiction can be exercised for the protection of the parties in such trade-mark as they have established by their acts, but not to make exclusive and more valuable that which was not exclusive in its adoption. The complainant is entitled to protection where the word "Hygeia," as applied to commercial water, is used alone, either in fact or in practical effect; but such use by the defendant does not appear from the allegations of this bill, considered as a whole. The decree is therefore reversed, at the cost of the complainant, and the cause remanded, with direction to dismiss the bill.

WERCKMEISTER v. PIERCE & BUSHNELL MANUF'G CO.

(Circuit Court, D. Massachusetts. August 7, 1894.)

No. 3,149.

1. **PAINTING—INTERNATIONAL COPYRIGHT—PROTECTION AGAINST INFRINGEMENT.**
The provisions of Act March 3, 1891, c. 565, § 3 (26 Stat. 1107), as to copyrighting a painting, are independent of those in regard to copyrighted photographs, and infringement of the copyright of a painting may be enjoined without regard to whether complainant had taken steps entitling him to import photographs of it.
2. **SAME—EXTENT OF PROTECTION.**
A valid copyright of a German painting gives protection against any reproduction of it, as by photographs.
3. **SAME—WHO MAY COPYRIGHT—"ASSIGNS."**
Under Act March 3, 1891, c. 565, § 1 (26 Stat. 1107), providing that the author or proprietor of any painting "and the assigns of any such person," shall, on compliance with the copyright provisions, have the sole liberty of publishing, one to whom a German artist gives the exclusive right of reproduction and publication is entitled to copyright, he being within the term "assigns."
4. **SAME—NOTICE—INSCRIBING COPY.**
Under Act July 8, 1870, c. 230, § 97 (Rev. St. 4962), denying one the right to sue for infringement of his copyright unless he give notice thereof by inserting in the several copies of every edition published, on the

title page or the page immediately following, if it be a book, or, if a map, chart, photograph, painting, etc., by inscribing on some portion of the face or front thereof the words, "Entered according to act of congress," etc., the words should not be inscribed on a copyrighted painting; but on the photograph or other publications thereof.

Suit by Emil Werckmeister against the Pierce & Bushnell Manufacturing Company for infringement of a copyrighted painting. Decree for complainant.

Goepel & Raegener, for complainant.
Alex. P. Browne, for defendant.

PUTNAM, Circuit Judge. On or about October 1, 1891, G. Naujok, a German subject, and a resident of Germany, painted in oils a picture, called by him, and in this case, "Die Heilige Cäcilie," an undoubtedly meritorious work of art. On the 5th of the succeeding March he executed, in behalf of the complainant in this case, who describes himself in his bill as a citizen of the empire of Germany, and who transacts his business under the name of the "Photographische Gesellschaft," an instrument of which the following is a copy:

"I transfer hereby to the Photographische Gesellschaft, in Berlin, for my work, 'Die Heilige Cäcilie,' the right of publication,—by which I wish to have understood the exclusive right of reproduction,—against a payment of 500 marks, and nine gratuitous copies thereof.

"Königsburg, in Prussia, March 5, 1892.

Gustav Naujok."

The artist never painted a replica. In the summer of 1892 he sent the picture to Munich, to the Grosse Internationale Kunstausstellung, where it was sold to some person unknown to the artist, and not shown in this case; and neither the artist nor either of the parties to this case know where the picture is, or where it has been since the sale. From January, 1892, until March, 1892, the picture was publicly exhibited at Berlin in the Kunsthandlung von Schulte, a public art gallery, the rules of which as to suffering copies to be taken are not shown. No other publications are proven, except the photographs of the parties to this case. On the 16th of May, 1892, complainant delivered at the office of the librarian of congress a copy of the title of the painting, and a description of it, and obtained the following certificate:

"Library of Congress, Copyright Office, Washington.

"To wit: Be it remembered, that on the 16th day of May, anno domini 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this Office the title of a Painting, the title or description of which is in the following words, to wit:

DIE HEILIGE CACILIE.

G. Naujok.

Photo. & Descrip. on file;

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

"A. R. Spofford, Librarian of Congress."

Afterwards, on or about the 15th of September, 1892, complainant put on the market in Germany a photograph of the painting, and subsequently imported, or caused to be imported, the same photo-

graph, and has sold it, or caused it to be sold, in the United States. Subsequently the defendant sold in the United States a photograph, which is an undoubted infringement, if, under the law, there can be an infringement; and the bill is brought to restrain the defendant, touching its photograph, and for other relief.

The photograph of the complainant bears the inscription, "Copyright, 1892, by Photographische Gesellschaft," and reproduces from the picture the signature of the artist; but it contains no notice, unless implied in the foregoing words, that the painting itself was ever copyrighted, nor has there been inscribed on the painting, or its mounting, the notice pointed out by section 4962 of the Revised Statutes. By the proclamation of the president of April 15, 1892 (27 Stat. 1021), the benefit of the international copyright act of March 3, 1891, c. 565 (26 Stat. 1106), was extended to German subjects. The act of 1891 (section 3) provides that the two copies of a copyrighted photograph required to be delivered at the office of the librarian of congress shall be printed from negatives made within the limits of the United States, or from transfers made therefrom; and that during the existence of the copyright the importation into the United States of the photographs copyrighted, or any edition or editions thereof, or any negatives, shall be prohibited. Consequently the complainant's imported photographs cannot be directly protected by statute. As they are not copyrighted, and are, therefore, perhaps, not prohibited from importation, it is claimed that, if his positions in this case are sound, the policy of the provisions of the third section, to which we have referred, may be partially defeated. These provisions, however, are apparently precise, in that they are limited to the cases of "book, chromo, lithograph, or photograph." *Littleton v. Oliver Ditson Co.* (decided by this court August 1, 1894) 62 Fed. 597. They do not assume to reach any reproduction which does not involve depositing with the librarian of congress two copies; and the case at bar does not fall within the latter class, but within the class requiring one photograph of the subject-matter of copyright. Therefore we are apparently not met by any broad policy, such as would trouble us in reaching a result not fairly excluded by the letter of the statute. But, as the right of the complainant to enjoin the defendant does not depend on the right of the former to import photographs, we need not particularly investigate the effect of these statute provisions. At the common law, the artist or the owner of the painting can prohibit reproductions of it until he in some way publishes it; but, after publishing it, either by photographs or otherwise, it becomes subject to the same rules as other published matter, and the public becomes entitled to it. This principle is so fundamental that it need not be elaborated, or fortified by any citation of authorities, and we will only refer on this point to *Parton v. Prang*, 3 Cliff. 537, 548, 549, Fed. Cas. No. 10,784. Moreover, a mere exhibition of a picture in a public gallery, like that at Berlin, does not, at common law, forfeit the control of it by the artist or the owner, unless the rules of the gallery provide for copying, of which there is no evidence in this case. But if, by proper authority, which it does not lie in the mouth of the complain-

ant in this case to deny, photographs of this painting have been put on the market in the United States, under such circumstances that they are not protected by the copyright statutes, the public is free to copy it, and to sell copies of it in the legitimate course of trade, and the bill cannot be maintained.

The propositions of the complainant necessary to maintain his case are that, by virtue of the agreement given him by the artist, which we have already set out, he was entitled to copyright the painting itself, and that he has lawfully done so; and that, the painting being copyrighted, all reproductions of it in every form are infringements. While he admits that he is neither the author nor the proprietor of the painting, yet he claims, by virtue of the instrument given him by Naujok, to come in under the words "assigns of any such person," found in section 4952 of the Revised Statutes. In response to the complainant's claim, the defendant, among other things, refers to section 4962 of the Revised Statutes, and asserts that, even if the complainant's position was correct in other respects, he could maintain no action for any infringement of his copyright, because the words specified in the section last referred to have not been inscribed on any visible portion of the original painting, or on the substance on which the painting is or may have been mounted.

Neither party has cited to the court any decided cases nor referred us to any other authorities, bearing directly on the principal questions involved. *Yuengling v. Schile*, 12 Fed. 97, has been brought to our attention, as leading up to the proposition that the proprietor of a painting, merely as such, has no right to a copyright thereon. We do not understand that such is a proper inference from that case, or that the statute law is to that effect. We have no occasion to make any issue touching any questions which were actually decided in that case. Our attention is also called to *Schumacher v. Schwencke*, 30 Fed. 690; but this case, so far as it applies to the case at bar, is only in harmony with *Gambart v. Ball*, 14 C. B. (N. S.) 306; *Rossiter v. Hall*, 5 Blatchf. 362, Fed. Cas. No. 12,082; and *Ex parte Beal*, L. R. 3 Q. B. 387, 394,—to the effect that the person holding the copyright of an original painting is protected against any reproduction of it, whether by a photograph of it, by a reproduction of an authorized photograph, or in any other manner. The decisions of the English courts are of but little assistance, because their statute touching copyrights of original paintings (25 & 26 Vict. c. 68) makes special provisions with reference to the right to a copyright impliedly passing with the picture itself; and also the general copyright act now in force (5 & 6 Vict. c. 45) contains, in section 2, a definition of the word "assigns," and, in section 25, provisions about the nature of the estate in copyrights, not found in the statutes which govern us. Some English cases will, however, be referred to, which relate incidentally to the determination of this case.

Returning to the principal propositions at issue, they divide themselves into three: First, whether the complainant had a lawful right to copyright the original picture; second, whether, if the copyright is valid, it carries with it protection against all reproductions

of it, including the photographs of the defendant; and, third, whether the omission to inscribe on the original painting, or its mounting, either of the expressions required by the copyright statutes, and already referred to, bars this action. If either of these propositions is determined against the complainant, we, of course, need go no further. We have no doubt that the law is correctly laid down in the cases to which we have referred,—that the author or proprietor of a painting, who properly copyrights it, is protected against all reproductions of it in any form. This proposition is so fundamentally essential to the policy of the copyright statutes that it needs no elaboration; and it follows logically that, if the complainant in this case, who received from the artist the exclusive right of reproducing the painting, became thereby entitled to a copyright, his copyright protects him as fully as the artist would have been protected if he had reserved his right of reproduction, and taken the copyright himself. Therefore, on the second proposition at issue, we are clearly with the complainant. It is to be observed that the instrument given by Naujok to the complainant contained no expression of any authority to copyright, in the name either of Naujok or the complainant; but this is of no consequence if the complainant's contention is correct that he is covered by the words "assigns of any such person," already cited. In accordance with that contention, the complainant registered the copyright in his own name, and on his own right, and not in the name of Naujok, nor on the assumption of any agency coming from Naujok, either revocable or otherwise. It is also to be noticed that the case runs clear of the difficulties which would arise from the word "sole" in section 4952 of the Revised Statutes, if the right vested in the complainant by Naujok had not been exclusive, even as against Naujok himself. At the common law the right to control the publication of a painting follows the title to the painting. It vests in the artist so long as he retains the painting; but when it is sold by him, if sold without any qualification, limitation, or restriction, all the incidents of the painting, including that of controlling its publication, vest in the purchaser. This is in strict harmony with the law touching the incidents of property, and flows necessarily out of it. We hardly need to cite authorities to sustain this proposition, but refer again in this connection to *Parton v. Prang*, 3 Cliff. 537, 550, 551, Fed. Cas. No. 10,784. The English copyright statute (25 & 26 Vict. c. 68), which created the law authorizing copyrighting of paintings (*Fishburn v. Hollingshead* [1891] 2 Ch. 371, 379), and which is still in force, contains regulations touching this matter, enabling the artist, when disposing of his painting, to retain or dispose of the right to reproduce it. But nothing of this nature is found in our statutes, and the question arises, therefore, how far their general terms are intended to vary from the practice of the common law referred to. Is there or is there not enough in them to overcome the presumption that the statutes do not change the common law, except so far as the intention to do so is apparent? In the absence of something showing an intention to vary the common-law rule, it must be presumed to

stand. We do not mean by this that at common law the owner of a painting might not empower some other person than himself to elect as to publication, or that he might not dispose of the painting, reserving to himself the right of such election; but we mean to say, that, inasmuch as at the common law this right is presumably in the proprietor of the painting, it requires something more than general expressions in a statute to satisfy the court of an intention to vest the privilege of securing a copyright in any other person than the one in whom it presumably exists. Moreover, the word "assigns," on which the complainant relies, is ordinarily construed as only indicating the nature of the estate, and its ordinary effect is only to the extent of declaring that whatever is obtained is of an assignable character. Strictly, an authority to assign, or an assignment, relates to what already exists, and has no pertinency to the creation of a right out of another right,—as by the instrument given by Naujok to the complainant. Such instruments are ordinarily spoken of as "licenses," and not "assignments," and the holders of them as "licensees" and not "assigns." This is the common rule under the statutes touching patents, although they contain a system so much more elaborated than those touching copyrights that it is not safe to reason too liberally from one to the other. Instruments of this class relating to patents are ordinarily regarded as strictly in gross. *Oliver v. Chemical Works*, 109 U. S. 75, 82, 3 Sup. Ct. 61. But the instrument in this case is so strongly expressed that it must be construed as vesting in the complainant all the right of publication which Naujok had, or ever could have, and therefore as vesting a full estate, which would pass by succession, and also be assignable. The instrument, having been executed in Germany, where the technical rules of the common law touching the particular phraseology required to create more than a life estate or a personal interest do not exist, is especially free from doubt on this score. It cannot be questioned that all the right which Naujok had to publish or reproduce passed out of him, and, as it was in him assignable and descendible, it follows necessarily that the same qualities attach to it as vested in the complainant. It is for this, with other reasons, that, as we have already stated, no embarrassment arises in this case from the word "sole" in section 4952 of the Revised Statutes.

Following out the same line touching the distinction between transferring interests already existing and creating new ones, and between assignments and licenses, it is stated in *Copinger on the Law of Copyright* (3d Ed. p. 449) that it has been decided that a document conveying the sole right to reproduce a picture in chromos, or in any other form of color painting, for the term of two years, was not an assignment, and therefore did not need to be registered; but the learned author questions this decision. In *Lucas v. Cooke*, 13 Ch. Div. 872, Mr. Justice Fry—of especially large experience and ability in cases of this character—used, with reference to an instrument of this nature, the words "assignment" and "license" interchangeably; and, on the whole, it involves no vio-

lent presumption to maintain that section 4952 of the Revised Statutes, in its use of the word "assigns," had no reference to its narrow, technical meaning to which we have referred. The English statute, 25 & 26 Vict. c. 68, already referred to, in designating the persons who may copyright an original painting, uses only the word "author," and the words "and his assigns." The word "proprietor" occurs at various points in the English copyright acts, but not in this connection; and the same may be said as to the copyright statutes of the United States prior to the act of July 8, 1870, c. 230, § 86 (16 Stat. 212). The provisions of the statute last named were re-enacted by section 4952 of the Revised Statutes, and further re-enacted, so far as this point is concerned, by the first section of the international copyright act of March 3, 1891, c. 565 (26 Stat. 1107). As there found, it provides, in terms, that the "author * * * or proprietor of any * * * painting * * * and the assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending." The phraseology of the statute 25 & 26 Vict. c. 68, might not require going beyond the ordinary implications of the common law, or beyond holding that the word "assigns" contemplated any one except the purchaser of the painting itself. But section 4952 of the Revised Statutes, as re-enacted in the international copyright act, in addition to the word "author," uses the word "proprietor;" and this latter word extends to paintings as well as to the other matters designated in the section. By the word "author" and the word "proprietor" our statute exhausts everything which the English statute necessarily covers by the word "author" and the words "or his assigns;" and, if nothing more was contemplated than is provided by the English statute, the word "proprietor," or the word "assigns" in our statute—one or the other of them—would be necessarily surplusage, and of no effect. The language of our statute is not only explicit in including "author," "proprietor," and "assigns," but is rendered even more so by the use in the same connection of the words, "upon complying with the provisions of this chapter." These demonstrate that the assigns, equally with the author or proprietor, may register and complete the copyright.

Applying the ordinary rules of construction, the court must ascertain, if it can, why, after using the word "proprietor," our statute also uses the word "assigns." Certainly this requirement cannot be met if the word "assigns" is limited to its ordinary technical meaning, already referred to, or to the holder of the original painting; because all this is covered by the word "proprietor." We therefore cannot escape the conclusion that the statute requires us to broaden out the class of persons authorized to take out a copyright, so as to include others than mere proprietors of the paintings themselves, having regard always, of course, to the word "sole," which the section contains, and to which we have already referred. We are unable to perceive the force of all these words, unless the statute covers cases of the precise character of this at bar. What

the complainant claims has been accomplished in this case could clearly have been accomplished by first registering a copyright or copyrights with various nationalities by Naujok, or in his name, and by his then assigning them absolutely and without reservation to the complainant. The result, under those circumstances, would have been precisely the same as the result which the complainant now maintains; and certainly a construction of a statute which avoids this circumlocution cannot be unjust or against good sense. On the whole, we think the complainant rightfully and effectually registered the copyright, as maintained by him.

So far the history of the legislation in the United States has not been of much assistance to the court, but on the remaining proposition it proves to be of great value. The defendant claims that section 4962 of the Revised Statutes is to be read literally, and that, being thus read, it requires the notice to be inscribed on the painting itself, or at least on the mounting of it. If the defendant is right in this literal reading, it follows that the statute is satisfied by inscribing the notice on the original painting, or its mounting, and that all reproductions thereof, whether in engravings, photographs, or other forms, go free from the notice. The supreme court has said, what must be patent to every one, that the object of the statute in this particular is to give notice of the copyright to the public. *Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 4 Sup. Ct. 279. The purpose of the statute, therefore, would wholly fail of accomplishment by inscribing notice on the painting only, which presumably passes into some private collection, entirely out of the view of the general public. This is so patent that it need not be enlarged upon, and would be enough of itself to persuade the courts very urgently to look, if necessary, beyond the mere letter of the statute. Moreover, the same clause of section 4962 on which the defendant relies groups paintings with engravings, photographs, chromos, and various other articles, which need not be specified; and, if the defendant's construction properly applies to paintings, it would seem to follow that it applies to all the other articles named in the same clause, and that the notice, therefore, should be inscribed on some original or quasi original engraving, photograph, or chromo, and not on the copies thereof which go out to the public. But the practice as to such articles is distinctly the other way, and its correctness was expressly recognized in the decision of the supreme court last cited, in which the court said that the notice is to be given by placing it "upon each copy." Thus, in a single sentence, the supreme court has torn down the structure of apparent literalness on which the defendant relies.

An examination of the history of the legislation out of which section 4962 developed makes the result entirely clear. The first statute requiring the inscription of a notice was that of April 29, 1802, c. 36 (2 Stat. 171). At that time the province of the copyright laws was narrow, and was divided in that statute into two fields. Section 1 provided that the copy of the record of registration required by law to be published in one or more newspapers should be in-

serted on the title-page, or the page immediately following it, of every book, but that in the case of a map or chart certain abbreviated phraseology, pointed out by the statute, should be impressed "on the face thereof." Section 2 extended the copyright privilege to historical and other prints, and required that the same entry impressed on the face of maps and charts should be engraved on the plate, with the name of the proprietor, and printed on every print. Under this statute it was clear that the notice prescribed should go out to the public on every copy protected by the statute, and evidently the engraving of it on the engraver's plate was only to make sure that the main purpose of the statute was accomplished.

The next statute is the act which so long stood as the copyright code of the United States,—that of February 3, 1831, c. 16 (4 Stat. 436). The provisions of that act touching the question now under examination we reproduce here at length:

"Sec. 5. And be it further enacted, that no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured on the title-page, or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: 'Entered according to act of congress, in the year , by A. B., in the clerk's office of the district court of ,' (as the case may be)."

This statute somewhat extended the scope of the copyright privilege, but left the provision on this point entirely clear. A distinction was made by section 5 between a book on one hand, and a "map, chart, musical composition, print, cut, or engraving" on the other; but it was only as to the precise place on which the notice should be inscribed,—in the one case on the title-page, or the page immediately following it; and in the other on the face, with a provision that, in cases of volumes of maps, charts, music, or engravings, it should be on the title-page or frontispiece. Except as to the mere place of impressing the notice, the statute applied without discrimination to all articles within the scope of the copyright privilege, and looked for the inscription of the notice on every copy which went out to the public, and nowhere else. The words, "the several copies of each and every edition," ran through and governed every part of the section. This is so clear that it needs nothing to be added to the statement of the fact.

The next act was that of August 18, 1856, c. 169 (11 Stat. 138), which contained nothing to be noticed in this connection. Next came the act of March 3, 1865, c. 126 (13 Stat. 540). This is important, because it first extended the copyright privilege to photographs, and provided that this extension should inure to the benefit of the authors of photographs "upon the same conditions as to the authors of prints and engravings." In other words, when photographs first came into the copyright statutes, they came in under the clear provisions of the fifth section of the act of 1831, requiring the inscription of the notice to be on every copy going out to the

public, and nowhere else. That was the law when the Revised Code of July 8, 1870, c. 230 (16 Stat. 198), was adopted. The provision we are looking for is found in section 97 of that act. This statute first extended the copyright privilege to paintings, statues, statuary, models, and designs, and section 97 was a consequent attempt to cover the additional articles by condensation of phraseology. It was afterwards incorporated into section 4962 of the Revised Statutes, on which the defendant rests. To this time there had been no indication of any policy except that which the supreme court, in the citation we have made, had said was necessary to give the public notice of the copyright privilege claimed,—a policy which we have already seen expressly included photographs, maps, and charts as well as books. In this attempted condensation, maps, charts, and photographs were dislocated from the express provision touching books, and associated with paintings, statues, statuary, models, and designs. As no reason can be suggested for any change touching maps, charts, and photographs, the presumption is that congress intended, notwithstanding the awkward phraseology used, that the law should continue the same as to them; and, if this presumption stands, it carries with it the same law for paintings as for maps, charts, and photographs. *Logan v. U. S.*, 144 U. S. 263, 302, 12 Sup. Ct. 617. The whole section was as follows:

"Sec. 97. And be it further enacted, that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of congress, in the year —, by A. B., in the office of the librarian of congress, at Washington.'"

The words, "several copies of every edition published," may well be held to permeate and govern that portion of the section commencing with the words "if a map, chart," etc., as effectively as it does the words "if it be a book," and the section may well be construed precisely the same as if the words "if it be a book" preceded the words "on the title-page." The word "thereof," in the latter part of the section, may well be held to refer back to the words "the several copies," in its early part. For clearness, we give the section as thus rearranged:

"That no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting in the several copies of every edition published, if it be a book, on the title-page or the page immediately following, or if a map, chart, * * * painting, * * * by inscribing upon some portion of the face or front thereof * * *."

Under the circumstances, the breaking up and dislocation of the section into sentences or phrases should be held to have been merely for the purpose of indicating the place where the notice is to be inscribed, according to the subject-matter of the publication,—

that is to say, on the title page, or on the page immediately following, if it be a book, but, if it be other matter, on the face, or front; and it should be further held that in all other particulars the directions of the statute are identical with reference to each article to which the subject-matter relates. A rearrangement of clauses or parts of sentences is justifiable under the most common circumstances, and is especially justifiable in order that the statute may not be read contrary to its plain purpose and the general public policy. A careful comparison of this section of the act of 1870 with the corresponding section of the act of 1831 shows that there are no other differences, except those of detail, required by the extension of the copyright code, nor any which can affect the proposition we are considering. This provision of law, as we have already said, was re-enacted without substantial change in section 4962 of the Revised Statutes. It was again re-enacted in the act of June 18, 1874, c. 301 (18 Stat. 78). The only differences are the option of the shorter form of notice contained in the latter statute, and a broadening out of the provision touching the portions of the published article on which the notice may be inscribed. No other purpose in the last enactment was suggested in *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, in which it is somewhat referred to.

The only remaining act to be considered is that of August 1, 1882, c. 366 (22 Stat. 181). The main purpose of this statute was to make sure of the accomplishment of one general purpose of the act of 1874. The latter required that the notice be inscribed on some visible portion of the published articles, while the act of 1882 expressly permitted it, under some circumstances, to go on the back or bottom of such articles, although in some senses the back or bottom might not always be visible portions thereof. The reading of the act of August 1, 1882, contains, however, a legislative construction of the prior statutes on the point which we are considering. The prior statutes included designs in the same class with maps, charts, photographs, and paintings. Therefore if, with reference to paintings, the inscription is to go on the painting itself, it would follow, as a matter of course, that, with reference to models and designs, under section 4962 of the Revised Statutes, it should appear on the original models and designs, and not on the articles put on the market constructed according to them. But the act of 1882 says in terms that the manufacturers of designs of molded decorative articles may put the mark prescribed by statute, not on the designs, but "upon the back or bottom of such articles." As the clear purpose of this statute related entirely to the place where, on any particular article, notice might be inscribed, and it clearly was not in any way intended to change the law as to what the inscription shall be impressed on, the effect of this phraseology cannot be mistaken. On the whole, while we must admit that the phraseology of the statute is unfortunate, and might have been more clearly and positively expressed, we are convinced that, as we have already said, the differences in the various phrases relate entirely to the place on which the notice is to be inscribed, according to the subject-matter of the article published, and that,

with that exception, the phrases apply alike to all classes of articles, and relate entirely to the notices to be inscribed on what goes to the public in various forms and editions, and that there is no requirement that any shall be inscribed on the painting itself, more than there is that there shall be an original or quasi original map, chart, musical composition, print, cut, engraving, photograph, drawing, chromo, or model or design, to be inscribed with the notice, as the defendant claims the painting in this case should have been inscribed.

The defendant also claims that the words inscribed on the photograph, namely, "Copyright, 1892, by Photographische Gesellschaft," give no notice that the painting has been copyrighted, and imply only that the photograph has been. If this is so, the fault is that of the statute, and not of the complainant, as he has used exactly the phraseology imposed by law. Undoubtedly the statute, if it had not been so condensed, might have given a form of notice more in harmony with the facts of cases of this character; but we can see that in this notice there is enough to give any one who is looking for the truth, and who desires to avoid infringement, the thread which will lead him easily to the actual condition of the copyright. There is something in the form of this notice which tends to sustain the contention of the defendant that it should have been inscribed on the painting itself, but not enough to overcome the force of the rules of construction which have led us to the result we have explained. We perceive nothing further in the case which requires any observations from the court.

Decree for the complainant.

BURKE v. DAVIS.

(Circuit Court, N. D. Illinois. July 21, 1894.)

1. CUSTOMS DUTIES—CONSIGNMENT TO AGENT—VALIDITY.

Act June 10, 1890, § 1, providing "that all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned," does not prohibit the consignment of imported goods to another than the real owner.

2. CLAIMS AGAINST UNITED STATES — JUDGMENTS AGAINST COLLECTORS FOR AN EXCESS OF DUTIES.

Judgments against collectors for an excess of duties collected are not "claims upon the United States," within the meaning of Rev. St. § 3477, which makes void transfers and assignments of any claim upon the United States, unless freely made and executed in the presence of at least two attesting witnesses after its allowance, etc.

3. SAME—ASSIGNMENT ORDERED BY COURT.

Even if such judgments are claims upon the United States, the statute does not affect assignments to the real owner of the judgments, made by an agent in whose name they were rendered, by order of a court, since such statute applies only to voluntary assignments.

4. EQUITY—JURISDICTION TO COMPEL ASSIGNMENT OF JUDGMENTS FOR EXCESS OF DUTIES.

Where an importer obtains judgments, in the name of his agent, against a collector, for an excess of duties collected on goods imported in the

name of such agent, and the agent refuses to assign the judgments to his principal, the latter has no adequate remedy at law, and a court of equity has jurisdiction to compel such assignment.

This was an action by William H. Burke against Frank L. Davis to compel defendant to assign to plaintiff certain judgments obtained by plaintiff, in defendant's name, against a revenue collector, for an excess of duties collected on goods imported by plaintiff in defendant's name. Heard on demurrer to the bill. Demurrer overruled.

Richard S. Thompson, for complainant.
Chas. H. Aldrich, for defendant.

BUNN, District Judge. This is a general demurrer to a bill in equity. The facts, as they appear by the bill of complaint, are substantially these: The complainant is a citizen of London, England, and is engaged in the business of manufacturing, importing, and selling marble and mosaic decorations for buildings; having establishments at the city of Chicago, Illinois, Buffalo, and New York, in the state of New York, and at London, England, and Paris, France. In August, 1888, he employed the defendant, Davis, as his clerk and agent in and about his business at Chicago. That, in the course of complainant's business at Chicago, it became necessary for the complainant to be absent from Chicago much of the time, and in consideration thereof he appointed said Davis his agent at Chicago, to receive importations of marbles, mosaics, and merchandise which he was importing from time to time to Chicago, from his London and Paris establishments, for use in his Chicago business. That said Davis had no interest whatsoever in said importations or business, except as clerk and agent of complainant. That in the years 1889 and 1890 he made various shipments of said goods from Paris and London in the name of said Davis as consignee. That there arose differences between the complainant and the collector of the port of Chicago in regard to the proper duties to be paid upon such goods. That thereupon the complainant paid the duties claimed and charged by the said collector, under protest, in conformity to the law. That said protests were made in the name of said Davis, he being named as consignee, though having no interest in the property or business. That complainant took appeals to the secretary of the treasury, in the name of said Davis, from the decision of the collector fixing the proper duties to be paid, and that the decisions of the collector were affirmed by said secretary of the treasury. That thereupon complainant, in the name of said Davis, took appeals from the decision of the secretary of the treasury to the United States circuit court for the northern district of Illinois. That he prosecuted said several appeals to decisions in said United States circuit court, and that judgments were therein rendered in favor of the said Frank L. Davis against Anthony F. Seeberger, defendant, for various sums, amounting in all to \$9,000 or thereabouts, for excessive duties paid upon said goods by him, the said complainant. That said Davis

had at no time any interest in said suits or appeals, or in the said business, except as the clerk and agent of the complainant, but that the complainant was solely interested therein, and that the judgments so obtained against the collector are the property of complainant, the defendant being merely a trustee and agent of the complainant in the procurement thereof; but that, nevertheless, the said defendant has quit the service of the complainant, and refuses, though so requested, to assign such judgments to the complainant. This suit is brought to restrain the defendant from assigning said judgments to third persons, and to require him to assign them to complainant. The defendant demurs to the bill, assigning three general grounds of demurrer, which will be noticed in their order.

First. It is claimed there was a violation of a positive statute of the United States in having defendant named as consignee when he was not in fact the owner, and that, therefore, there can be no relief granted to the complainant. The provision of law referred to is found in section 1 of the customs administrative act of June 10, 1890, which is as follows:

"That all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned."

It is evident from a reading of the provision that it can have no such effect as is claimed for it by counsel. There is no prohibition against having goods consigned to a person other than the real owner. The provision is that, for the purposes of the tariff act, the person named as consignee shall be deemed and held to be the owner of the property, whether he is in fact the owner or acting only as agent, as the defendant acted in this case.

Second. It is contended by the defendant that these judgments are claims against the United States, the assignment of which is prohibited by section 3477, Rev. St. U. S., and that equity will not compel the defendant to do what the law has prohibited him from doing voluntarily. This ground of demurrer, though seemingly more plausible, is no whit sounder, than the other. These judgments are not claims against the United States, within the meaning of that section. They come neither within the letter nor the spirit of that provision. The purpose of that provision was to prevent embarrassment on the part of the government by the trading in claims against the government. Section 3477 provides that:

"All transfers and assignments made of any claim upon the United States, * * * whether absolute or conditional, * * * shall be absolutely null and void unless freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing a warrant for the payment thereof."

In the judgment of the court, this provision has no reference to claims in the form of judgments against the collectors of revenue for an excess of duties collected. If the facts set forth in the bill be true,—and they are admitted for the purpose of this demurrer,—the complainant is, and ever has been, the real and

substantial owner of these judgments, and the defendant never had any real interest in the same, or any interest at all, except as trustee and agent of the complainant; and it is a mere question as to whether the court can and will compel him to execute the trust which he took upon himself. It hardly lies with him to say that the government or the collector of the port will not recognize the decree of the court as valid. Allowing the judgments to be a claim against the government,—and no doubt the government, in practice, whatever its legal obligations may be, will in such cases save the collector harmless,—there would be no inconsistency, and no risk of embarrassment, in paying these judgments to the complainant, after a decree of the court adjudging the complainant to be the legal and proper owner, or compelling an assignment to him by the defendant. The courts have adjudged several cases not to come within the intent and meaning of the provision. One is where there is an assignment by death. Another is in case of bankruptcy or voluntary assignment for the benefit of creditors. In *Erwin v. U. S.*, 97 U. S. 392, it was held by the supreme court that this provision applies only to cases of voluntary assignments of demands against the government, and does not embrace cases where there has been a transfer of title by operation of law. It is there said, "The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed." So, an assignment under a decree of a court, or a passing of the legal title by such decree, is not a voluntary assignment, nor is it within the evil at which the statute is aimed. The same principle is again affirmed in *Goodman v. Niblack*, 102 U. S. 556; and in this case (opinion by Mr. Justice Miller) the true rule is laid down that the sole purpose of the statute was to protect the government, and not the parties to the assignment. If the government is satisfied to pay to the person adjudged by its own courts to be the true and equitable owner, the party to the assignment cannot complain. In other words, he cannot make this statute a cover and pretext for such a gross fraud and breach of personal trust as is contemplated by the defendant in this case, if the allegations of the bill are true. The language of the court in the last-named case, in speaking of these exceptions to the operation of the statute, such as transfers in bankruptcy and by will, is equally applicable to a transfer by operation of a decree of court. The court says:

"The language of the statute—all transfers and assignments of any claim upon the United States or any part thereof or interest therein—is broad enough (if such were the purpose of congress) to include transfers by operation of law or by will, yet we held it did not include a transfer by operation of law or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made."

The assignment by a decree of court is not a voluntary assignment. The full equitable title being already in the complainant, the court will require the defendant to transfer the legal title,

or will itself, in default thereof, adjudge the legal title to be in the complainant. Such an assignment is necessary, under the facts, that justice may be done, and it will cause neither the collector nor the government any embarrassment.

Much stress is laid by defendant's counsel upon the two cases of *St. Paul & D. R. Co. v. U. S.*, 112 U. S. 733, 5 Sup. Ct. 366, and *Howes v. U. S.*, decided by the court of claims, and reported in 24 Ct. Cl. 170. But these cases are neither of them an authority for the defendant in this case. In the first, there had been an assignment of a claim against the United States by way of mortgage to secure a debt, followed by a judicial sale, and the case was properly held to be within the prohibition of the statute. The claim was conceded to be a claim against the United States, and the fact that the transfer of the claim was in the first place by way of security, which was afterwards made absolute by judicial sale, was held not to alter the case. It was a voluntary transfer by way of mortgage for the security of a debt, and finally completed and made absolute by a judicial sale. It was held to be as much within the statute as though the original transfer had been absolute. This would no doubt be so even if the statute did not in terms include conditional assignments. In the Case of *Howes* the language, in some places, used by the court of claims, is no doubt broad enough to cover the case at bar, if the claim here was one in form against the United States, especially where that court undertakes to give limit to the decisions of the supreme court in the cases before cited and quoted from. But this language must be interpreted with reference to the facts and circumstances before the court. In that case, *Howes & Co.* were the owners of certain claims against the United States for their undistributed portion of the Geneva award money, and which they were prosecuting before the court of commissioners of Alabama claims. Judgments were rendered in the California court against *Howes & Co.*, and a receiver appointed, who was, by the decree of the court, subrogated to the rights of *Howes & Co.*, the claimants, and authorized in terms to bring suits upon these claims against the United States in the court of claims. Suits were accordingly brought by the receiver of *Howes & Co.*, and also by *Howes*, and a sharp contest was made. The receiver first, however, moved in the court of commissioners of Alabama claims for leave to intervene, and to have judgments in said claims entered in his favor; but the court overruled the motion, and gave judgment in favor of *Howes & Co.* The receiver also appeared before the comptroller of the treasury, and asked to intervene as a rightful claimant, but was again overruled. Then suits were brought by both the contesting parties in the court of claims. A case could hardly be stated coming more squarely within the mischiefs which the statute was intended to prevent. Here was a distinct controversy over a claim confessedly against the government, and which, as such, might be prosecuted in the court of claims. A California court had authorized the prosecution of this claim in the court of claims by the receiver, who was to stand in place of the claim-

ants. But the claimants themselves were there contesting the right of the receiver. The court refused to recognize the power of the state court to authorize the prosecution of the claim by the receiver, and gave judgment in favor of the original claimants. In the case at bar the claim is not one in form against the United States. It is not one which could be prosecuted in the court of claims at all. The controversy out of which the claim grew related simply to the proper adjustment of custom duties, prosecuted first before the government officers, and lastly in the United States circuit court. The suits were for the purpose of ascertaining the proper duties to be paid upon certain importations. The United States was not a party to the proceeding. The parties to the controversy were the importer, the complainant in this case, and the collector. When the controversy was settled the law required that the collector, or person acting as such, should liquidate the entry accordingly. Customs Administration Act 1890, § 15. In *Nicholl v. U. S.*, 7 Wall. 122, it was held that cases arising under the revenue laws are not within the jurisdiction of the court of claims. It is only claims against the government that can be prosecuted in that court, and a claim against the collector for excess of duties paid is, when reduced to judgment, a liquidated debt, and not a claim against the government. See *Lopez v. U. S.*, 24 Ct. Cl. 84. The government, in many cases, has recognized claims in the hands of assignees, and when it does so the assignor will not be heard to complain. These judgments already belong, in equity and good conscience, to the complainant; and the defendant has not now, and never had, any substantial interest in them. If assignments are made by him, under the decree of the court, to pass the legal title, or if the court decrees the title to be in the complainant, who shall say in advance that the collector or the treasurer of the United States will not recognize the complainant's right, and pay over the money to him? It clearly does not lie with the defendant to say that they will not.

The third ground of demurrer urged is that the court has no jurisdiction in equity, because the complainant has an adequate remedy at law. It is urged that there is no allegation that the defendant is not responsible, and that if he should collect the judgments the complainant could recover the amount of him in an action at law. But the answer to this is that it is not true that the complainant has an adequate or ample remedy at law. On the contrary, to compel the execution of a trust is a common head of equity jurisdiction. Suppose the defendant should not collect the judgments. What remedy at law has the complainant? Must he stand by and wait for his money until the defendant sees fit to collect it? That would seem to be his remedy at law in such a case, but it requires but a bare statement of the case to show how incomplete and wholly inadequate it would be.

The demurrer to the bill of complaint is overruled, and a decree will be accordingly entered in favor of the complainant against the defendant, unless the defendant answers the bill of complaint, to the merits, on or before the first Monday of September next.

COLBY v. CARD.

(Circuit Court, N. D. Illinois. April 30, 1894.)

1. PATENTS—INFRINGEMENT—TOY BANKS.

In the case of a toy bank having a discharging aperture secured by a spring latch, which is opened from within by the weight of accumulated coin, infringement is not avoided by merely strengthening the spring so that when the last coin is inserted some additional pressure thereon is required to open the bank.

2. SAME.

The Colby patent, No. 373,223, for an improvement in toy banks, held valid and infringed.

This was a suit in equity by Edward J. Colby against George C. Card for infringement of a patent for toy banks.

Barton & Brown, for complainant.

Henry M. Brigham and Cyrus J. Wood, for defendant.

GROSSCUP, District Judge. The complainant claims under letters patent No. 373,223, issued November 15, 1887, to Edward J. Colby, for an alleged improvement in toy banks. The first and principal claim of the patent is as follows:

A toy bank consisting of a hollow toy provided with a coin-receiving and coin-discharging aperture, a movable cover for the discharging aperture, and a spring latch to secure the same from within; said spring latch being normally closed, but constructed to be opened by the weight of the coin within.

The essential feature of the plaintiff's patent is the combination, with a hollow toy having a coin receiving and discharging aperture, of a spring latch which secures the opening aperture from within until the specific weight of coin operating thereon opens the latch. The defendant's device is a plain tube, with like opening and discharging apertures and a spring latch so arranged with reference to the capacity of the tube that the last of a given number of coins is forced through the open aperture, and thus communicates the pressure to the latch, which causes it to open. The pressure operating upon the latch in the case of the complainant's device, and necessary to overcome the resistance of the spring, is the weight of the coin. The pressure in the defendant's device is the weight of the coin, with such added force as is communicated to the column of the coin by the forced introduction of the last piece. In one the operating force is weight, pure and simple; in the other, the operating force is weight added to by the pressure which is communicated by a wedge through a solid column. The principal question is whether these are mechanical equivalents. In my opinion they are. The defendant adopted complainant's idea of a spring, and has simply so strengthened it that a little pressure, added to the weight of the coin, is needed to overcome its resistance. This is no reasonable advancement upon or differentiation from the complainant's idea.

The complainant's patent is not, in my opinion, anticipated either by the Bossert or by the Gabbey patents. It is not seriously

claimed that the first is an anticipation of the complainant's particular combination. In regard to the Gabbey patent, it seems to me that while the weight of the contained grain causes the opening and shutting of the valves, and thereby the registration of the amounts, somewhat analogous to the Colby invention, yet the machines, as machines, are different. With the patent before the inventor, he would have to exercise almost as much invention to adapt it to the peculiar requirements of a money bank as would an inventor in producing it without the presence of the Gabbey patent. For the foregoing reasons the findings will be for the complainant, against the defendant, George C. Card, and an injunction will issue accordingly.

CAMPBELL et al. v. BAYLEY et al.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1894.)

No. 14.

1. INVENTION—MANUFACTURE.

A device, in order to be patentable, must be novel, whether it be deemed to be a manufacture or a machine (Rob. Pat. §§ 182, 185, note), within the meaning of the patent law, and the test of novelty would seem to be essentially the same in the one instance as in the other.

2. PATENTS FOR INVENTIONS—CATCH-BASIN COVERS.

The first claim of letters patent No. 204,882, issued June 18, 1878, to George G. Campbell, for a catch-basin cover constructed with a slanting front, grate bars, and raised partition, is void for want of invention.

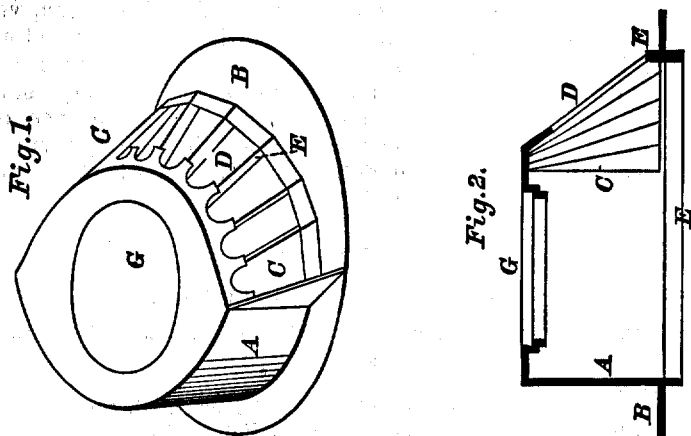
Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Suit by Gardiner Campbell and George G. Campbell against James E. Bayley, Arthur J. Bayley, and Harry F. Bayley for injunction and accounting. Defendants obtained a decree. 45 Fed. 564. Complainants appeal.

Suit by the appellants against the appellees for an accounting, and to enjoin infringement of the first claim of letters patent No. 204,882, issued June 18, 1878, to George G. Campbell, one of the appellants, for certain improvements in catch-basin covers. The specification and claims of the patent are of the following tenor:

"My invention has for its object the providing of a catch-basin for the corner of streets, which the following description will more fully show: Fig. 1 is a perspective view of my invention, and Fig. 2 a sectional view of the same. In the drawings, A is the body of the catch-basin cover; B, the base of the same; C, C, flanges secured to the base and body for the purpose of holding the stone or other material back to the sidewalk which may be used in setting the cover; D, strips of metal standing obliquely over the opening, to keep rubbish out of the basin as the water flows into the same; E, a raised stop or partition in front of the strips, L, for the pavement to face up against; F, a flange projecting below on the under side of the cover to keep the water from wearing away the mortar between the bricks or stones which the basin may be made of; G, an opening, with cover to the same, for access to the basin. This device is calculated to stand at the corner of a street and jut back into the sidewalk, and the front stands slanting, the bottom part of it projecting to the bottom of the gutter, so that a team in passing, if it hugs too close to the sidewalk, the wheels will strike on the strips of metal, D, and slide down off the same, and the base, B, will be under the sidewalk and paving, so that the basin cover will be held firmly

in place. What I claim as new, and desire to secure by letters patent, is: (1) A catch-basin cover constructed with slanting front, with strips, D, base, B, and raised partition, E, substantially as specified. (2) A catch-basin cover, with body, A, flanges, C, C, and flange, F, substantially as specified." The drawings referred to are as follows:



The defense relied upon is lack of invention or patentable novelty, and in support thereof the following references are made to the prior art: "No. 32,008, granted to William H. Short, for an improved inlet to sewers, April 9, 1861. No. 109,067, granted to Henry Smith, Jr., for sewer catch-basin covers, November 8, 1870. No. 124,061, granted to Abel G. Hodgman, for water courses across roadways, February 27, 1872. No. 125,118, granted to William H. Chase and George White, for cover and trap for sewer basins, April 2, 1872. No. 132,757, granted to Edward L. Dyer, for sewer basins, November 5, 1872. No. 134,978, granted to Henry W. Clapp, for grating for sewer inlet, January 21, 1873. No. 149,373, granted to Henry W. Clapp, for grating for sewer inlet, April 7, 1874. No. 150,072, granted to Ernest L. Meyer, for sewer basins, April 27, 1874. No. 153,425, granted to Ephraim B. Culver, for removable trays for sewer traps, July 28, 1874. No. 167,444, granted to Daniel H. Fernald, for manhole cover for sewers, September 7, 1875. No. 169,551, granted to Louis Johnes, Jr., for sinks, November 2, 1875. British patent No. 255, of 1874, to Wellington Henry Synge, dated January 20, 1874."

The opinion of the court below is reported in 45 Fed. 564.

Erwin & Benedict and John G. Elliott, for appellants.
H. G. Underwood, for appellees.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

WOODS, Circuit Judge (after stating the facts). We concur in the opinion of the circuit court. The argument here in behalf of the appellants rests mainly upon the proposition, apparently not presented below, that the patent in suit is for a manufacture, and therefore entitled to a more liberal construction or treatment in respect to the question of aggregation of parts than if the invention were a machine. The distinction is stated in Robinson on Patents (section 185, note), but the definitions attempted can hardly be deemed clear enough for practical application. In many

cases it would be difficult, if not impossible, to determine satisfactorily whether an article is of one class or the other. Broadly speaking every machine is a manufacture, though not every manufacture is a machine. By the general definitions given in section 182 of the work named, the catch-basin cover with which we are dealing is strictly neither one nor the other, and perhaps may as well be called by either name. The section reads as follows:

"A manufacture is an instrument created by the exercise of mechanical forces, and designed for the production of mechanical effects, but not capable, when set in motion, of attaining by its own operation to any predetermined result. It has no inherent law which compels it to perform its functions in a given method, but receives its rule of action from the external source which furnishes its motive power. In this absence of 'principle' or 'modus operandi' lies the distinction between a manufacture and a machine,—the former requiring the constant guidance and control of some separate intelligent agent, the latter operating under the direction of that intelligence with which it was endowed by its inventor when he imposed on it its structural law."

The cover for a catch-basin can hardly be said to be set in motion or to receive its rule of action from an external source of motive power, and certainly not to require the guidance and control of an intelligent agent. On the contrary, it would be more accurate to say that it operates without guidance, under the direction or in accordance with the structural law imposed upon it by its designer. It performs its functions, necessarily, in a given method, and accomplishes predetermined results. But whether, within the meaning of the patent law, a device should be deemed to be a manufacture or a machine, in order to be patentable it must be novel; and by the decided cases the test of novelty would seem to be essentially the same in the one instance as in the other. "Nothing short of invention or discovery will support a patent for a manufacture, any more than for an art, machine, or composition of matter," said Justice Clifford, in *Glue Co. v. Upton*, 4 Cliff. 237, Fed. Cas. No. 9,607, and the same expression is repeated in *Collar Co. v. Van Deusen*, 23 Wall. 530, 563, in context with the following pertinent statement:

"Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production."

To the same effect are the decisions and discussions in the *Wood-Paper Patent Case*, 23 Wall. 566; *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 311, 4 Sup. Ct. 455, and *Reckendorfer v. Faber*, 92 U. S. 347. Nothing could be more certainly a mere manufacture or instrument, as distinguished from a machine, than the rubber-tipped pencil which was the subject of the last-cited case. It was so treated by counsel and by the court, and yet the combination was held to be merely an aggregation. In the course of the opinion it is said:

"An instrument or manufacture which is the result of mechanical skill *merely* is not patentable. Mechanical skill is one thing, invention is a dif-

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ferent thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish the expense, is not patentable. The distinction between mechanical skill, with its conveniences and advantages, and inventive genius, is recognized in all the cases. * * * The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by thier separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements."

If these propositions are applicable to "the combination of the lead and india rubber, or other erasing substance, in the holder of a drawing pencil," they are applicable to the catch-basin cover now in question, and to the parts of which it is made up. The only new feature claimed for it in argument was the oblique bars, and, in order to distinguish those from the bars in the Synge device, designed for a strictly analogous use, the suggestion was ventured that in that structure the bars are hinged at the upper end, and, being unattached at the lower end, are capable of being lifted,—a suggestion which implied, and, indeed, was followed by the assertion, in answer to a question from the bench, that a catch-basin cover in all other respects like that of the patent would not infringe if made with bars hinged at the top and unattached below. It is evident that patentability cannot depend on such distinctions. The decree below should be affirmed.

ROSS v. CITY OF FT. WAYNE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 147.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—EQUITY JURISDICTION.

Where a suit to restrain the infringement of a patent and to recover damages therefor is begun about two months and a half before the patent expires, the expiration of the patent before any preliminary injunction has been applied for does not deprive the court of jurisdiction of the case to award damages.

2. SAME—ASSIGNMENT AFTER EXPIRATION OF THE PATENT.

Where the complainant in such suit assigns his rights under the patent pending suit, but after expiration of the patent, his assignee is entitled to be substituted as complainant, and to file an original bill in the nature of a supplemental bill. 58 Fed. 404, reversed.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit by Isaac C. Walker against the city of Ft. Wayne to restrain the alleged infringement of a patent. Nathan O. Ross was substituted as plaintiff, and filed a supplemental bill. A demurrer there-to was sustained (58 Fed. 404), and Ross appeals.

On the 21st of April, 1892, Isaac C. Walker brought in the court below his bill of complaint against the city of Ft. Wayne, Ind., alleging infringement of reissued letters patent No. 6,831, issued January 4, 1876, in lieu of original letters No. 165,438, granted July 13, 1875, to Robert Bragg, showing adjudications of the validity of the patent, and praying a discovery, injunction, and damages. At the ensuing May term of the court, on May 5, 1892, the defendant filed a plea, which, besides the special matters al-

leged, contained the averment, equivalent to the general issue, "that said city has never caused to be made, used, or sold, or contemplated the making, use, or sale of any such device as set forth in plaintiff's bill, or its plea herein, nor any device similar to that in plaintiff's bill;" and for a second plea it was alleged "that at the commencement of this suit the patent in the bill set forth was not owned and held by the complainant alone, but was owned and held jointly by the complainant, the Hon. N. O. Ross, of Logansport, Ind., Edward C. Egan, and Atwater J. Treat of Indianapolis, Ind., and others to defendant unknown, in and of the state of Indiana." No further step was taken until the ensuing term of court, when, on November 4, 1892, the appellant, Nathan O. Ross, moved in writing, supported by affidavit, "for leave to file herein the bill, in the nature of a supplemental bill, herewith exhibited," and that he be substituted as complainant, with leave to prosecute the cause in his own behalf and in behalf of the equitable interests recited in the bill, and have the benefit of all proceedings theretofore had in the case. By that affidavit, as well as by the averments of the proffered bill, it appears that, when the suit was commenced, Walker held the legal title of the letters patent in trust for himself, Ross, and three others, and that afterwards, September 14, 1892, with the consent of all of the beneficiaries, Walker transferred his entire right, title, and interest in the patent, and in all rights of action for infringement thereof, and in all rights of whatsoever kind in respect thereto, held by him, to Ross, who thereby acquired the legal title and all rights of action; taking for himself a five-eighths beneficial interest, and for each of the other beneficiaries (Shirk, Egan, and Treat) a one-eighth interest. Over objection by the defendant, Ross was substituted for Walker as plaintiff, and leave given him to file, as it is called in the order, "An Amended and Supplemental Bill," and the bill proposed was then filed. It contains the substance of an original bill in the nature of a supplemental bill. Ten days later the defendant moved the court to set aside this order, and to strike the bill from the files, and, that motion having been overruled, demurred. The court sustained the demurrer on the ground that, the term of the patent having expired, the assignment by Walker to Ross vested the latter only with the right to recover damages for past infringements in a suit at law, and gave him no standing to prosecute the pending suit in equity. Upon this point the opinion of the court, reported in 58 Fed. 404, 407, is as follows:

"The important and difficult question is whether the present plaintiff can maintain his bill on the equity side of the court. It is elementary that a party who has a plain, adequate, and complete remedy at law cannot successfully invoke the jurisdiction of a court of equity. The original plaintiff brought suit about two and a half months before the term of his patent expired. He prayed for an injunction in his bill, but took no steps to procure a temporary restraining order or to bring the suit to a hearing while he remained the party of record. While an application for a temporary restraining order might have been made before the term of his patent expired, yet, according to the course of procedure of the court, it would have been impracticable to have prosecuted the suit to final hearing and decree within that time. When the patent has expired, and the entire claim of the plaintiff against the defendant rests upon the infringing acts performed during the term, an action on the case for the recovery of damages generally affords a complete redress, and the only one to which the plaintiff is entitled. Consolidated Safety-Valve Co. v. Ashton Valve Co., 26 Fed. 319; 3 Rob. Pat. § 1092. An adequate remedy at law exists in favor of the owner of the patent, against the infringer, whenever the sole relief required is compensation for past injury, provided the remedy can be afforded without equitable aid. When the plaintiff has chosen to seek his recompense for the enjoyment of his invention through an established license fee, and the infringing acts raise an implied acceptance of the offer, the sum which the plaintiff is entitled to recover is certain and fixed, and the remedy at law is adequate, and a court of equity is without jurisdiction; and, where the plaintiff has a mere right to the recovery of damages for past infringements, equity is without jurisdiction. *Ulman v. Chickering*, 33 Fed. 582; *Burdell v. Comstock*, 15 Fed. 395; *Root v. Railroad Co.*, 105 U. S. 139;

Spring v. Sewing-Mach. Co., 13 Fed. 446; *Jenkins v. Greenwald*, 2 Fish. Pat. Cas. 37, Fed. Cas. No. 7,270; *Hayward v. Andrews*, 12 Fed. 786. Where the bill is filed too late for a temporary injunction to issue before the expiration of the term secured by the patent, and the recovery of damages would afford adequate relief, jurisdiction in equity does not exist. *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217; *Mershon v. Furnace Co.*, 24 Fed. 741; *Davis v. Smith*, 19 Fed. 823; *Burdell v. Comstock*, 15 Fed. 395; *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. 367. It has been held that a bill filed four days before the patent expired should be dismissed. *Mershon v. Furnace Co.*, *supra*. Where a bill is filed five days before the expiration of the term, and no effort is made to obtain an injunction, the prayer for injunction will be held as a mere pretext, and the case not of equitable cognizance. *Burdell v. Comstock*, *supra*. In *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, *supra*, where the bill was filed about two months before the patent expired, the court expressed grave doubt whether, under the rule in *Root v. Railroad Co.*, 105 U. S. 189, jurisdiction in equity existed, and resolved the doubt by dismissing the bill without prejudice to an action at law. While it is certainly true that, if a bill in equity to restrain the infringement of letters patent is properly filed before the expiration of the term, the jurisdiction of the court is not defeated by the mere expiration of the patent by lapse of time before the final decree (*Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090), yet where a bill is filed shortly before the expiration of the patent, and no application for a restraining order is made, and from the nature of the infringing acts complained of it is apparent that an action on the case would afford adequate relief, the bill ought to be dismissed. It is not necessary to determine whether the bill filed by Walker ought to have been dismissed, in the view that is taken of the rights of the present plaintiff. His rights were acquired by an assignment two months after the patent had expired. It is true that the bill states that the improvement secured by the patent was transferred, but, as the patent had already expired, nothing remained capable of assignment, except the mere right of action for the recovery of damages for past infringements. If the present plaintiff had filed an original bill to enforce his rights acquired under the assignment, made, as it was, after the expiration of the patent, a court of equity could not have entertained jurisdiction. He filed, nearly four months after the patent had expired, an original bill in the nature of a supplemental bill, exhibiting a right to recover damages for past infringing acts acquired under an assignment made two months after the expiration of the patent. By such assignment the plaintiff acquired the right to recover damages only for past infringements, because the patent right—the franchise—was incapable of transfer, since it had ceased to exist. Walker had no vested right in the remedy, which he could sell and assign to the present plaintiff. For the recovery of damages for past infringements, which alone passed to the assignee, an action at law afforded the plaintiff adequate redress, and, in my judgment, the only redress to which he is entitled."

Robert H. Parkinson, for appellant.

S. R. Alden and W. H. Shambaugh, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge (after stating the facts). In *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, the suit was upon a patent which had 15 days only to run when the bill was filed; no special ground for equitable relief was shown, except the prayer for an injunction; and though, by the rules of the court, only four days' notice of an application was required, it does not appear that an injunction or restraining order was asked for; yet the jurisdiction was upheld, the court saying that, "if the case was one for equitable relief when the suit was instituted, the mere fact that the ground

for such relief expired by the expiration of the patent would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort;" and a number of decisions are cited to show that this has often been done in patent cases. In *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, where the suit was upon a patent which expired by its own limitation after the filing of the bill and before final decree, it is said that "as the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree." See, also, *American Bell Tel. Co. v. Brown Tel. & Tel. Co.*, 58 Fed. 409; *American Bell Tel. Co. v. Western Tel. Const. Co.*, Id. 410. When this suit was commenced, the patent in question had two months and twenty-two days to run. It was therefore clearly within the power of the court to grant a temporary injunction, if not to enter a final decree, before the patent should expire; and though no restraining order was issued, or perhaps could have been after the patent had expired, jurisdiction of the case was not lost on that account.

Other objections to the original bill are urged, which are not tenable, or at least are not now available. A brief consideration of them will be enough.

The city of Ft. Wayne, respondent, is located in Allen county, Ind., but is described in the bill as "located in the county of Vigo;" and upon that ground it is contended that the suit, as begun, was against another party, and that an amendment of the bill was necessary to make it a suit against the respondent. The erroneous statement in respect to the location of the city was simply a matter of misdescription, not affecting or, at most, not determinative of the identity of the party. The fact that Ft. Wayne is in Allen county is probably a matter of judicial cognizance, notwithstanding the averment of the bill; but, to say the least, the respondent, having made a full appearance and pleaded to the merits of the bill, has waived the objection, and also the objection that the original complainant had an adequate remedy at law. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594.

Walker was competent to prosecute the suit in his individual name, either upon the averments of his own bill, which showed him to be the holder of the legal title to the patent, or upon the bill of Ross, which shows that he held the title for the benefit of himself and others, of whom Ross was one, "with full power to maintain suit to recover for infringement, and to take all steps proper and necessary for the protection and enforcement of the rights, legal and equitable, held under said letters patent."

In *Carey v. Brown*, 92 U. S. 171, it is said:

"The general rule is that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust, as well as the trustees, are necessary parties. Story, Eq. Pl. § 207. To this rule there are several exceptions. One of them is that where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, and in no wise affects

his relation with his cestuis que trust, it is unnecessary to make the latter parties. *Horsley v. Fawcett*, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The master of the rolls said: 'If the object of the bill were to recover the fund, with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is therefore unnecessary to bring before the court the parties beneficially interested.' Such is now the settled rule of equity pleading and practice."

And in *Kerrison v. Stewart*, 93 U. S. 155, 160:

"It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw v. Railroad Co.*, 5 Gray, 171; *Bfield v. Taylor*, Beatty, 91; *Campbell v. Railroad Co.*, 1 Woods, 376, Fed. Cas. No. 2,366; *Ashton v. Atlantic Bank*, 3 Allen, 220); or to one by a stranger against him to defeat it in whole or in part (*Rogers v. Rogers*, 3 Paige, 379; *Wakeman v. Grover*, 4 Paige, 34; *Winslow v. Railroad Co.*, 4 Minn. 317 [Gil. 230]; *Campbell v. Watson*, 8 Ohio, 500). In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

See, also, *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. 463.

Ross, it follows, having succeeded to the title and entire interest of Walker, was properly admitted as complainant, and was entitled to continue the prosecution of the suit, unless, by reason of the expiration of the patent, it was necessary that this suit should abate or be dismissed, and all subsequent remedies be sought in a court of law. Walker, having parted with all interest, and, with the consent of the other parties concerned, having divested himself of any trust in their favor, could not prosecute the suit further, and abatement was inevitable, unless a new plaintiff could be substituted. The right to introduce new parties, or to substitute one party for another, in equity, when there has been a change of interest pending the suit, is so well recognized that the books treat not so much of the right as of the method of accomplishing the substitution. It is done either by a supplemental bill, or by an original bill in the nature of a supplemental bill,—the former being applicable properly to those cases where the same parties or the same interests remain before the court, while the latter "is properly applicable when new parties, with new interests arising from events since the institution of the suit, are brought before the court." Story, Eq. Pl. § 345. If a complainant, suing in his own right, parts with less than his entire interest, or if he is deprived of his entire interest but he is not the sole complainant, the defect in either case may be supplied by means of a supplemental bill. *Id.* §§ 346-348. But if a sole complainant suing in his own right is deprived of his whole interest, as in the

case of bankruptcy, or if he assigns his whole interest to another, he is no longer able to prosecute the suit, for want of interest, and the assignee may be made complainant in his stead; but, as the title of the latter may be litigated, the substitution must be accomplished by means of an original bill in the nature of a supplemental bill. *Id.* § 349; 2 Daniell, Ch. Pl. & Pr. c. 33. The dispute here, however, is not over the general rule. The contention is that, as the patent in this case had expired before Walker's transfer to Ross, nothing remained which was capable of assignment, except the mere right of action for past infringements; that the patent right was incapable of transfer, since it had ceased to exist; and that Walker had no vested right in the remedy, which he could sell and assign to the present plaintiff. Broadly stated, that means that a complainant in equity may not transfer to another his interest in the subject-matter of the contest, and confer upon the assignee the right to prosecute the suit to a decree upon the merits, if, by reason of events subsequent to the bringing of the suit, the controversy has so changed as to be the subject only of an action at law. The serious consequences of such a restriction upon the right of a complainant to sell his interest in the subject-matter of litigation, and to have the purchaser substituted as complainant, are obvious. In every such instance an assignment by a sole complainant, or by all of the complainants, to a stranger, would be followed necessarily by a dismissal of the suit at the complainant's costs. If in a federal court, and the jurisdiction dependent on citizenship, the assignee might be compelled to go with his case at law into a state court; and if, pending the suit in equity, the right of action at law should have become barred by the lapse of time, the complainant, whatever his original equities, might as well abandon his case as attempt a transfer, which could benefit no one but his adversary in the litigation.

No authority directly in point upon the question has been cited, or has come under our observation, but an analogous question has been determined in numerous cases where the jurisdiction, dependent originally upon diverse citizenship, has been maintained notwithstanding changed relations of the parties, which, if existing at the beginning, would have made jurisdiction impossible. A bill of revivor, for instance, may be brought by one who could not have brought the original suit. *Clarke v. Mathewson*, 12 Pet. 164. And supplemental or ancillary proceedings, though between parties of whom the court in the first instance could not have taken jurisdiction, are treated as dependent upon the suits out of which they grew. *Freeman v. Howe*, 24 How. 450; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136. If, in this case, after the expiration of the patent, Walker had died, it is clear that the suit could have been revived and prosecuted in the name of the legal representative (*Clarke v. Mathewson*, *supra*), or in case of bankruptcy the assignee, by means of a supplemental bill, could have taken the benefit and control of the proceedings; and we think it equally regular, where the complainant has made a voluntary transfer of his title and in-

terest to one who is a stranger to the suit, that the latter shall be admitted into the place of the original complainant. The substitution of Ross as complainant, we think, would have been proper if Walker, besides holding the legal title, had owned the entire beneficial interest in the patent. Ross and the others beneficially interested, upon a full statement of the facts, would have been proper, though not necessary, co-complainants in the original bill. If they had been, and there had been the same transfer of interest which is shown to have occurred, a supplemental bill only would have been necessary in order to dismiss Walker from the record, and to enable the others interested to prosecute the suit; but Walker having brought the suit as if in his own right alone, and having transferred his interest and title to Ross, it was necessary and proper that the latter should come in under an original bill in the nature of a supplemental bill, and having done so he is, in our opinion, entitled to prosecute the action to the end, as if he had begun it. The decree below, therefore, should be reversed, and the order sustaining the demurrer to Ross' bill set aside, and it is so ordered.

UNITED STATES v. HALL et al.

(Circuit Court of Appeals, First Circuit. May 15, 1894.)

No. 85.

1. NAVIGABLE WATERS—OBSTRUCTION BY SUNKEN VESSEL — COMPELLING REMOVAL.

Owners of a vessel, who scuttle and sink her in a harbor while on fire, for the purpose of saving her rigging and spars and abandoning her to the underwriters, may be compelled to remove the hull, as an obstruction to navigation, under Act Sept. 19, 1890, § 10.

2. APPEAL—REHEARING.

A rehearing will not be granted, ordinarily, for causes not brought to the attention of the court on the original argument, or by the petitioner's brief.

Appeal from the Circuit Court of the United States for the District of Maine.

This was a suit by the United States against Hudson G. Hall and others to compel removal of an obstruction to navigation. The circuit court dismissed the bill, and a decree for defendants was entered thereon. The United States appealed.

Isaac W. Dyer, for the United States.

William H. Folger and Benjamin Thompson, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

ALDRICH, District Judge. This is a bill in equity based upon the act of congress of September 19, 1890 (26 Stat. 426), and instituted under the direction of the attorney general of the United States, to compel the defendants to remove the hull of a vessel, which, it is claimed, exists as an obstruction to navigation, in Rockland harbor, on the coast of Maine, and comes by appeal from the circuit court for that district.

The facts are, in substance, as follows: On the 8th of February, 1893, the three-masted and double-decked schooner, William H. Jones, sailed from Rockland, with a cargo of lime, bound for New York. The next morning, when about 40 miles out, it was discovered that her cargo was on fire, when the vessel was put about, sealed, and headed for the home port, where she might lay at rest in quiet water, and the chances of saving the cargo and vessel be thereby promoted. She proceeded under sail on the homeward voyage as far as Seal harbor, reaching that port about 1 a. m. the following morning, and from thence was towed into Rockland harbor, and anchored off the breakwater, and more carefully sealed, that the fire might be smothered. A little later she was taken to the northerly part of the harbor, a little off the main channel, inside the breakwater, and anchored at a point used for navigation by the lighter class of vessels, and for winter anchorage. At the end of 21 days her cabin doors were opened, but again carefully sealed; and, with careful watching, she remained sealed until March 21st (38 days in all), when, as it was supposed the fire was smothered, arrangements were made to discharge her cargo. Between 3 and 4 o'clock of the same day, from the internal progress of the fire, and without warning, the mizzen mast fell, tearing up the deck, and breaking in the after house. Some of the owners were immediately called on board, and after consultation the vessel was scuttled at the place of anchorage, in 13 or 14 feet of water; the purpose being, according to the testimony of one of the defendants, to save the rigging and spars, and abandon the vessel to the underwriters. She was afterwards condemned by an underwriter's survey, sold at auction, and bought in by the owners, who are the defendants in this proceeding, who stripped and abandoned her where she was anchored and scuttled, and where she now remains as an obstruction to anchorage and navigation.

The evidence of the defense tends to show that after the fall of the mast the vessel could not have been towed to deep water, or left to drift into shoal water with the wind, without hazard to the property of others. But such hazard would not attach to the vessel lying and burning at anchor. The scuttling, therefore, was not to avoid peril, or to save the property of others, but to save the rigging, spars, etc., to the owners. From the beginning the effort was to save the property as a whole, and the harbor might well be used in a reasonable manner to that end; but when it was discovered that the vessel and cargo could not be saved, using the harbor of refuge as a scuttling place for the hull, in order to make the slight pecuniary saving which would result from stripping the vessel, under the circumstances of this case, was an unreasonable use of the public waters, and upon the principle of decided cases, involving analogous questions (*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 97; *Rex v. Ward*, 4 Adol. & E. 384. See, also, *Bruckelsbank v. Smith*, 2 Burrows, 656; *Steamboat Co. v. Munson*, 117 Mass. 34; *Rex v. Watts*, 2 Esp. 675; *White v. Crisp*, 10 Exch. 318, 2 Hawk. P. C. c. 75, § 11; 1 Russ. Cr. (9th Ed.) 532; *Wood, Nuis.* §§ 481-483; *Gould, Waters*, §§ 121-128; *Ang. Tide Waters*, pp. 111, 113, 115;

Lord Hale's Treatise, *De Portibus Maris*, c. 7; Harg. Law Tracts, p. 85), the obstruction resulting would constitute a nuisance at the common law, removable upon information by the attorney general.

The defendants also contend that there was a chance, and perhaps a probability, that the vessel would have sunk before she could have been towed either to shoal or deep water; but the voluntary and deliberate act of the defendants, in scuttling her, relieves us from the consideration of questions which might arise from such conditions. We are therefore not called upon to determine where the responsibility would rest in a case where the vessel was being removed from her anchorage and place of refuge to a point where the hull would not be an obstruction to navigation, and, while the owners were prosecuting such efforts, and in the exercise of due care, the vessel stranded, or sunk in navigable waters. The evidence in the cause at bar does not present a case of inevitable accident or misfortune, such as relieves the owner from responsibility in respect to the obstruction, nor does the evidence present an emergency which justified the scuttling of the vessel at the time and place, as an act incident to the right of navigation. As has been said, she might have been left at anchor without danger to other property than that of the owners; and it is not clear that she might not have burned through and filled sufficiently to extinguish the fire without sinking, in which event she could have been towed to nonnavigable waters and broken up, or taken to deep water and sunk. It is apparent from the evidence that the prime motive of the owners, in scuttling the vessel at the particular time and place, was to save the rigging and the spars, which otherwise would have burned with the cargo. It is also apparent that the act was voluntary and deliberate, and it is quite immaterial whether, as contended by the plaintiff, the purpose was to turn her over to the government, and cast the burden of removal thereon, or, as conceded by the defense, to abandon her to the underwriters.

Some obligation rests upon the government to keep the harbors clear for public use, and the obligation rests upon each individual member of the public, exercising the right of navigation, to have reasonable regard for public rights, as well as the common and equal rights of others having occasion to use the public waters. In other words, he must not act with reference to his own pecuniary advantage alone. While members of the public may use the harbor as a place of refuge and greater safety for the vessel and cargo in case of necessity and distress, they may not, under the circumstances disclosed by the record in this case, use it as a scuttling place for the hull, that the rigging may be saved. As has been said, such is not a right incident to the right of navigation; and if, under such circumstances, the owner sees fit to scuttle his vessel, that the wreck may be stripped, he is bound to remove the obstruction, which, for his own slight pecuniary advantage, he voluntarily creates.

In our view, section 10 of the act of September 19, 1890, was intended to apply to all obstructions of a permanent character not

affirmatively authorized by law, willfully, wantonly, carelessly, or voluntarily created in the navigable waters, over which the United States has jurisdiction, not covered by the specific provisions of the preceding sections in the same chapter; and it follows from this construction that hulls of vessels sunk in harbors not through perils of the sea, but by voluntary act of owners or their authorized agents, are obstructions, within the meaning of this section of the statute. It is not quite clear whether the court below, holding this view of the statute, determined the cause, and dismissed the bill upon findings of fact against the government, or whether the order of dismissal resulted from construing the statute as not covering obstructions of the character disclosed by the record; but this is perhaps immaterial, for in either view it results that the decree of the circuit court must be reversed.

The decree of the circuit court is reversed, and the case is remanded, with directions to enter a decree in accordance with the views herein expressed.

On Rehearing.

(June 14, 1894.)

PER CURIAM. The court has duly considered the petition for a rehearing filed in this cause by the appellees under rule 29, 47 Fed. xiii. The causes assigned in the petition, numbered 1 to 5, inclusive, were not brought to the attention of the court at the argument, or by appellees' brief. To permit them to be argued now would split up the case in a manner which the proper progress of suits does not ordinarily allow of. Extreme cases may arise where this may be done, but this is not one of them, though it might be if this procedure was under the criminal provisions of the statutes, or if the joinder of defendants involved, as a practical result, a gross injustice. The remaining causes were fully considered by the court before its conclusion was announced.

Ordered that, as none of the judges who concurred in the judgment in this case desire that the petition for a rehearing be granted or argued, the petition is denied, and the mandate may issue forthwith.

DOUGHERTY v. DOYLE et al.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

No. 155.

PATENTS—INFRINGEMENT—MINCE-PIE COMPOUNDS.

The Allen patent, No. 268,972, for a dry mince-pie compound, in which dryness is made the essential characteristic, and the use of cider, except as contained in the desiccated apples forming one of the ingredients, expressly excluded, is not infringed by a compound to which there is added 150 pounds of boiled cider to every 1,200 pounds of other ingredients. 59 Fed. 470, affirmed.

Appeal from a decree of the circuit court, northern district of New York, dismissing a bill in equity for alleged infringement of

letters patent No. 268,972, dated December 12, 1882, to Henry Julian Allen, for "preserved compound for mince pies."

George W. Hey, for appellant.

Josiah Sullivan, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. In affirming the decree upon the ground that no infringement is shown, it seems unnecessary to add anything to what has been said by the circuit judge. The patentee obtained his letters patent only after much argument and many amendments, which, with increasing insistence, presented his invention as a practically dry compound of old ingredients, viz. beef, sugar, apples, spice, currants, raisins, and salt, with, if desired, a small quantity of starch, and also, if desired, "wine, brandy, or other liquor," in so small a proportion as to "create no sensible moisture in the composition." To secure the dryness which he pointed out as characteristic of his invention, he not only cooked the meat and desiccated the apples, but also avoided the use of ingredients containing a substantial quantity of free water. Cider was commonly used as an ingredient of earlier compounds. The patentee does not include it in his enumeration, and, when referred by the patent office to Atmore's compound, distinctly states that he uses none, except such as may be present in the desiccated apples, "the cider being dried, and the free waters removed, when the apples are dried or evaporated. So that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it." And in his final amendment of the specification he seeks to differentiate his invention from "mince-pie compounds [which] have heretofore been prepared in the wet state with free water present in the shape of wine, cider, or other liquid." Within the lines with which the patentee has himself circumscribed his patent, it must be construed, and, as thus construed, there is no infringement in a compound where there is added 140 pounds of boiled cider to every 1,200 pounds of the other ingredients, with the result of creating a sensible moisture in the composition. The decree of the circuit court is affirmed, with costs.

THE EMPIRE.

THE TRANSFER NO. 3.

KENNEDY v. THE EMPIRE and THE TRANSFER NO. 3 et al.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

No. 150.

1. COLLISION IN EAST RIVER—BREACH OF STATUTE AND INSPECTORS' RULES—TOWNS.

A steamer going east in the east channel of the East river is in fault for keeping in close to the Blackwell's Island shore, and attempting to pass a steamer going in the opposite direction starboard to starboard, instead of keeping in the middle of the river, and passing port to port, as required by the state statute, the rules of the supervising inspectors, and the cus-

tom of navigation in that locality. Nor can she excuse herself on the pretense that, having a tow astern on a 50-fathom hawser, there was danger that the tow would drift upon the rocks at Brown's Point on the Long Island shore; for, if there was any such danger, it was her duty to shorten the hawser, or take the tow alongside.

2. SAME—ABSENCE OF LOOKOUT.

Failure of the other vessel to have a stationed lookout will not render her liable, it appearing that her captain saw the approaching steamer in time to pass her safely according to the customary rules of navigation.

Appeal from final decree of district court, eastern district of New York, dismissing the libel as to Transfer No. 3, and holding the Empire liable in solido for damages sustained by libellant's schooner Thos. Potter in collision with a car float lashed to the starboard side of the Transfer. The schooner was lashed to the port side of the Empire, which had another schooner in tow on a hawser of 50 fathoms.

Wm. W. Goodrich, for Kennedy.

Chas. C. Burlingham, for the Empire.

Henry W. Taft, for the Transfer No. 3.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The collision happened at about 8 a. m., March 11, 1890, near the upper end of Blackwell's Island, in the east channel, and less than 125 feet from shore. The tide was flood, the wind light, and the weather rainy, but there was no difficulty in seeing vessels on the river. The Empire was bound east; the Transfer, west. The latter, just previous to the accident, had come out of Harlem river, on a course about from Eighty-Ninth street, in the city of New York, to the upper end of Blackwell's Island, intending to round in shore, and thus take advantage of the eddy. The Empire rounded Lunatic Point (which makes out on the Blackwell's Island shore about a quarter of a mile below the upper end of the island), under a starboard wheel, passing within 150 feet of the point, and continued to swing in even closer to the shore as she proceeded. The channel is nearly 600 feet wide. The district judge held the Empire in fault for "going over to the Blackwell's Island side of the river, as she approached the turn at the head of Blackwell's Island, instead of keeping in the middle of the river." We concur in this conclusion. The statute of the state, the rule of the supervising inspectors, and the custom of navigation in the locality all required her to keep towards mid river, and to pass such vessels as she encountered going in the opposite direction port to port. The excuse offered for hugging the Blackwell's Island shore is that, with a tow astern on a 50-fathom hawser, there was some chance, if she kept to starboard of mid river, of having her tow swing over on the rocks at Brown's Point, on the Long Island shore. We agree with the district judge that the proofs fail to sustain such excuse; and, if there was any such risk involved, it was the duty of the Empire to shorten the hawser, or to take the tow alongside. She should not so incumber herself that she cannot navigate according to law, and then suggest the incumbrance as excuse for failure so to do. It is quite clear

upon the proofs that, had she been navigating in mid river, the catastrophe would not have occurred; and the district judge, therefore, properly held her in fault for the collision.

The appellants insist that the Transfer was also guilty of fault contributing to the collision. When the Empire rounded Lunatic Point, she blew a signal of two whistles to the Transfer, indicating a request that both vessels should pass, not according to rule port to port, but starboard to starboard. The Empire claims that this signal was assented to, the Transfer giving an answering signal of two whistles; and that thus, under the rule laid down in *The Burke and The Sammie*, 37 Fed. 907, the Empire was not in fault for continuing on the course agreed upon, and the Transfer was in fault for not navigating in accordance with the agreement, and keeping to port. Upon this question, however,—viz. what signals were sounded by the Transfer?—there is a conflict of evidence, the witnesses for the Transfer testifying that she replied, not with two whistles, but with an alarm signal of three whistles. Upon this conflict the district judge, who saw most of the witnesses, seems to have found in favor of the Transfer, as he holds her free from fault, and we are not satisfied that his conclusion was erroneous.

It is not contended that the Transfer was at fault for any failure to stop and back; nor is she to be held liable for not having a stationed lookout, as her captain saw the Empire at a distance sufficient to allow him to pass her safely, according to the customary rules of navigation. Had he seen her sooner than he did, at any time, in fact, before she blew her two whistle signal, such discovery would not have warranted him in assuming that the Empire was going to try to pass him starboard to starboard, because, although she passed within 150 feet of Lunatic Point, the trend of the shore is such that had she kept on without further starboarding, or ported a little, she would have been where she ought to have been by the time the vessels reached each other. As an earlier view of the Empire would not have called for any change in the navigation of the Transfer, the failure to discover her when she was still below Lunatic Point in no way contributed to the collision.

The decree of the district court is affirmed, with interest to the libelants against the Empire, and costs to the Transfer against the Empire.

THE SAALE.

NORTH GERMAN LLOYD v. TROUTON et al.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

No. 157.

1. COLLISION—STEAM AND SAIL IN FOG—MODERATE SPEED.

A reduction of but 1 knot from a full speed of 16 knots is not "moderate speed." Nor is 10 knots moderate speed, if it does not enable the steamer to avoid a vessel sighted in her track at a distance of from twice to three times her length. 59 Fed. 716, affirmed.

2. SAME.

A steamer is bound to reduce speed as soon as she enters a fog bank, and failure to do so for a brief space—two to five minutes—puts her in fault for a resulting collision. 59 Fed. 716, affirmed.

Appeal from a decree of the district court, southern district of New York (59 Fed. 716) holding the steamship Saale liable to the libelants, owners of the cargo laden on the bark Tordenskjold, which was sunk by a collision with said steamship on August 4, 1892, about 7 p. m., in 43° 31' north latitude, and 56° 4' west longitude. The bark was struck on the port side between the fore and main rigging, the angle of collision being about seven points between the bows of the two vessels.

William D. Shipman, for appellant.

Harrington Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The district judge found that the bark, which had been sailing about northwest, changed her course to starboard after hearing the steamer's whistle, and that, had she not so changed, the steamer would unquestionably have passed her by a good margin without collision. This finding is supported by the evidence, and fixes the primary responsibility for the collision upon the bark. The change of course by the bark was made before the steamer sighted her, and did not mislead the latter's officers. The libelants, owners of cargo, and therefore not themselves in any fault, further contended that the steamship was not, at the time of collision, navigating at the moderate speed required by article 13 of the international rules of 1885. The district judge so found, and further held that the steamer failed to show that this statutory fault could not have contributed to the collision. The rule cited requires that "every ship * * * shall in a fog, mist, or falling snow, go at a moderate speed." That the Saale, whose full speed was about 16 knots, was going at 15 knots, is conceded. The atmospheric condition is in dispute on the testimony. All the witnesses from the bark testify that she had been running in a thick fog for about two hours prior to the time of collision. They were of course unable to testify to the atmospheric conditions surrounding the steamer until the moment before the catastrophe. The log of the Saale reports: "Until 6 p. m., light hazy mist; later, passing fog showers. Gave fog signals according to rules. Compartments closed. Placed double lookout. At 6:40 p. m., set engine telegraph on 'Stand-by.' Somewhat invisible. * * * We, on the bridge, were under the impression of still being able to see a mile off." The officers of the Saale, when called to the stand, corroborated this statement as to the impression prevailing on the bridge, but both lookouts, stationed on the bow, testified that for about four or five minutes before they saw the bark the steamer was in a fog so dense that they could not see more than two or three lengths ahead. No change, however, was made in the speed of the Saale until she sighted the Tordenskjold, about a minute before collision, at a distance which the officers on the bridge estimated at from 1,200 to 1,400 feet, and

the lookouts and boatswain (the latter standing on the foredeck) estimated at from a length to a length and a half (440 to 660 feet). The helm was at once ordered hard a-port, and the engine reversed as soon as possible. There is in fact no contention that there was any failure on the part of the Saale to do all she could to avoid collision after sighting. The whistles of the Saale were heard on the bark, but the bark's fog horn, though sounded properly, and at regular intervals, was not heard on the steamer until just as she was sighted. We concur with the district judge in the finding that the fog was of such density as made the thirteenth article applicable, and required the Saale to go at "moderate" speed. However free from mist the atmosphere may have been for the hour preceding collision, the moment she ran her nose into the bank or jacket of fog in which the bark lay hid it became at once her duty to moderate her speed. *The City of Alexandria*, 31 Fed. 431; *The Trave*, 55 Fed. 119. Although the Saale was not in a dense fog until she entered the bank in which the bark was enveloped, we are satisfied from the evidence that for a brief space before sighting—2, 3, 4, or 5 minutes—both vessels were moving in a dense fog, and during that time the steamer in no way reduced her speed of 15 knots. Her full speed was 16 knots, and the testimony shows that from full speed it takes 4 minutes under reversed engines to bring her to a standstill. There is no evidence in the case to show within what time or distance she can be brought to a standstill from a more moderate speed. That a reduction of but one knot from such speed is not a compliance with the thirteenth article, when the atmosphere in which the steamer is moving makes such article applicable, is no longer open to discussion. Whatever may be the demands of passengers, freighters, and postmasters-general as to maintaining the highest speed attainable, controlling authority has prescribed that speed in a fog shall be moderate; and, however difficult it may be to define the word "moderate" with mathematical precision, it is abundantly settled by similar authority that a reduction of but 1 knot from a full speed of 16 is not a compliance with the rule. *The Pennsylvania*, 19 Wall. 135; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122; *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211.

We are further of the opinion that, had the steamer been going at the moderate speed which the thirteenth article requires, she could have cleared the bark. The district judge reached the same conclusion. Elaborate calculations are presented by the appellant to prove the negative of this proposition on the assumption that the steamer, before sighting, was running at the rate of 10 knots. It is not necessary to review these calculations, since, if 10 knots were a speed so great that the steamer could not avoid a vessel lying in her track within the space at which she sighted her,—which the evidence shows to be from twice to three times her own length,—then it was not moderate, under the authorities above cited. She should have reduced to nine, or even eight, knots, and certainly the evidence does not warrant the finding that at that speed she could not have cleared the bark. The decree of the district court is affirmed, with interest and costs.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. October 11, 1894.)

No. 587.

JURISDICTION OF FEDERAL COURTS—SUITS BY UNITED STATES TO QUIET TITLE
—NONRESIDENT DEFENDANTS.

A suit by the United States to quiet title is within the jurisdiction of the circuit court of the district where the land lies, although defendants may not be inhabitants of that district, for such a suit is "substantially a suit in rem," within the doctrine of cases like *Pennoyer v. Neff*, 95 U. S. 714, and *Arndt v. Griggs*, 10 Sup. Ct. 557, 134 U. S. 316, and therefore falls within the provisions of section 8 of the judiciary act of 1875, relating to service by publication in certain cases affecting real estate, which section was expressly continued in force by the act of 1887-88.

George J. Denis, U. S. Atty., and Joseph H. Call, Spec. Asst. U. S. Atty.

Joseph D. Redding, for defendants.

ROSS, District Judge. This is a suit in equity brought by the government to quiet its alleged title to a large number of townships, sections, and parts of sections of land situated within this judicial district, in which it is alleged the defendants claim an interest under and by virtue of an act of congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes" (16 Stat. 573), and to enjoin the defendants from cutting or removing from said lands timber, wood, minerals, or other valuable deposits. To the bill the Southern Pacific Railroad Company, alleged to be a corporation organized and existing under the laws of the state of California; D. O. Mills and Gerrit L. Lansing, trustees, alleged to be citizens of the state of California, and residents of the city of San Francisco, of that state; the Central Trust Company of New York, alleged to be a corporation organized and existing under the laws of the state of New York; the Southern Pacific Company, alleged to be a corporation organized and existing under the laws of the state of Kentucky; and the Colorado River Irrigation Company, alleged to be a corporation organized and existing under the laws of the state of Colorado, —are made parties defendant. The Southern Pacific Railroad Company, the Southern Pacific Company, and Gerrit L. Lansing have appeared specially, and filed pleas in the nature of pleas in abatement, objecting to the jurisdiction of the court. The plea of the Southern Pacific Railroad Company sets up that it is a corporation duly organized under the laws of the state of California, and while admitting that it operates a line of railway through this judicial district, and maintains a ticket and freight office and depot therein, alleges that it is not an inhabitant of this district, but that it has its principal office, habitat, and domicile in the city and county of San Francisco, state of California. The plea of the Southern Pacific Company alleges that it is not an inhabitant or resident of this judicial district, but is a corpora-

tion organized and existing under the laws of the state of Kentucky, and having its habitat and domicile in that state. The plea of Gerrit L. Lansing alleges that he does not reside in this judicial district, but is an inhabitant and resident of the city and county of San Francisco, in the northern district of this state. Each of the defendants so appearing pray that the suit against them be dismissed for want of jurisdiction. On motion of the government the pleas were set down for argument. The question, therefore, is whether, under the facts as alleged in the bill and in the pleas, the court has jurisdiction to entertain the suit and proceed in the cause.

The court, of course, takes judicial notice of the fact that the state of California is divided into two judicial districts. It is further aware of the fact that it is the established law that a corporation organized in one of the United States, and in that state only, cannot be considered a citizen, an inhabitant, or a resident of any other state, and that a corporation created by a state in which there are two or more judicial districts is to be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is transacted. *Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, and cases there cited. The Southern Pacific Railroad Company, and D. O. Mills and Gerrit L. Lansing, trustees, are therefore to be regarded as citizens and inhabitants of the northern district of California; the Central Trust Company, as a citizen and inhabitant of the state of New York; the Southern Pacific Company of Kentucky, as a citizen and inhabitant of the state of Kentucky; and the Colorado River Irrigation Company, as a citizen and inhabitant of the state of Colorado. And as the government is not a citizen or inhabitant of any particular state or district, but is everywhere present within the territorial limits of the United States, none of the parties to the suit can be regarded as citizens or inhabitants of this judicial district; but the lands which constitute the subject of the suit are situated within this judicial district. By the act of congress of March 3, 1887 (24 Stat. 552), as corrected by the act of August 13, 1888 (25 Stat. 433), the circuit courts of the United States are given "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners * * *;" and, by a subsequent provision of the same section, it is declared: "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the

residence of either the plaintiff or the defendant * * *." It has been held by the supreme court that suits falling within the last clause quoted—that is to say, suits in which jurisdiction depends solely upon the diverse citizenship of the parties—cannot be brought in the district of the residence of the plaintiff unless, where there is more than one plaintiff, all of the plaintiffs reside in the district, nor, unless all of the defendants reside in the same district, can suit be brought therein, because the statute does not confer the right to bring the suit in a district wherein a part only of the defendants reside. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. One of the reasons assigned for that conclusion was that the court found, from the history of the legislation respecting the jurisdiction of the United States courts, a manifest purpose upon the part of congress, in passing the act of 1887, as corrected by the act of 1888, to restrict, rather than to enlarge, the jurisdiction of the circuit courts. The reasons which induced the court to hold that, in cases where the jurisdiction is founded only on the fact that the action is between citizens of different states, each plaintiff must be competent to sue, and, if there are several defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained, would seem to apply with equal force to that clause of the act of 1887, as corrected by the act of 1888, which declares that "no civil suit shall be brought, before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant." That is to say, each defendant must be an inhabitant of the district in which he is sued, because the provision of the statute quoted expressly so declares; and, if this provision of the statute is the law which applies to and controls the present case, the result must necessarily be that the suit cannot be maintained in any district, because the defendants are inhabitants of different districts. Yet the suit was instituted by the attorney general pursuant to an act of congress approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes" (24 Stat. 556), by which the secretary of the interior was authorized and directed to adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by congress to aid in the construction of railroads, and theretofore unadjusted, and by which the attorney general was, upon certain conditions, required to thereafter "commence and prosecute, in the proper courts, the necessary proceedings to cancel all patents, certifications, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States." By the act last mentioned, congress was not providing for the bringing of suits in the absence of a law conferring upon the courts jurisdiction to entertain them, nor for the bringing of as many suits respecting the same land in as many different districts as there should be diverse claimants thereto. The act of August 13, 1888, as well

as that of March 3, 1887, conferring jurisdiction on the circuit courts, expressly, by the fifth section thereof, continued in force section 8 of the act of March 3, 1875 (18 Stat. p. 472), which provides as follows:

"That when, in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It is thus seen that by section 8 of the act of March 3, 1875, provision is made for the bringing in, by publication if necessary, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real property within the district where such suit is brought, any one or more defendants, whether an inhabitant of the district or not, and thereafter, upon the failure of the defendant or defendants so served to appear, plead, answer, or demur within the time allowed, the court is empowered to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the district, provided, however, that such adjudication shall, as regards such absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district. The jurisdiction thus conferred by section 8 of the act of March 3, 1875, and continued in force by the acts of 1887 and 1888,

grows out of the nature of the subject-matter, and is in addition to that conferred on the circuit courts by the first section of the acts of 1875, 1887, and 1888, the provisions of which do not apply to cases over which jurisdiction is otherwise conferred upon the federal courts by reason of the subject-matter. In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221; In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 730. In *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 242, the supreme court said:

"Wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the circuit court sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the locus in quo."

A suit to quiet title, the object of which is to reach and settle the title to land, where provision is made by statute for the bringing in of nonresident claimants, would also seem to be local in its nature. In respect to such suits, section 741 of the Revised Statutes provides:

"In suits of a local nature, where the defendant resides in a different district in the same state from that in which the suit is brought, the plaintiff may have original and final process against him directed to the marshal of the district in which he resides."

It is, however, strenuously contended by counsel for the defendants objecting to the jurisdiction of this court that a suit to quiet title is one in personam, strictly, and therefore embraced by the provisions of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888; and in support of this contention much stress is laid by counsel on the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586. In the subsequent case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, the supreme court held that it is the established doctrine of that court that a state (and, of course, the United States) has power, by statute, to provide for the adjudication of title to real estate within its limits, as against nonresidents who are brought into court only by publication, and that it was not the intention of the court, in the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, to overthrow the series of cases affirming that power; on the contrary, that the court, in *Hart v. Sansom*, distinctly recognized it by saying, among other things, that:

"It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."

And in *Arndt v. Griggs* it is added:

"Of course it follows that, if a state has power to bring in a nonresident by publication for the purpose of appointing a trustee, it can in like manner bring him in and subject him to a direct decree."

The court, in *Arndt v. Griggs*, cited and reviewed the cases upon the subject at length; among others, that of *Boswell's Lessee v. Otis*, 9 How. 336, where, said the court—

"Was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on such accounting should operate as a judgment at law. Service, was had by publication, the defendants being nonresidents. The validity of a sale under such judgment was in question. The court held that portion of the decree and the sale made under it void; but, with reference to jurisdiction in a case for specific performance alone, made these observations: Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, second, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or by bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character."

If a bill for the specific execution of a contract to convey real estate is substantially a proceeding in rem, where, by statute, service of process in such suit may be had by publication, it would seem that a suit to quiet title to real estate is of the same character in cases where the statute authorizes a similar service. In the case of *Pennoyer v. Neff*, 95 U. S. 714, 727-734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Justice Field, thus stated the law:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. * * * It is true that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem, in the broader sense which we have mentioned."

The principle of these cases, in my opinion, sustains jurisdiction here, to the extent, at least, of settling the question of the title to the lands in dispute. Whether, should the facts warrant it, such decree may also include the injunction prayed for by the complainant, upon the ground that it is but incidental and ancillary to the principal relief sought, or under the principle that where jurisdiction is acquired against the person by the service of process, or by a voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties, need not now be determined. The pleas and motions to dismiss are overruled.

WYLY v. RICHMOND & D. R. CO.

(Circuit Court, N. D. Georgia. June 14, 1894.)

No. 1,074.

REMOVAL OF CAUSES—MOTION TO REMAND—WHEN TOO LATE.

A motion to remand on the ground that the removal was made after the case was to be treated as on trial under the state practice comes too late after more than a year has elapsed, and after the case has been transferred by consent to the equity docket, treated as an intervention in a pending receivership case, and referred to a special master therein; there being no question as to the jurisdiction of the federal court.

This was an action by George A. Wyly against the Richmond & Danville Railroad Company. Heard on motion to remand to the state court.

Glenn & Slaton, for plaintiff.

Jackson and Leftwich, for defendant.

NEWMAN, District Judge. This is a motion to remand, entered a few days ago. The case was removed to this court on the ground of prejudice and local influence on the 11th day of February, 1893. The Richmond & Danville Railroad and the Georgia Pacific Railroad Company are in the hands of receivers appointed by this court, and were in that situation at the time of removal. A special master had been appointed in the equity case in which the receivers were appointed, to hear all claims by way of intervention against the receivers arising in this district, and suits brought against the corporation. By consent of counsel, an order was taken in the above-stated case after its removal, transferring it to the equity side of the court, and treating it as an intervention in the equity case named, and referring it to the special master in the equity cause. This order was taken on the 23d day of May, 1893. For some reason, unexplained, the case has been delayed before the special master, and counsel for plaintiff now moves to remand it on the ground that it was removed to this court too late. They say, while it was not actually on trial, that substantially, under the ruling and practice in the state court, it had reached a stage at which it was treated as being on trial. No question going to the jurisdiction of this court is raised. The necessary diverse citizenship exists, plaintiff is a resident citizen, defendant being a corporation of the state of Virginia, and the necessary jurisdictional amount is involved. I think the motion to remand comes too late. Of course, if the question raised as to the right of this court to retain it was jurisdictional, and was well taken, no doubt the duty of this court would exist to remand at any stage of the proceeding; but, after the proceeding noted above has been taken in a removed case, it seems to me to be entirely too late, after more than a year has elapsed, to move to remand on the ground that is here set up. The motion to remand will be denied, but the special master will be directed to speed the case by hearing the same, and making a report to this court within 30 days from this date. Let an order be taken to this effect, and let the special master be notified of the same.

BAILEY v. MOSHER et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 418.

1. REMOVAL OF CAUSES—FEDERAL QUESTION — ACTION AGAINST OFFICERS OF NATIONAL BANK—CODE PLEADING.

One who loaned money to an insolvent national bank sued in a Nebraska state court to recover the amount from the officers and directors. The petition, which was drawn under the Code, averred that plaintiff was deceived as to the bank's condition by false reports to the comptroller of the currency; that defendants loaned excessive amounts of the bank's money to single persons, made large loans to the president and cashier, and paid dividends when there were no profits,—all in violation of the national banking act. In conclusion, the petition averred that, "by reason of the several violations of the banking law as above set forth," defendants were liable, etc. *Held*, that the petition stated a cause of action for violation of the national bank laws, and not a mere action for deceit at common law; and that the case was therefore properly removed from the state to the federal court.

2. SAME—CODE PLEADING.

The clauses in the petition which tended to state a cause of action for deceit could not be segregated from the other clauses, and held to constitute the statement of the cause of action. The plaintiff having seen fit, in his concluding averment, to state the legal effect of the facts set forth, cannot complain if his adversary and the court accept his own theory, especially when his pleading is ambiguous, and will support that theory as well as or better than any other.

3. SAME—"PARAGRAPH" DEFINED.

The word "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one or many sentences, but, whether one or many, it constitutes a statement of a single cause of action.

4. NATIONAL BANKS—MISCONDUCT OF OFFICERS — PERSONAL LIABILITY—WHO MAY ENFORCE.

A creditor of an insolvent national bank which has passed into the hands of a receiver cannot maintain an action to enforce, against officers and directors who have violated the banking laws, the personal liability imposed by Rev. St. § 5239; for this personal liability is an asset of the bank, belonging equally to all creditors, and must therefore be enforced by the receiver of the bank for their benefit in proportion to the amount of their claims.

In Error to the Circuit Court of the United States for the District of Nebraska.

S. B. Pound (Lionel C. Burr, Richard S. Norval, Benjamin F. Norval, and George W. Lowley, on the brief), for plaintiff in error.

J. W. Deweese (T. M. Marquett and F. M. Hall, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the district court of Lancaster county, Neb., by Thomas Bailey, the plaintiff in error, against Charles W. Mosher, Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stewart, and Richard C. Outcalt, the defendants in error, and removed into the circuit court of the United States for the dis-

trict of Nebraska on the petition of the defendants, upon the ground that the suit was one arising under the laws of the United States. A motion to remand the cause to the state court was overruled, and a demurrer to the complaint was sustained, and final judgment entered for the defendants; whereupon the plaintiff sued out this writ of error, assigning for error these rulings of the circuit court. The petition alleges the plaintiff loaned the Capital National Bank of Lincoln \$11,500, and seeks by this suit to recover the same from the defendants, who were directors of the bank, upon grounds to be presently stated.

We have only found it necessary to consider two of the many questions discussed in the briefs of counsel. It is earnestly contended that this is not a suit arising under the laws of the United States, but is an action for deceit, with which the national banking act has no connection. The soundness of this contention must be tested by the averments of the petition. The petition states a single cause of action, founded wholly on the alleged misfeasance and nonfeasance of the defendants in their capacities as officers and directors of a national bank. The alleged official misconduct of the defendants which is relied upon as stating a ground of action is particularly set out. It is alleged that they made false and misleading reports as to the condition of the bank to the comptroller of the currency, by which the plaintiff was deceived and misled as to the condition of the bank; that loans were made to persons in excess of the amount which could lawfully be loaned to any one person; that they made large loans to the president and cashier of the bank, in violation of the banking act, and declared and paid dividends when there were no earnings or profits out of which to pay them; that all of these acts were violations of the national banking act, and of the duties of the defendants as officers and directors of the bank under that act; and the complaint concludes with the averment that, "by reason of the several violations of the banking law as above set forth," the defendants are liable to the plaintiff in the sum sued for. In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that his cause of action does not arise under a law of the United States. It is said in the brief of the learned counsel for the plaintiff in error that, if certain allegations of the petition state a cause of action for a violation of the national banking act, the preceding paragraphs state an independent cause of action for deceit. A petition containing a single paragraph cannot be made to subserve the purpose of two distinct and dissimilar causes of action. *Kewaunee Co. v. Decker*, 30 Wis. 624. We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors. We cannot adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be

segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court cannot reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he cannot complain if his adversary and the court accept and act upon his own theory. Especially is this so when the petition is ambiguous, and will support that theory as well as or better than any other.

In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains "more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered" (Code Ark. § 5027); and all of them require that each cause of action shall be separately stated and numbered. The Nebraska Code provides that, "where the petition contains more than one cause of action, each shall be separately stated and numbered." Consol. St. Neb. 1891, § 4633, (93). And the supreme court of that state, construing this section, have said: "A plaintiff cannot jumble his causes of action together." *Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff cannot reform or amend his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the "violations of the banking law" therein set out. Section 5239 of the Revised Statutes of the United States provides that:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last

clause of this section. Under section 2 of the judiciary act of August 13, 1888, a removal cannot be sustained upon a statement, in the defendant's petition therefor, that the suit is one arising under the laws of the United States, but that fact must appear by the plaintiff's statement of his own claim. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. In this cause the plaintiff's petition does disclose that the cause of action is one arising under the laws of the United States. *Tennessee v. Davis*, 100 U. S. 257, 264; *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340; *Walker v. Bank*, 5 U. S. App. 440, 5 C. C. A. 421, 56 Fed. 76.

The petition shows that the bank of which the defendants are officers and directors is insolvent, and has passed into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. *Rev. St. U. S. § 5234*; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Colby*, 21 Wall. 609; *Hornor v. Henning*, 93 U. S. 228; *Stephens v. Overstoltz*, 43 Fed. 771; *Bank v. Peters*, 44 Fed. 13. The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Howe v. Barney*, 45 Fed. 668. The same rule applies to the creditors of a corporation. But it is said the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendants' report to the comptroller of the currency, by which he alone was damaged. As we have seen, the frame of the petition will not support this contention. The motion to remand was properly overruled, and the demurrer to the petition rightly sustained, upon the ground that the plaintiff is not the proper party to sue for the cause of action stated in the complaint as we construe it. These rulings make it unnecessary to express any opinion upon the other questions so fully and ably argued by counsel. The judgment of the circuit court is affirmed.

HALLETT v. MOSHER et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 417.

In Error to the Circuit Court of the United States for the District of Nebraska.

Henry H. Wilson (Arnott C. Ricketts, on the brief), for plaintiff in error.
Charles E. Magoon and J. W. Deweese (Charles O. Whedon, T. M. Marquett, and F. M. Hall, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This case is on all fours with the case of Bailey v. Mosher (decided at the present term) 63 Fed. 488, and the judgment of the court below is affirmed on the authority of that case.

CENTRAL TRUST CO. OF NEW YORK et al. v. MARIETTA & N. G. R. CO. et al. (MORSE, Intervener).

(Circuit Court, N. D. Georgia. April 20, 1894.)

Nos. 488 and 503.

EQUITY PLEADING—RAILROAD FORECLOSURE—INTERVENTION TO OBTAIN CONSTRUCTION OF DEED OF TRUST.

The right of certain bonds to participate in the fund to be derived from a railroad foreclosure sale depended upon the construction of a certain deed of trust, and it was conceded that such construction should be made by the court in which the foreclosure suits were pending, and in connection therewith. *Held*, that it would seem that a petition of intervention was the proper procedure; but, even if it should appear that a dependent original bill was the proper remedy, the court would not reject a pleading styled a "petition of intervention," which contained all the allegations necessary to raise the question to be determined.

This was a petition of intervention, filed by George W. Morse in the foreclosure suit brought by the Central Trust Company of New York and the Boston Safe-Deposit & Trust Company against the Marietta & North Georgia Railroad Company and others.

H. B. Tompkins, for plaintiff Central Trust Co.

Clay & Blair, for defendant Marietta & N. G. R. Co.

John C. Lane, Tully R. Cornick, and A. O. Bacon, for intervener.

NEWMAN, District Judge. This proceeding by petition of George W. Morse is filed in the above-stated case, and is called in the papers an "intervening petition." The petitioner seeks, so far as his proceeding is insisted upon now, to have a construction by this court of a certain clause in a trust deed executed by the Marietta & North Georgia Railroad Company to the Central Trust Company of New York, the clause being in reference to the exchange of certain first and second mortgage bonds for a later issue of bonds on an extended line of road called here "Consolidated Bonds." A demurrer has been filed by the Central Trust Company of New York to this proceeding on several grounds. The only one now in-

sisted upon is that the petitioner has not adopted the proper method of proceeding to obtain the aid of the court as prayed for. The argument is that the proper proceeding is by an original dependent bill. The allegations which are made in the original petition and in the two amended petitions, taken together, are unquestionably sufficient to raise the question of which the petitioner seeks a determination. It is conceded by counsel presenting the demurrer that the relief sought should be granted in this court, and, as I understand it, it is even conceded that it should be done in connection with the suits here to foreclose the mortgages on the railroad, and in which suits the intervention is filed. The allegation and the prayer of the petition being sufficient, and the proceeding being in this court, where the bill to foreclose the mortgage was pending, and where the proceeds of the sale of the property must be distributed, the court will not reject it, even if it should appear that the petitioner has improperly named it; and this is not at all clear. The question of construction here raised involves the right of certain bonds to participate in the fund which will be derived from the sale of the Marietta & North Georgia Railway, and that fund must be distributed in this court, and by the proceeding in which the intervention is filed. The intervention would seem to be the proper remedy. A dependent bill need contain nothing more than is contained in this petition here and the two amendments, except the prayer for process and service. While the demurrer does not raise the question, it is suggested in argument that there should be service on the railroad company, and the railway company, and, as I understand it, counsel for petitioner, agree to the propriety, if not the necessity, of this, and propose to the court to have such service made before proceeding further. The demurrer is overruled.

JOHNSON v. RICHMOND BEACH IMP. CO.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

MORTGAGE OF COMMUNITY PROPERTY—FORECLOSURE—JURISDICTION OF PARTIES—SUMMONS—SERVICE ON ABSENT WIFE.

A husband and wife removed from their community land, on which they had given a mortgage, to another state, where they separated. The wife remained out of the state, but the husband returned to the land. Afterwards there was a decree foreclosing the mortgage, and the return of the sheriff showed that service of the summons was made on the husband personally, and on the wife by delivering a copy to the husband at her usual place of abode. *Held*, that the court had jurisdiction of the parties, and such decree was binding on the wife.

This was an action by Maria E. Johnson against the Richmond Beach Improvement Company to redeem land sold on foreclosure of a mortgage. Heard on demurrer to the amended complaint. Demurrer sustained.

Strudwick & Peters, for complainant.

Burke, Shepard & Woods and Thomas B. Hardin, for defendant.

HANFORD, District Judge (orally). This case was argued and submitted on a demurrer to the amended complaint. This is a suit in equity by a woman to redeem from a mortgage certain real estate, the title to which was acquired by her husband while she and her husband were living together in this state, when it was a territory, and which, under the laws of the territory, became their community property. The mortgage was given for part of the purchase money. It appears by the bill of complaint that after the couple had taken possession of the land, and lived upon it for a time, and made some improvements upon it, they changed their residence and left the territory. After going away, they separated, and the husband returned; and when he was within the territory and had a residence here, default having been made in the payment of the amount secured by the mortgage, a foreclosure suit was brought in the district court of the third judicial district of Washington territory. This complainant and her husband were both named as defendants in that foreclosure suit. A summons was served on the husband personally. Service of the summons was made on this complainant by delivering a copy to the husband at her usual place of abode, as the sheriff certifies. Mrs. Johnson did not appear in the case, and a decree of foreclosure was entered, and the property sold. The time for redemption expired. The sale was confirmed, and a sheriff's deed was executed and delivered to the purchaser. Several years after the time for redemption had expired, this suit was brought in this court, by the complainant, to redeem the property from the mortgage, she tendering or offering to pay the full amount of the mortgage and interest. After the sale of the property, a divorce was granted in Dakota, at the suit of the husband. Plaintiff is now an unmarried woman. She claims that, by reason of her community interest in the property, she had a right to redeem; that she is not bound by the foreclosure decree, because the service of process was not a legal service, as the place at which the service was made was not her actual place of abode at that time.

On the face of the record, the service was regular and legal, and the court appeared to have acquired jurisdiction of all the parties defendant; and, to upset that judicial sale, it is necessary for the court to admit evidence aliunde to impeach the validity of the record of a court of general and superior jurisdiction. The court is not inclined to permit that to be done, unless the equity of the plaintiff is so strong, and her legal right to do this is so clear, as to admit of no doubt. All the people have an interest in preserving the verity of public records, and upholding titles acquired by judicial sales. It is subversive of justice to permit titles in which no defect can be discovered by an inspection of the record to be ripped up and invalidated by proceedings commenced long subsequent. It is my opinion that the sheriff's return of service, as to the fact of the place where service was made being the usual place of abode of the defendant, is not conclusive on the parties. That is a matter of which he cannot have such personal knowledge as to be able to give such evidence in his certificate that it ought to be regarded as conclusive; but I think the intent of the law is fulfilled when the

return of the sheriff is so far true that the place at which service was made upon an absent defendant is the legal place of abode; and that is the case here. The person to whom the papers were delivered for this complainant was her husband. He was the person to whom the title to this property had been conveyed, and in whose name it stood upon the record. He was vested by the law of Washington territory with the control and management of that community property. He had a right to represent, not only himself, but his wife and the community, in the management of that property; and parties having a lien upon the property, and a right to bring a foreclosure suit, could not be prevented from exercising that right by the absence of the wife from the territory, or her concealment, so that personal service could not be made on her. Now, the very best that could be done in compliance with the laws of Washington territory was to make the service on her at her place of abode. If she was not actually there, although there had been a disruption of the family, it was still, until a legal separation, her lawful place of abode, because a wife's legal home is with her husband. It is my opinion, therefore, that the service was lawful, and the court which rendered this decree had jurisdiction of the parties, and the decree is binding on both of them. It is my opinion, also, that the decree is binding upon this complainant, upon the principle that not only parties, but privies, are bound by the judgments of courts. This woman had no separate, independent title to this property; that is, no title independent of that of her husband. Whatever interest she had in this property was by virtue of being the wife of her husband, in whom the legal title vested. Her interest in the property is not by any public record made to appear. Therefore its existence can only be established by proof of her marriage. There is no other way in which she can connect herself with this title so as to establish any interest in it whatever. She is therefore claiming through her husband, and, as I have already recited, the husband was, under the community property laws, manager or trustee of this community property at the time the foreclosure suit was commenced and prosecuted. He was the representative of himself and the community and his wife. All the interests that were involved in that community title were represented by the husband, and whatever operated to divest him of the title divested him of that title which he held in his capacity as trustee, and carried with it all interests of whomsoever he was lawfully authorized to represent in that case.

In the case of *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549-551, 8 Sup. Ct. 210, the supreme court states the rule applicable to this class of cases as follows:

"Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make a defense, or to control the proceedings, and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But, to give full effect to the principle by which parties are held bound by a judgment; all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term

'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and, whenever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. The correctness of this statement has been often affirmed by this court (*Lovejoy v. Murray*, 3 Wall. 1-19, and *Robbins v. Chicago*, 4 Wall. 657-673); and the principle has been recognized in many cases. Indeed, it is elementary. *Hale v. Finch*, 104 U. S. 261-265; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14-22; *Butterfield v. Smith*, 101 U. S. 570."

See, also, *Plumb v. Goodnow's Adm'r*, 123 U. S. 560, 8 Sup. Ct. 216.

In the argument a good deal of stress was laid upon the point that the right of the complainant in this case became extinguished, and she is estopped by her own laches, and it is also contended that the suit is barred by the statute of limitations of this state. I disagree with counsel for the defendants as to both of these propositions. The time is something less than seven years from the date of the sheriff's deed until the bringing of this suit, which is less than the time allowed by the statute of limitations for bringing an action to recover real estate; and there is nothing on the face of the record to show me that there has been any such change in the state of the title, or the situation of the parties defendant, as to make it appear that they have been prejudiced by the delay. Now, where there is no prejudice by the delay, I am not willing to recognize any period less than the time allowed for instituting a suit for recovering real estate to bar a right in equity on the ground of laches. The statute of limitations of this state is not binding upon this court, as a court of equity; and, if it were, the period of time allowed by the statute has not run. The statute of limitations would not commence to run against the right to redeem until there had been an offer to redeem and a refusal, and, according to the bill of complaint, it is less than two years since the defendants in this case refused to consent to a redemption of the property from the mortgage.

The other points discussed on the oral argument are so interwoven and involved in the main questions as to the validity of the service, and the binding effect of the judgment of the district court, that it is unnecessary for me to make any remarks respecting the same. The demurrer to the bill is sustained.

SUTTON MANUF'G CO. v. HUTCHINSON.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 159.

1. CORPORATIONS—INSOLVENCY—SALE OF ASSETS.

Although the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors, and although such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its charter or by statute, exercise as

full dominion and control over its property, having due regard to the objects of its creation, as an individual may exercise over his property, when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation.

2. SAME—LIEN OF CREDITORS—TRUST.

When a private corporation is dissolved, or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty, in such cases, of preserving it for creditors, rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors.

3. SAME—DUTY TO SUSPEND BUSINESS.

A corporation is not required, by any duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and, by a mortgage upon its property, secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him.

4. SAME—DISTRIBUTION OF ASSETS—RIGHTS OF DIRECTORS.

But when a corporation becomes insolvent, and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is "to act up to the end or design" for which the corporation was created (1 Bl. Comm. 480); and, when they can no longer do so, their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, being creditors, to obtain any particular advantage for themselves to the prejudice of other creditors.

5. SAME—MORTGAGE TO CREATE PREFERENCE—VALIDITY.

Rev. St. Ind. 1881, §§ 4920, 4924 (Rev. St. 1894, §§ 6645, 6649), do not cover every case of an insolvent private corporation which mortgages its property to secure an antecedent debt due to one of its creditors. The statute was aimed at conveyances or assignments of property made with the intent to hinder, delay, or defraud creditors or other persons of their lawful demands. It leaves the question of the validity of a conveyance, not made with the forbidden intent, but simply for the purpose of preferring a particular creditor, to be solved by any general recognized principles that are applicable to such a case.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit by William B. Hutchinson, trustee under the assignment made by the Hopper Lumber & Manufacturing Company, against the Sutton Manufacturing Company, to set aside a mortgage. Complainant obtained a decree. Defendant appeals.

Addison C. Harris and J. E. McCullough, for appellant.
John S. Duncan and Charles W. Smith, for appellee.

Before HARLAN, Circuit Justice, JENKINS, Circuit Judge, and BUNN, District Judge.

HARLAN, Circuit Justice. On the 25th day of July, 1891, in the forenoon, the Hopper Lumber & Manufacturing Company, a corporation of Indiana, filed for record a mortgage to the Sutton Manufacturing Company, a corporation of Michigan, covering the entire stock of the mortgagor company, and every article and thing in or about its lumber and coal yard and used in its business.

The mortgage was given to secure the payment of drafts of different amounts drawn at different times between May 21, 1891 and July 23, 1891 by the Hopper Lumber & Manufacturing Company on the Sutton Manufacturing Company. These drafts aggregated \$18,000; and were accepted by the latter company solely for the accommodation of the drawer. They were all negotiated and transferred, but none of them had matured when the above mortgage was executed.

At the time the mortgage was given, the Hopper Lumber & Manufacturing Company was insolvent, its liabilities exceeding its assets by about \$40,000. The fact of its insolvency was then known or ought to have been known to its president, who acknowledged the mortgage, and, it is to be presumed, was known or ought to have been known to his codirectors. And the record leaves no room to doubt that the grantor intended to suspend all further prosecution of its business immediately upon executing the mortgage.

During the afternoon of the same day the Hopper Lumber & Manufacturing Company executed and filed for record a deed of assignment conveying to William B. Hutchinson all its property of every kind and nature, in trust to be sold and disposed of by him; the proceeds, after paying the costs of the deed of assignment and the lawful expenses of executing the trust, to be applied ratably to creditors of the mortgagor company.

The deed of assignment purports upon its face to have been made because of the inability of the mortgagor company to meet the demands of its creditors.

At the date of the mortgage, James S. Hopper, Henry S. Hopper, and Fannie E. Hopper were the directors, James S. Hopper the president and treasurer, and Henry S. Hopper the secretary, of the mortgagor company; and James S. Hopper, Henry S. Hopper, and Benjamin F. Sutton were the directors, James S. Hopper the president, Benjamin F. Sutton the vice president, and Henry S. Hopper the secretary and treasurer, of the Sutton Manufacturing Company.

Of the 600 shares of the stock of the Hopper Lumber & Manufacturing Company of the par value of \$25 each, James S. Hopper held at the time of executing the mortgage 510 shares, Henry S. Hopper 30 shares, Mrs. Elizabeth Sutton 40 shares, and Mrs. Fannie E. Hopper 20 shares; and of the 1,000 shares of the Sutton Manufacturing

Company of the par value of \$25 each, Mrs. Sutton held 220 shares, Mrs. Fannie E. Hopper 259 shares, Benjamin F. Sutton 204 shares, Walter A. Hopper 120 shares, Henry S. Hopper 120 shares, Mary J. Adams 76 shares, and James S. Hopper 1 share.

James S. Hopper is the husband of Fannie E. Hopper, a daughter of Mrs. Elizabeth Sutton and a sister of Benjamin F. Sutton and Mary J. Adams. Walter A. Hopper and Henry S. Hopper are sons of James S. Hopper by a former wife, who was a sister of Fannie E. Hopper and a daughter of Elizabeth Sutton.

Some question was made in the pleadings whether the mortgage was in fact accepted before the filing for record of the deed of assignment to Hutchinson. While that point is not deemed vital in the case, it may be well to state that, in the answer of the Sutton Manufacturing Company to an amended bill of complaint, it is averred that at the time the mortgage was executed, "to wit, before 9 o'clock a. m. on the 25th day of July, 1891, the same was then and there unconditionally delivered, and all control over the same surrendered, by the Hopper Lumber & Manufacturing Company to Henry S. Hopper, the secretary and treasurer and financial agent and manager of the defendant, the Sutton Manufacturing Company, for the said defendant company. And as such officer, agent, and manager of said company, the said Henry S. Hopper, then and there acting for and on behalf of said defendant company, accepted the same, and had the same recorded at 9 o'clock a. m. of that day. And that as such officer, manager, and agent he had then and there full authority, for and on behalf of said company, to accept said mortgage for it and on its behalf." It thus appears that the mortgage was surrendered by the Hopper Lumber & Manufacturing Company, represented in part by Henry S. Hopper, a director and its secretary, to Henry S. Hopper, a director and the secretary, treasurer, financial agent, and manager of the Sutton Manufacturing Company; and, on behalf of the mortgagee company, he "then and there" accepted the mortgage from the mortgagor company, in part represented by himself as a director and stockholder. The active parties in this transaction do not seem to have been neglectful of any matter of form.

The present suit was brought by Hutchinson, as assignee under the deed of assignment, to obtain a decree declaring the mortgage void as to him and the general creditors, in which event the property embraced by it would belong to him for administration under that deed.

On the authority of *Lippincott v. Carriage Co.*, 25 Fed. 577, and *Howe v. Tool Co.*, 44 Fed. 231,—both of which cases were decided by Judge Woods,—the circuit court, the district judge presiding, entered a decree setting aside the mortgage.

We are of opinion that there was no error in the decree. It is quite true that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors; and such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its charter or by statute,

exercise as full dominion and control over its property, having due regard to the objects of its creation, as an individual may exercise over his property. But when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation.

In *Curran v. State*, 15 How. 304, 307, the supreme court of the United States said that the assets of an insolvent banking corporation "are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of other than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has been often decided, and rests upon plain principles." So, in *Drury v. Cross*, 7 Wall. 299, 302, in which case it appeared that a corporation had conveyed its property so as to protect its directors against liability as indorsers for it, the court, in condemning the conduct of the directors, held that it was their duty "to administer the important matters committed to their charge for the benefit of all parties interested, and in securing an advantage to themselves not common to the other creditors they were guilty of a plain breach of trust." Subsequently, in *Graham v. Railroad Co.*, 102 U. S. 148, 161, the court, after observing that a corporation, if not forbidden by its charter, could hold property as absolutely as an individual could hold property, and that its estate, interest, and possession were the same, said that:

"When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081, the language of the court was:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when a corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders."

See, also, *Koehler v. Iron Co.*, 2 Black, 715; *Richardson's Ex'r v. Green*, 133 U. S. 43, 44, 10 Sup. Ct. 280.

There is nothing in *Hollins v. Iron Co.*, 150 U. S. 371, 382, 14 Sup. Ct. 127, to which appellant calls attention, that is at all inconsistent with these principles. On the contrary, the court, while reaffirming the doctrine that the property of a private corporation is not burdened with any specific lien or direct trust in favor of general creditors, observed that such a corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exist in favor of the cred-

itors of a partnership after becoming insolvent, and that in each case such lien and trust will be enforced by a court of equity in favor of creditors.

It is, we think, the result of the cases that when a private corporation is dissolved or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors.

In what cases, where the subject is uncontrolled by legislation, can such preference or priority be legally given by a corporation? Undoubtedly a solvent corporation, if not forbidden by its charter, may mortgage its property to secure the performance of obligations assumed before or at the time of the execution of the mortgage. So, a mortgage executed by a corporation whose debts exceed its assets, to secure a liability incurred by it or on its behalf, will be sustained, if it appears to have been given in good faith to keep the corporation upon its feet and enable it to continue the prosecution of its business. A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind, a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Richardson's Ex'r v. Green*, 133 U. S. 30, 43, 10 Sup. Ct. 280; *Oil Co. v. Marbury*, 91 U. S. 587, 588.

Entirely different considerations come into view when an insolvent corporation, having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred by one of its directors, or, in a general assignment of all of its property, gives him a preference. To a general assignment by a private corporation for the equal benefit of all its creditors, including directors, no

objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said in *Pickstock v. Lyster*, 3 Maule & S. 371, 375, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors.

The contention of the defendants is that in disposing of their respective properties an individual and a corporation were recognized at common law as having equal rights; and as the former may, in the absence of a statute forbidding it, transfer the whole or part of his property with the intention or with the effect of giving a preference to some of his creditors to the exclusion of others, so an insolvent corporation, when financially embarrassed and not intending to continue its business, may make a preference among its creditors, whoever they may be, and whatever their relation to the corporation or to the property transferred. If this be a sound rule, it would follow that directors, being also creditors, of an insolvent corporation, which has abandoned the objects of its creation and ceased an active existence, may distribute among themselves its entire assets, if the reasonable value thereof does not exceed their aggregate demands. We cannot accept this view. In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard of course to valid liens or charges previously placed upon it. Their duty is "to act up to the end or design" for which the corporation was created (1 Bl. Comm. 480), and when they can no longer do so their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others, and, instead of being relaxed, should be rigidly enforced in cases of breach of duty or trust by corporate managers seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule, as applied to those intrusted with the management of corporate property.

As between an individual and those with whom he transacts business, there is no relation of trust or confidence in respect to

his property that affects his absolute right to dispose of it as to him seems fit. He is not bound to devote his property to any particular uses or to the discharge of any particular debts. But his entire estate, so far as it is not burdened by himself with liens or exempted by law from execution, may be reached by appropriate proceedings, and subjected to sale in satisfaction of his debts. If his property is insufficient at the time of his insolvency to discharge all his liabilities, unpaid creditors may abide their time, and, until their claims are barred by limitation, look to any property thereafter acquired by him. In short, every one contracts with an individual upon the basis of his absolute dominion over his property, except as its disposition when he becomes insolvent or contemplates insolvency may be restricted, as in many jurisdictions it is restricted, by express statute.

But the situation is wholly different in the case of a private corporation, whose property in the hands of its directors or managing agents is, by the law of its being, devoted to the special objects for which it was created. Because it is so devoted those who take it with notice that it is being applied to purposes foreign to the objects for which the corporation was established may be compelled, at the instance of proper parties, to surrender it or to account for its proceeds. *Russell v. Waterworks Co.*, L. R. 20 Eq. 474, 479; *Studdert v. Grosvenor*, 33 Ch. Div. 528, 539, 540. Upon like grounds, equity will enjoin the managing agents of a corporation from using its funds for objects not germane to its authorized business; and as, in the absence of a statute prescribing a contrary rule, creditors of a private corporation cannot look for their security to the private estate either of the corporators or of those who manage its property, the only recourse of creditors, when a corporation is dissolved or becomes insolvent and ceases to prosecute its business, is the property in the hands of its managing officers. The law in effect says to all who deal with private corporations that they must look to its property as the only security for the fulfillment of its obligations; and, if the law gives this assurance to creditors of a corporation, those who are authorized to represent it in its dealings with the public, who control and manage its property, and upon whose fidelity and integrity the public as well as creditors rely, ought not to be permitted, when the corporation becomes insolvent and abandons the objects for which it was created, to appropriate to themselves as creditors any more of the common fund in their hands than is ratably their share. If, upon becoming insolvent, a corporation should invoke the aid of a court of equity for the distribution of its assets, creditors would be paid *pari passu* in ratable proportions. Those, therefore, who hold fiduciary relations to creditors, ought not to be allowed, by any form of proceeding, or by their own act, after the corporation is practically extinct, to appropriate its property for their special benefit, to the injury of those who, upon every principle of justice, have equal rights with themselves.

These views are fully supported by many well-considered cases in

addition to those decided by Judge Woods, and to which reference has been made. Some of them are named in the margin.¹

The cases cited on behalf of the appellant have not been overlooked, but upon careful examination we are of opinion that most of them fall short of sustaining its contention. Be that as it may, we think the better reason is with the views we have expressed.

Among those upon which the appellant relies are *Gould v. Railway Co.*, 52 Fed. 680, 681; *Brown v. Furniture Co.*, 7 C. C. A. 225, 58 Fed. 286; *Hills v. Furniture Co.*, 23 Fed. 432; *Buell v. Buckingham*, 16 Iowa, 284; *Smith v. Skeary*, 47 Conn. 53; and *Holt v. Bennett*, 146 Mass. 437, 16 N. E. 5.

Gould v. Railway Co. does not sustain the position of appellant. That case involved, among other things, the validity, as against the creditors of a railroad corporation, of a deed of trust executed as additional security to certain stockholders and directors who had previously advanced large sums for it, and for the repayment of which the company pledged as collateral security mortgage bonds known at the time to be inadequate as security. But it was the best security the company could then give. Subsequently it obtained a grant of lands from the State, and at a later date, 1884, the above deed of trust was given to secure the above loans or advances. Now, the company, when it made the deed of trust, had not abandoned, and did not intend to abandon, the prosecution of its business. Nor was it hopelessly insolvent. On the contrary, it appeared, and the fact is stated in the report of the case, that "at the date of the execution of the deed of trust the floating debt of the company was inconsiderable, and the company continued to be a going concern, and to own its road, until it was sold in 1887 under a decree foreclosing the mortgage given to secure its first-mortgage bonds." The general observations in the opinion in that case must, of course, be interpreted in the light of these facts, and the decision taken as being only that a corporation, although in failing circumstances, may, by mortgage, give a preference to some of its creditors, even to directors, if it be done in good faith to meet existing demands and to keep it "a going concern."

¹ *Bradley v. Converse*, 4 Cliff. 375, Fed. Cas. No. 1,776; *Bradley v. Farwell*, 1 Holmes, 433, 439, 443, Fed. Cas. No. 1,779; *Corbett v. Woodward*, 5 Sawy. 403, 417, Fed. Cas. No. 3,223; *Adams v. Milling Co.*, 35 Fed. 433; *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 45 Fed. 7; *Stout v. Milling Co.*, 4 McCrary, 488, 13 Fed. 802; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Olney v. Land Co.*, 16 R. I. 597, 599, 18 Atl. 181; *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Richards v. Insurance Co.*, 43 N. H. 264; *Smith v. Putnam*, 61 N. H. 632, 634; *Corey v. Wadsworth (Ala.)* 11 South. 350; *Robins v. Embry*, 1 Smedes & M. 207, 255; *Coons v. Tome*, 9 Fed. 534; *Marr v. Bank*, 4 Cold. 476, 477; *Hopkins' Appeal*, 90 Pa. St. 76; *Sweeny v. Sugar-Refining Co.*, 30 W. Va. 433, 4 S. E. 431; *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624, 17 S. E. 938; *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co.*, 86 Tex. 143, 24 S. W. 16; *Roan v. Winn*, 93 Mo. 503, 4 S. W. 736; *Williams v. Jackson County Patrons*, 23 Mo. App. 132. See, also, *Improvement Co. v. Terrell*, L. R. 10 Eq. 174; *Green, Ultra Vires* (2d Ed.) 477, 479; 2 *Perry, Trusts* (3d Ed.) § 904; 2 *Mor. Priv. Corp.* § 803.

Brown v. Furniture Co., which arose in the state of Michigan, was determined upon the authority of decisions in the supreme court of Michigan, particularly *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512. It was contended in that case that the court should reach a conclusion as upon a doctrine of general law, but it declined to do so, holding it to be its duty, when the matter was one of doubt, to lean towards the decisions of the State court. *Hills v. Furniture Co.* was also a Michigan case, and involved the validity of a mortgage to secure creditors, and to protect directors against liability arising from their indorsements for the company. It may be observed that the court, in the latter case, considering generally the right of the mortgagor company to give the mortgage there in question, quotes from the testimony of one of its officers, who, in describing the circumstances attending its execution, said: "We thought we could then, aided by the time thus obtained, go on and pay what we owed. We had no idea but what our debts would be paid."

Buell v. Buckingham involved the validity of a sale of property belonging to a private corporation to one of its directors, in discharge of its obligation to him. It is sufficient to observe, in reference to that case, as was done by Judge Woods in *Lippincott v. Carriage Co.*, above cited, that in that case there was no evidence that the corporation was insolvent, or that the sale there in question embraced all its property. The case necessarily involved only the question whether the sale was void by reason alone of the fact that the purchaser was a director of the corporation that sold the property. *Smith v. Skeary* does not sustain the broad proposition that an insolvent corporation, which intends to discontinue altogether the prosecution of its business, may transfer its property to a director, being a creditor, to the exclusion of other creditors. That was a case in which directors of a corporation, who were also creditors, took personal property from it in discharge of their claim. But the transfer to them was in good faith, in the ordinary course of business, and in the honest belief on the part of directors that the corporation would be able to meet all its liabilities, although it appeared subsequently that the fact was otherwise. In *Holt v. Bennett* a creditor of a corporation disputed the validity of a mortgage made by it for the benefit of two of its directors. The court, among other things, said:

"The whole transaction is found to have been done in good faith, with the intent to put the corporation on a better footing to go on with its business and develop its patents, which were deemed to be valuable. * * * Even if, when this deed was made, the property of the corporation, outside of the value of the letters patent possessed by it, was insufficient to pay its debts in full, the process patented was honestly believed to be of great value, and indeed has since been made successful, although by another corporation. The position of the plaintiff appears to be that a corporation intending in good faith to proceed with its business, and to render the patents available which it possesses, cannot pay its directors money which it has borrowed from them in the ordinary course of business without rendering them responsible for the amount which they thus receive to any of its creditors whose debts may then be owing from it, although not then due and payable. This is quite untenable. The cases cited by the plaintiff which hold that where a corpora-

tion is insolvent it cannot make conveyances of its property in contemplation of such insolvency, for the security of its directors who are also its creditors, to the exclusion of others, do not require examination or discussion. They have no relation to a case like that at bar. There was no reason why this corporation should not conduct its business in the ordinary manner, even if incidentally debts for borrowed money were paid to its directors; this being done fairly, and in its prosecution of the object for which it was formed."

It is clear that the Massachusetts case is not an authority in support of appellant's position, but looks the other way.

This question, so far as we are aware, has not been determined by the supreme court of Indiana, under whose laws the mortgagor company became a corporation. But the appellant insists that the case is covered by the statutes of Indiana, which provide:

"All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods, or things in action, every charge upon lands, goods or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay, or defraud creditors or other persons of their lawful damages, forfeitures, debts, or demands, shall be void as to the persons sought to be defrauded." "The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact." Rev. St. Ind. 1881, §§ 4920, 4924 (Rev. St. 1894, §§ 6645, 6649).

Under this act it has been held that fraud in the disposition of property cannot be presumed, but must be averred and proved, and that an insolvent debtor may by mortgage give a preference to some of his creditors, although he may at the time intend by another instrument, and at an early day thereafter, to make a general assignment, under the statute, of his property for the benefit of creditors. And this principle has been applied even where the preferred creditor was the wife of the debtor, the only proper inquiry in all such cases being whether the debt secured was a genuine one. *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. 296; *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488; *Fletcher v. Martin*, 126 Ind. 55, 25 N. E. 886; *Shillito Co. v. McConnell*, 130 Ind. 41, 26 N. E. 832; *Hutchinson v. Bank*, 133 Ind. 271, 30 N. E. 952; *Fuller v. Mehl*, 134 Ind. 60, 33 N. E. 773.

In our judgment these cases have no application to the one now before us. The Indiana statute does not cover the whole subject of the conveyance or transfer of property in violation of the rights of others. It does not embrace every case of an insolvent private corporation which mortgages its property to secure an antecedent debt due to one of its directors. The statute was aimed at conveyances or assignments of property made with the intent to hinder, delay, or defraud creditors or other persons of their lawful rights or demands. A mortgage made in good faith, without intent to hinder, delay, or defraud other creditors, but for the sole purpose of preferring a particular creditor, is not prohibited. The statute does not take away the right to give such a preference where it could be lawfully done according to the principles of the common law. It leaves the question of the validity of a conveyance not made with the forbidden intent, but simply for the purpose of preferring a particular creditor, to be solved by any general, recognized principles

that are applicable to such a case. At common law even a general assignment by a debtor of his entire property for the benefit of all his creditors, although it interfered with the enforcement by the ordinary process of law of the demands of creditors, was not regarded as hindering or delaying creditors, within the meaning of the statutes against fraudulent conveyances. *Reed v. McIntyre*, 98 U. S. 507, 509 et seq., and authorities cited. So an assignment or mortgage which operates as a preference of a particular creditor is not in itself fraudulent, or a hindrance or delay, within the meaning of the Indiana statute, and its validity depends upon the nature and circumstances of the transaction. The case of an insolvent corporation, which has no purpose to continue in business, and which, in the distribution of its property, gives a preference to one of its directors, being also a creditor,—such preference being given with no intent to hinder, delay, or defraud other creditors,—is left untouched by the statute. The determination of such a case may depend altogether upon the fiduciary relation sustained by the directors to the property and to creditors, and the circumstances under which the preference was obtained. In other words, an assignment or mortgage by an insolvent corporation to one of its directors, being a creditor, may be invalid either upon the ground that it was made with the intent to hinder, delay, or defraud other creditors, or upon the ground that it was inconsistent with the fiduciary relations held by the director to the property or to creditors. If the first ground be not established,—that is, if the fact of the fraudulent intent is not proved,—it would not follow that the second would be overruled. No case has been cited indicating that the supreme court of Indiana has relaxed in any degree the salutary rule that forbids any one holding a trust fund to obtain by his own act, or by the act of those associated with him in such holding, any peculiar advantage for himself, to the prejudice of those interested equally with him in the distribution of such fund.

In the present case it appears that two of the directors of the insolvent mortgagor company owned nearly 400 out of the 1,000 shares of the stock of the mortgagee company. The mortgage therefore had the effect to protect their interests in the property of the latter corporation against the liability previously incurred by its accepting drafts drawn by the former, and to withdraw the property mortgaged from its primary liability for the debts of the mortgagor company. The case presented is consequently one in which an insolvent corporation, recognizing its inability to further prosecute its business, and with no hope of recovering from its financial embarrassments, gives a preference by mortgage of its property to some of its directors, being also creditors. According to the principles we have announced, this could not be rightfully done.

For the reasons we have given the judgment of the circuit court is affirmed.

NORTH BRITISH & MERCANTILE INS. CO. v. LATHROP et al.

LATHROP v. NORTH BRITISH & MERCANTILE INS. CO.

(Circuit Court, E. D. Virginia. September 15, 1894.)

1. EQUITY—INJUNCTION—CROSS BILL—PRESUMPTION.

Where an insurance company procures a temporary injunction in the United States court, which restrains a policy holder from suing on the policy until after the time limited thereby for such suit, and defendant, by cross bill, asks to recover the amount of the loss under the policy, the court will presume, in determining whether such affirmative relief can be granted in equity, that, if it denies such relief, a state court, in which an action at law on the policy would have to be brought, would enforce the limitation, notwithstanding the injunction, and defeat recovery.

2. SAME—JURISDICTION.

Where an insurance company brings suit to enjoin an action on a policy, and procures a temporary restraining order, and, after the issues are settled and proofs taken, defendant files a cross bill, asking to recover the amount of the loss under the policy, on the ground that the time limited by the policy for bringing an action thereon at law has expired, such affirmative relief will not be denied defendant, on the ground that his demand is a legal one, of which equity has no jurisdiction.

3. SAME—JURY TRIAL—WAIVER.

In such case the insurer waives the right to a jury trial by voluntary submission to the jurisdiction of a court of equity.

This was a bill by the North British & Mercantile Insurance Company against Kate M. Lathrop, trading, etc., and others, to enjoin defendants from bringing an action on an award of appraisers of loss sustained by fire, under a fire insurance policy issued by complainant, etc. Defendant Lathrop filed a cross bill to enforce payment of the award, to which complainant demurred. Demurrer overruled.

The original bill here was a suit by an insurer of fire risks against sundry parties insured, of whom one only had an actual interest in this result. The policy contained a provision that it should be entirely void in case of fraud on the part of the insured. A fire occurred; and, in pursuance of a provision of the policy, an appraisal was made, and an award rendered by two of three appraisers, fixing the loss at a certain amount. To this award the insurer objected, and filed its bill on the equity side of this court, charging fraud in the appraisal, and praying the court to enjoin the insured from bringing suit at law for the loss ascertained by the award, and from applying for or procuring the sale of any bonds belonging to the insurer on deposit with the treasurer of Virginia, as security for satisfying awards made against it for losses by fire. The bill also prayed for disclosure and discovery. One of the judges of this court granted an order temporarily restraining the insured from in any manner enforcing, or attempting to enforce, the award that had been made in their favor,—that is to say, from bringing suit at law,—and also from procuring the sale of bonds held by the state treasurer in satisfaction of the award. The bill was brought in October, 1892. In the November following, the answer was filed, denying all the fraud charged, in general and in particular. The suit went on in due course. Pleadings were matured, proofs all taken and concluded, and the case made ready for a final hearing; when, on the 4th April, 1894, the insured filed a cross bill in this suit, by leave of court, praying affirmative relief and payment of the amount awarded by the appraisers. It is alleged in the cross bill, among other things, that the insured had been prevented by the temporary restraining order of the court from suing at law upon the award beyond the limitation of time for so suing stipulated in the policy,

and also by the fact that this court, having acquired jurisdiction of the question of the validity of the policy which is the basis of this suit, has exclusive jurisdiction of that question. The cross bill further alleges that if this court should merely dismiss the original bill, without decreeing the payment of the amount of the award, the expense and delay of an action at law to recover the money due would be thrown upon the insured; and that in such suit the insured would be resisted by a plea of limitation, founded on a provision of the policy, forbidding suit after one year from the time of the fire. The cross bill avers that it is the province of a court of equity, having charge of a controversy, to do full justice between the parties to it; and that it would be contrary to equity, and injurious and oppressive to the insured, for the insured to be required, at this stage of the proceedings, to institute a separate suit at law to recover what is due. The insurer demurred to the cross bill, relying—First, upon the ground that the claim of defendant is of a purely pecuniary nature, sounding in damages, for an alleged breach of contract only, and therefore, under the constitution and laws of the United States, cognizable and triable only in a court of common law, which this court has no jurisdiction to hear and determine; and, secondly, upon the ground that the claim of the insured under the award is subject to a limitation in the policy, which limitation is binding upon courts of equity, as well as of law.

Chas. S. Stringfellow, for complainant.

C. V. Meredith, for defendant Mrs. Lathrop

HUGHES, District Judge (after stating the facts). As to the question whether the limitation clause of the policy would defeat the insured if required to sue at law, it would certainly be competent for any other court but this, in which suit at law might be brought, to rule in favor of enforcing the limitation. Such court would be bound by no other consideration in favor of the insured than the comity due between courts; but no court can yield its convictions as to the force of a contract to any considerations of comity. I do not feel that this court has a right to presume that another court, in which suit at law might be brought by the insured, and the plea of limitation relied upon by the defense, would necessarily hold that the insurer was estopped from pleading the limitation. On the contrary, I think this court ought to presume the worst, to wit, that the limitation would be enforced. In contemplation of such a ruling, it would be contrary to equity for this court, after enjoining the insured from suing for a time beyond the period of limitation, to send him to a court of law to enforce his rights.

The authorities are very conflicting on the question whether a court of equity, having entertained a suit such as the one under consideration, through all its stages, until it is matured for hearing, and having found it necessary, in order to do full justice between the parties, to entertain a cross bill filed by the defendant, praying affirmative relief, is debarred from proceeding under the cross bill because it asserts a cause of action originally cognizable only in a court of law. These conflicting decisions seem to have arisen, to a greater or less extent, out of the peculiar and varying circumstances of the particular cases tried.

I do not think that there are any cases in the books in which the circumstances justifying a court of equity—after a protracted litigation, which has arrived at a stage for a decree, and full and com-

plete justice to all parties cannot be done except by admitting and considering a cross bill asking affirmative relief, involving a cause of action cognizable by a court of law—in retaining a suit, are so strong and clear in favor of such a course as the case at bar. The complainant in the original bill came into court praying that the defendant might be enjoined from suing at law on the award by appraisers fixing the loss she had sustained. A temporary order was at once granted, denying to the defendant the privileges of the courts in the matter of suing for this loss. This injunction has been continued in force until the time within which suit at law can be brought under the policy has expired. Certainly, such a state of facts would, in ordinary cases, constitute an estoppel upon the complainant against objecting to the jurisdiction of the court which he has made the instrument of such delay, and justify the interference of equity. As to the insured, who exhibits the cross bill, praying the affirmative relief to which he believes himself entitled, the very fact of presenting such a bill is a voluntary submission on his part to the jurisdiction of the court, and waiver of the right of trial at law.

Under the general principles of equity practice, the court would undoubtedly be, not only entitled, but bound, to entertain such a cross bill; and the simple question is whether, under all the circumstances of this case, the general principles of equity practice should govern, or whether a general rule, giving the right of trial by jury in common-law cases, should be enforced, in defeat of the equity jurisdiction. I think that this general rule, denying jurisdiction to equity courts in cases cognizable at common law, contemplates only original suits, and that it does not relate to proceedings arising incidentally in the regular course of equity causes. I think it would be a harsh application of this rule to hold that after a suit in equity has gone through pleadings and proofs, and the rights of parties have been ascertained, and the cause made ready for final hearing, a cross bill, necessary to doing complete justice between all parties, should be rejected because it asserts a claim cognizable at law.

The provisions of the national constitution securing trial by jury in civil actions, and preserving the distinction between courts of law and equity, have for one of their objects the preservation of the equity jurisdiction, and not its destruction. To deny to courts of equity the power to entertain cross bills like the one in the case at bar would have the latter tendency. The constitution of the United States, in providing for courts of common law and equity, and in providing for "trial by jury in suits at common law," evidently contemplates original suits. There is nothing in its general language on these subjects which conveys the idea that in the collateral branches of suits in equity the courts of equity shall be debarred from doing full and complete justice between litigants under any circumstances. There is nothing in its language or its spirit to indicate an intention to take away from equity the decision of pecuniary questions arising incidentally in the course of equity proceedings. The tendency of such a policy would be to

impair the equity jurisdiction, and not to preserve it. Congress seems to have construed the provision requiring trial by jury in all cases at common law as applying only to original suits. Its language in the judiciary act (section 723 of the Revised Statutes) is: "Suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law." Moreover, the provision guaranteeing jury trial in civil cases is not absolute in respect to jurisdiction, but is one that may be waived by the parties interested. It was designed to guard against oppression; it was the grant of a privilege; and therefore in cases like the present one, where each party resorts to equity, and prays for relief from the court of equity, each party waiving the right of trial by jury, the resort to a common-law court need not be enforced. "Cessante ratione, cessat et ipsa lex." The supreme court of the United States, in the course of its opinion, in the case of *Scott v. Neely*, 140 U. S. 109, 11 Sup. Ct. 712, says, *passim*:

"The constitution, in its seventh amendment, declares that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it."

The pleadings in this cause show that both parties to the suit have not only assented to the equity jurisdiction, but have voluntarily invoked it. The demurrer must therefore be overruled.

MILLS et al. (RIDER, Intervener) v. MILLS.

(Circuit Court, D. Oregon. March 30, 1894.)

No. 1,910.

PROPERTY SUBJECT TO TRUST—PURCHASE BY TRUSTEE.

The purchase by a trustee, from the *cestui que trust*, of the property which is subject to the trust, is not interdicted by the statute of Oregon, and will be upheld by the court where no advantage was taken of the fiduciary relation, no fraud was practiced, and the consideration was adequate. 57 Fed. 873, affirmed.

The following opinion was rendered upon a rehearing in this case. The former opinion in the case will be found fully reported in 57 Fed. 873.

Frank V. Drake, for plaintiffs.

N. B. Knight, for defendant.

GILBERT, Circuit Judge. A rehearing was ordered in this case upon the question of law passed upon by the court in the former opinion, regarding the power of the defendant, Fred H. Mills, to deal with Warren Mills concerning the property belonging to an estate of which he was then the administrator. Upon reargument of that question, and consideration of the authorities presented by the respective parties, I am convinced that the views of the court upon that question, as contained in the original opinion, are correct. This is not the case of an administrator

buying at his own sale, which is interdicted by the statute of Oregon. It is rather the case of a trustee purchasing from a cestui que trust the property which is the subject of the trust. In such a case the transaction would be upheld by the court, provided there was no advantage taken of the fiduciary relation, no fraud was practiced, and the consideration was adequate. It is claimed in this case, however, that the evidence shows the consideration to have been inadequate. The price which Fred H. Mills promised to pay Warren Mills for the personal property was \$3,800. That was to cover the whole title to the personalty. Warren Mills claimed to be the owner of one undivided half of the personalty by virtue of his father's will. Shortly before the transaction by which he sold to Fred H. Mills, he had purchased the other half from J. B. Rider, who had owned the same jointly with Warren Mill's father. It is impossible to believe from the evidence that Warren Mills was not acquainted with the value of the property that he was selling to Fred H. Mills. He had seen the property; he had had it inventoried some time before; but the most significant fact is that he had purchased an undivided half from J. B. Rider, a man who had owned and been in possession of the property, and was aware of its value. In buying out the interest of J. B. Rider, Warren Mills undoubtedly considered and discussed the value of the interest he was buying, and satisfied himself that the price he was paying was proportionate to that value. One witness, William M. Rider, testifies that the value was more than twice the price at which the property was sold to Fred H. Mills. In his petition for leave to intervene, however, he places the value at \$4,000. There is no other witness that testifies that the value was any greater than \$3,800. The values affixed to the property by William M. Rider for the horses and cattle seem to me fanciful prices, in the absence of any showing that the stock was different from ordinary cattle and horses. It is likely, moreover, that in this transaction Warren Mills was intending to favor his cousin, who stood very high in his esteem. He had the right, if he chose, to make a present to Fred H. Mills of his interest in the estate, and the parties to this suit can have no greater right to ignore the transaction, or set the same aside, than Warren Mills himself would have had if he were still living and prosecuting this suit. A considerable portion of the argument of counsel for the complainant seems to be based upon the fraud and inequity of the conduct of Fred H. Mills, subsequent to the death of Warren Mills; but, in deciding whether or not the title to the personalty passed to Fred H. Mills, the court regards only the transaction between the parties at the time. If Fred H. Mills acquired a title to that property by purchase from Warren Mills, there is no principle of equity which would authorize the court to say that he has forfeited his rights by wrongful acts since done. Concerning the purchase of the McCollum lease, however, I am inclined to the view that that transaction should be set aside. Fred H. Mills claims to have paid for that lease \$800 in cash. I am of the opinion that his testimony in that regard is untrue;

that he had no money, and paid no money to Warren Mills in connection with the transaction; and to that extent the decree heretofore ordered will be modified. The principles applicable to the sale of the personalty apply also to the lease of the realty. For that lease the defendant was to pay \$1,000 annual rent. There is no intimation that the amount of the rent is inadequate, or that the contract of lease was procured by unfair means. By the covenants of the lease it is provided that the rights of the defendant thereunder may be forfeited, and the lease canceled, for nonpayment of rent.

MERCANTILE TRUST CO. v. ATLANTIC & P. R. CO.

(Circuit Court, S. D. California. September 26, 1894.)

No. 584.

1. TELEGRAPH COMPANIES—ERECTION OF LINE ON RAILROAD RIGHT OF WAY—MILITARY AND POST ROADS.

A telegraph company which is embraced within the terms of the act of July 24, 1866 (Rev. St. § 5263), and has accepted its provisions, is entitled, by the terms thereof, to erect a line of telegraph upon a railroad right of way granted by congress out of the public domain, subsequent to the date of that act, and declared by the granting act to be a military and post road of the United States; subject, however, to the condition that the telegraph line be so constructed as not to interfere with ordinary travel on the railroad.

2. INTERVENTION IN EQUITY.

The alleged right of a telegraph company to build a telegraph line upon the right of way of a railroad company whose property is in the hands of the court's receiver pending foreclosure may properly be presented and enforced by intervention in the foreclosure proceeding.

3. SAME—CALIFORNIA STATUTE—FEDERAL COURTS.

The California statute relating to interventions has no application to interventions in railroad foreclosure proceedings pending in a federal court.

This was a petition of intervention filed by the Postal Telegraph Cable Company in the suit brought by the Mercantile Trust Company against the Atlantic & Pacific Railroad Company, the object of the intervention being to enforce an alleged right of the telegraph company to erect a line of telegraph upon the railroad company's right of way. Heard on demurrer to the petition of intervention.

Lamme & Wilde and Frank J. Loesch, for Postal Tel. Cable Co.

R. B. Carpenter and H. D. Estabrook, for respondent.

ROSS, District Judge. In this cause the Postal Telegraph Cable Company filed a petition setting forth that it is a corporation organized January 25, 1886, under and by virtue of the laws of the state of New York, for the purpose of owning, constructing, using, and maintaining lines of electric telegraph within and also beyond the limits of that state; that, under its articles of incorporation, the petitioner may, by its line or lines of telegraph, connect each and every city, town, and village within the United States where a post office has been established, and each and every such city, town, and

village is, by said articles of incorporation, designated as a point to be connected by telegraph; that after its incorporation, and, to wit, on the 6th day of April, 1886, the petitioner filed its written acceptance with the postmaster general of the restrictions and obligations required by section 5263 of the Revised Statutes of the United States, hereinafter set out, and thereby acquired the right to, among other things, construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States; that it owns, and has constructed, and now uses and maintains, lines of telegraph in the United States connecting nearly all of the principal cities east of the Rocky mountains with each other, and has open and maintains over 3,000 telegraph offices, between all of which offices, when required by any of the officers of the United States, it transmits government telegrams at rates annually fixed by the postmaster general; that it is now engaged in constructing a main or trunk telegraph line from La Junta, Colo. (where it connects with its eastern lines), via Albuquerque, N. M., on the Atlantic & Pacific Railroad, through New Mexico, Arizona, and California, to Mojave, in this state, there to connect with the Pacific Postal Telegraph Company's lines in California; that its line of telegraph has been erected and constructed on the right of way of said Atlantic & Pacific Railroad from Mitchell Station, in New Mexico, to the Arizona territorial line, under and by virtue of a decree of the district court for the second judicial district of New Mexico, entered upon petitioner's petition, in the case wherein the Mercantile Trust Company is complainant, and the Atlantic & Pacific Railroad Company is defendant; that petitioner's line of telegraph from the New Mexico and Arizona boundary line is now being erected and constructed upon the right of way of the Atlantic & Pacific Railroad Company under and by virtue of a decree of the district court for the fourth judicial district of Arizona, entered upon a like petition in that jurisdiction; that by an act of congress approved July 27, 1866, incorporating the Atlantic & Pacific Railroad, said railroad was granted, among other things, a right of way 200 feet wide through all public lands, and such additional public lands as it might find necessary for station buildings, or workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and that it was also declared by the act of July 27, 1866, that said Atlantic & Pacific Railroad, or any part thereof, shall be a post road and military route, subject to the use of the United States for postal, military, naval, and all other government service; that the Atlantic & Pacific Railroad, as constructed and now operated, from the California state line, at the point known as the "Needles," in San Bernardino county, to Mojave, in Kern county, Cal., was constructed upon, through, and over public lands of the United States; and that the said right of way occupied, controlled and owned by said railroad company is of the width of 200 feet throughout its entire length in California.

The petition further alleges that the petitioner is about to com-

mence the construction of its said line of telegraph in the state of California, from the Needles to Mojave, and desires and claims the right to construct its said line of telegraph under the power conferred upon it by its charter, and under the laws of the United States and of California, upon the right of way of the said Atlantic & Pacific Railroad from the Needles to Mojave, said line to be so constructed and maintained by petitioner as not to interfere with the usual and ordinary operation and maintenance of said railroad. The petitioner further alleges that the construction, maintenance, and operation of said telegraph line would be of great benefit to the receivers of the Atlantic & Pacific Railroad and to said railroad company, in that petitioner is now paying, and must continue to pay, to the receivers or the owner of such railroad, large sums of money for the transportation of telegraph poles and other materials needed to construct and maintain the line, and will give to the railroad additional telegraph facilities; that it is usual and customary for railroad companies to extend to a telegraph company, constructing telegraph lines upon the railroad rights of way, material aid and assistance, by furnishing freight trains with cars to carry telegraph material, and distributing the same between stations along the line of construction as the material may be needed, and to aid in other ways to expeditiously and economically construct such lines and repairs; that, by reason of the natural obstacles to be overcome in the country traversed by the Atlantic & Pacific Railroad in this state, petitioner needs, and will need, in order to expeditiously construct its line of telegraph, the aid of said receivers in furnishing said facilities for distributing telegraph lines, material, and the additional requirement of furnishing such petitioner and its employes with water for their necessary use, petitioner alleging that, at many places and between long distances on said railroad, the water is owned and controlled by said receivers. Petitioner further alleges, upon information and belief, that the said described aid and facilities have been furnished, and are being furnished, by the receivers to the Western Union Telegraph Company, which claims to own and operate, in connection with the said Atlantic & Pacific Railroad, a telegraph line upon the said railroad right of way in the state of California, as hereinbefore described. The petitioner further alleges that it has notified the receivers of the Atlantic & Pacific Company that it desired to erect and construct its telegraph line upon said described railroad right of way in the state of California from the Needles to Mojave, and desired to have extended to it the aforesaid aid and facilities, and that for said right of way, and for such aid and facilities, petitioner was ready and willing, and offered, and in the petition offers, to pay to said receivers just compensation, and requested said receivers not to interfere with the erection of petitioner's telegraph line upon said right of way; but that the receivers refused, and do refuse, to allow the petitioner to construct its telegraph line upon said right of way in the state of California; and that they refused, and still refuse, to furnish to petitioner such aids and facilities, alleging and giving as a reason for such refusals the existence of a certain contract in writing, entered

into on the 1st day of June, 1872, between the Atlantic & Pacific Railroad Company and the Western Union Telegraph Company, a corporation of the state of New York, for the construction and maintenance of a telegraph line for the joint use of said two companies, the ninth clause of which contract the petitioner alleges reads as follows:

"Ninth. The said railroad company further agrees to grant the said telegraph company, as far as it has the right and power so to do, the exclusive right of way for telegraphic purposes on and along the line of its road, and will not permit any other person or corporation to construct a line or lines of telegraph along said railroad, nor, in any case, will it furnish to such other person or corporation facilities, aid, or assistance in constructing or maintaining such competing lines which it may lawfully withhold."

The petition further alleges that by said contract of June 1, 1872, facilities are extended by said Atlantic & Pacific Railroad and said receivers to the Western Union Telegraph Company which are by said railroad company and by said receivers denied to the petitioner under like conditions and circumstances; that the receivers aver that but for the existence of the aforesaid contract of June 1, 1872, they would grant to petitioner the rights claimed by it for a just and reasonable compensation, to be agreed upon between them; and they pray for an order or decree of the court directing the receivers to accord to the petitioner the alleged rights and privileges.

In response to the petition, the counsel for the receivers appeared, and stated in open court that by reason of the contract of June 1, 1872, between the Atlantic & Pacific Railroad Company and the Western Union Telegraph Company, they would authorize the attorneys of the Western Union Telegraph Company to appear for and contest in the name of the Atlantic & Pacific Railroad Company the intervening petition of the Postal Telegraph Cable Company; and, accordingly, the attorneys of the Western Union Telegraph Company filed, in the name and on behalf of the Atlantic & Pacific Railroad Company, a demurrer to the intervening petition, upon these grounds: (1) That the court is without jurisdiction to entertain or grant the prayer of intervenor's petition in the summary manner proposed. (2) For that the petition of intervention raises issues wholly foreign and collateral to those involved in the original suit of *The Mercantile Trust Company v. The Atlantic & Pacific Railroad Company*, and shows no right, title, or interest in or to the subject-matter of the original suit opposed to either of the parties to such suit, or both of them. (3) For that there is a defect of parties, it appearing from the petition that the Western Union Telegraph Company has, or claims to have, rights which would be affected by the order sought; furthermore, that it appears from the petition that the right of way of the said several railroad companies is at least in part over and through private grounds; and that an additional burden or servitude placed upon said right of way would entitle the owners of abutting property to a hearing and compensation; and that all of said

abutting owners to be so affected are necessary parties to the determination of this matter. (4) For that it is beyond the scope of the duties or powers of the receivers to grant, bargain, or sell any portion of the right of way, or to fasten upon the same any additional burden or servitude. (5) For that it is beyond the powers or jurisdiction of the court, by interlocutory order or other interlocutory or collateral proceeding, to authorize the court receivers to sell, bargain, or convey any portion of the right of way of said railroad company, or to incumber the same by any additional burden or servitude for years or in perpetuity. (6) For that it appears from the petition that the Western Union Telegraph Company had paid a consideration to said railroad company for the faithful observance of all the terms of the contract between it and the Atlantic & Pacific Railroad Company, including the covenant and provision complained of by the petition, and that there is in the petition no offer to pay or refund to the Western Union Telegraph Company the said consideration, or any part of it. (7) For that the intervening petition does not state facts sufficient to constitute a cause of action.

The suit in which the intervening petition was filed was brought by the Mercantile Trust Company of New York, as the holder in trust of certain bonds issued by the defendant railroad company, to foreclose a mortgage given as security for their payment, and to obtain the appointment of a receiver of the mortgaged property pending the litigation. The suit was therefore one in equity; and the California statute respecting intervention, relied on in support of the demurrer, does not, I think, have any application to the present proceeding. The property in question being in the hands of the officers of the court, there is no more appropriate way in which to present the alleged rights of the Postal Telegraph Company than by an intervening petition. A similar practice has been several times sustained by the supreme court. *Vault Co. v. McNulta*, 153 U. S. 554, 14 Sup. Ct. 915; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243. See, also, *High, Rec. §§ 254, 255*; *Kennedy v. Railroad Co.*, 3 Fed. 97.

The primary right claimed by the petitioner is the right to erect a line of telegraph on and along that portion of the right of way over the public domain extending from the Needles to Mojave, in this judicial district, granted to the Atlantic & Pacific Railroad Company by the act of congress of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast." 14 Stat. 292. By that act the Atlantic & Pacific Railroad Company was incorporated, and authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances—

"Beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river; thence to the town of Albuquerque, on the river Del Norte, and thence by way of the Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence, along the 35th parallel

of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by such company for crossing; thence, by the most practicable and eligible route, to the Pacific [ocean]."

By the second section of the act it was enacted:

"That the right of way through the public lands be, and the same is, hereby granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed. * * * Said way is granted to such railroad to the extent of 100 feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations. * * *"

The eleventh section of the act provided that said Atlantic & Pacific Railroad shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation. At the time of the incorporation of the Atlantic & Pacific Railroad Company, and of the above-mentioned grant to it, there was, and ever since has been, in force, the act of congress of July 24, 1866, incorporated into the Revised Statutes as section 5263, which reads as follows:

"Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with ordinary travel on such military or post roads."

That act has been the subject of consideration in several cases relied on in support of the demurrer; among them, a case decided in 1888, by Judge Allyn, of the second judicial district of the then territory of Washington, a pamphlet copy of whose opinion I have been favored with. That was a suit for an injunction brought by the Pacific Postal Telegraph Cable Company against the Northern Pacific Railroad Company et al., to restrain that company from interfering with the construction by the postal company of its line of telegraph along the right of way of said railroad company from Kalama to Tacoma. A portion of the right of way there in question was obtained by the defendant Northern Pacific Railroad Company under and by virtue of its grant by congress of July 2, 1864, which grant, in respect to the right of way, and in respect to the route being made a post and military road, was precisely similar to that made to the Atlantic & Pacific Railroad Company. It was there distinctly held that a telegraph company embraced by the terms of section 5263 of the Revised Statutes, and which accepted its provisions, is not thereby granted the right to construct a line of telegraph along that portion of the right of way of the Northern Pacific Railroad Company granted to it by the act of Congress of July 2, 1864. The court in that case concluded that the portion of the right of way

acquired by the Northern Pacific Railroad Company by virtue of its congressional grant occupied the same position as that portion of it acquired by purchase from private persons, and that in respect to each portion of the right of way the railroad company's right was absolute and exclusive. If so, it followed, of course, that no part of it could be taken without compensation. The cases of Pensacola Tel. Co. v. W. U. Tel. Co., 2 Woods, 643, Fed. Cas. No. 10,960, on appeal 96 U. S. 1, and W. U. Tel. Co. v. American Union Tel. Co., 9 Biss. 72, Fed. Cas. No. 17,444, are also relied on by counsel appearing for the respondent as sustaining the same proposition. But in that respect counsel are, I think, clearly in error. It does not appear that the right of way involved in the Pensacola Case or in the case decided by Mr. Justice Harlan, and reported in 9 Biss. 72, Fed. Cas. No. 17,444, was acquired under a congressional grant similar to the grant to the Atlantic & Pacific Railroad Company, or under any sort of a congressional grant. The right of way in each of those cases being private property, to which no reservations or conditions appear to have been attached, obviously could not be constitutionally taken for any sort of use without just compensation. By the act of July 24, 1866, congress, as said by the supreme court in the Pensacola Case, 96 U. S. 12, "made no attempt to provide for the appropriation of private property to the uses of the telegraph. * * * The use of public property alone is granted." At the time of the passage of the act of July 24, 1866, the land constituting the right of way of the Atlantic & Pacific Railroad Company from the Needles to Mojave was a part of the public domain of the United States. It was therefore in all respects subject to all the rights conferred by the act of July 24, 1866, upon any telegraph company then organized, or which might be thereafter organized, under the laws of any state, to wit:

"The right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters or interfere with the ordinary travel on such military or post roads."

Every telegraph company, in order to obtain the benefits of that act, was required to accept in writing the conditions imposed by it, which give to the business of the several departments and officers of the government priority over all other business of such company, and at rates to be fixed by an officer of the government, and confers upon the government the privilege of purchasing the lines of such company at an appraised value. Act July 24, 1866, §§ 2, 3 (Rev. St. §§ 5266, 5267).

In the case of Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, it was insisted that the grant contained in the act of July 24, 1866 (Rev. St. § 5263), extends only to such military and post roads as are upon the public domain. But the supreme court, in answering that contention, said:

"This, we think, is not so. The language is: 'Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under, or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are therefore to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, to military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are therefore subject to legitimate congressional regulation."

This law, as has been said, was in force when the grant to the Atlantic & Pacific Railroad Company was made; and, as the act creating that company and making that grant made the Atlantic & Pacific Company a post and military road, and did not exempt it from the operation of the act of July 24, 1866, it follows, I think, that the Atlantic & Pacific Railroad Company took its grant subject to the provisions of the act of July 24, 1866. The Atlantic & Pacific Company is undoubtedly entitled to full protection of the right of way granted to it to the extent of its necessary and ordinary uses; for, as has been seen, the grant to telegraph companies expressly provides that such lines of telegraph shall not be so constructed or maintained as to interfere with the ordinary travel on the military or post roads. But the full protection of those rights does not exclude from its right of way any telegraph company embraced by the act of July 24, 1866, and which has accepted its conditions, whose lines of telegraph can be so constructed and maintained as not to interfere with the ordinary travel on such roads.

Entertaining these views in respect to the congressional legislation upon the subject, it is unnecessary to consider that portion of the contract of June 1, 1872, by which the Atlantic & Pacific Railroad Company undertook, so far as it could, to confer upon the Western Union Telegraph Company the exclusive right for telegraphic purposes on and along its right of way. Whether the facilities asked for by the petitioner are within the scope of the ordinary duties of the Atlantic & Pacific Railroad Company can be best determined upon the coming in of the answer and the making of the proof. Demurrer overruled.

UNITED STATES v. LEE YUNG.

(District Court, S. D. California. October 8, 1894.)

No. 652.

CHINESE LABORER — LOSS OF RESIDENCE — TEMPORARY ABSENCE FROM UNITED STATES.

A Chinese laborer, entitled to reside in and a resident of the United States, does not lose his residence by going to the Hot Springs, in Mexico, one or two miles from the boundary line, with the intention of remaining there only two or three days, for the benefit of his health, and in fact remaining there only one night.

Lee Yung was charged with unlawful entry into the United States. From an order of a United States commissioner directing him to be deported to China, he appeals. **Reversed.**

W. A. Sloane, for appellant.
George J. Denis, U. S. Atty.

ROSS, District Judge. This is an appeal from the judgment and order of a commissioner directing the deportation of the defendant to China. The agreed statement of facts shows that the defendant has resided in San Diego county, in this judicial district, for five or six years, and had applied for, received, and at the time of his arrest, had in his possession, his certificate of residence, issued according to law, and showing him to be a Chinese laborer, and entitled to reside in the United States; that he is the owner of a one-third interest in a Chinese store in the city of San Diego, having about \$1,000 invested therein, but has not been personally engaged in the business, and is not a merchant, as contemplated by the exclusion act. He is, proceeds the agreed statement, "what is termed an 'Americanized Chinaman,' having adopted the Christian religion and American manners of dress and living, and bears a high reputation for truthfulness and reliability." The agreed statement further shows that on the afternoon of July 18, 1894, acting under the advice of his physician, who had been treating him for inflammatory rheumatism, that he should go to the country for a time, the defendant left San Diego for the purpose of spending a few days with some Chinese friends some miles back from the seacoast. These friends live in San Diego county, near a branch of the San Diego & Otay Railroad, which forms a junction with the main line running between San Diego and Tia Juana, at a point a few miles north of Tia Juana. That, on the afternoon named, the defendant took passage on the train over this road, and went through to Tia Juana, a distance of 15 miles from San Diego, with the intention of coming back to where his friends lived on the return train that evening. He had with him a hand valise, containing a change of underclothing, a collar or two, and some medicine. On reaching Tia Juana, which is situated in the United States, on the international boundary line between this country and Mexico, he heard the driver of an omnibus calling "All aboard for Hot Springs." These springs are a health resort, situated in Mexico, a mile or two below the international line, and a short distance from Tia Juana. It occurred to the defendant, proceeds the agreed statement, "that the hot baths at the springs might benefit his rheumatism, and, after making some inquiry with that purpose in view, he went to the springs, not having originally contemplated doing so, and with the intention of remaining there a short, but indefinite period, probably not exceeding two or three days. He tried the baths that evening, and the next morning returned to Tia Juana, and recrossed the line into the United States." He then boarded the train, and paid his fare to his original destination, the place where his friends lived, and was en route for there when arrested."

The agreed statement of facts further recites that the evidence shows that he was, prior to entering Mexico, at Tia Juana, on the afternoon of July 18th, lawfully entitled to reside in the United States, and that the crossing the line under the circumstances and at the time stated constituted his only departure from the United States, and his return to this country on the following morning, July 19th, was the act charged as an unlawful entry into the United States; that defendant knew he was crossing the boundary line into Mexico.

In the Case of Ah Tie, 13 Fed. 291, Mr. Justice Field, with whom concurred Judge Sawyer, held that a Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the act of congress prohibiting the master of such vessel from bringing within the United States from a foreign port or place any Chinese laborer, by such temporary entry, upon a foreign country, as may be caused by the arrival of the vessel on her outward voyage at her port of destination, or her touching at any intermediate port in going or returning, or her putting into a foreign port in stress of weather; and we should hesitate, proceeded the learned justice, "to say that it would be lost by the laborer passing through a foreign country in going to different parts of the United States by any of the direct routes, though we are told by the counsel of the respondent that a Chinese laborer, having taken a ticket by the overland railroad from this place to New York, by the Central Michigan route, which passes from Detroit to Niagara Falls through Canada, was stopped at Niagara, and sent back, as within the prohibition of the act of congress, and, on his attempting to retrace his steps, was again stopped at Detroit. A construction which would justify such a proceeding cannot fail to bring odium upon the act, and invite efforts for its repeal. The wisdom of its enactment will be better vindicated by a construction less repellent to our sense of justice and right. All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion. 'General terms,' said the supreme court, in a case before it, 'should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.' U. S. v. Kirby, 7 Wall. 482. So the judges of England construed the law which enacted that a prisoner breaking prison should be deemed guilty of a felony, holding that it did not apply to one breaking out when the prison was on fire, observing that the prisoner was 'not to be hanged because he would not stay to be burnt.' And, in illustration of this doctrine, the construction given to the Bolognian law against drawing blood in the street is often cited. That law enacted that whoever thus drew blood should be punished with the utmost severity, but the courts held that it did not extend to the surgeon who opened the vein of a person falling down in the street in a fit." The application of these just and sensible views to the facts of the case at bar requires that the judgment and order appealed from be reversed, and the defendant discharged. It is so ordered.

In re MATTHIAS' ESTATE.
GRAHAM v. MATTHIAS et al.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

1. DESCENT AND DISTRIBUTION—ILLEGITIMATE CHILDREN—INHERITANCE FROM FATHER.

Under "An act in relation to marriage" (Laws Wash. T. 1854, p. 404), § 3, which provides that all children born of marriages declared void by section 2, and "all children born of persons living and cohabiting together, as man and wife, and all children born out of wedlock whose parents shall intermarry, shall be legitimate," the child of a man and woman who lived and kept house together as man and wife inherits from the father though he and the mother never intermarried.

2. SAME—PARENTAGE—SUFFICIENCY OF EVIDENCE.

In an action by G. to establish her right as the child and heir of M., deceased, who was a prominent citizen of a small town where G. was born, ten witnesses testified positively that for three or four years, during which time G. was born, her mother and M. lived together as husband and wife, while seven witnesses, all well acquainted with M., never saw G.'s mother at M.'s house, nor heard that she lived there. *Held*, that the evidence showed that G.'s father and mother lived together as husband and wife, and that G. was his heir, and entitled to his estate as against collateral heirs.

This is a proceeding by Rebecca Lena Graham to establish her right as a child and heir at law of Franklin Matthias, deceased, and to receive from his administrator the property in his hands for distribution, as against C. Matthias and others, his collateral heirs.

Arthur, Lindsay & King and Turner & Ellsworth, for claimant.
Lichtenberg, Shepard, Lyon & Denny, for defendants.

HANFORD, District Judge (orally). This case involves a contest on the part of Rebecca Lena Graham in which she asserts, against the persons named as defendants, her right as an heir at law of Franklin Matthias, deceased, to receive from the administrator of his estate the residue remaining after the payment of costs and expenses of administration and all indebtedness. She claims to be a daughter and only child of Franklin Matthias. The other parties to the suit, who claim to be the lawful heirs, are collateral heirs; and no one other than Mrs. Graham claims to be a lineal descendant.

The questions in the case are whether Mrs. Graham is in fact the daughter of Franklin Matthias, whether she is his legitimate daughter, and under the laws of this state entitled to inherit his property. A large number of witnesses have been called to testify in support of Mrs. Graham's claim, and to dispute it. I find in the testimony a great deal that is mere surmise, a great deal of gossip, a great deal of rumor, and a great deal that I regard as fiction. Some of the witnesses are not very well informed; others are reckless. I repudiate entirely all the testimony in regard to the marriage ceremony between Frank Matthias and Mrs. Graham's mother ever having taken place. I repudiate

as utterly false the testimony in regard to Mrs. Graham having been in her infancy christened by the name of Rebecca Matthias, in the presence of prominent citizens of Seattle. I repudiate as utterly false the testimony given in the case in regard to the conduct of Capt. Gansevoort, of the American man of war Decatur, at the time of the battle with the hostile Indians at Seattle, in the year 1856. Capt. Gansevoort was a credit to the American navy, not only for his competency and ability as a commanding officer, but for his courtesy and gentlemanly conduct on that occasion. He was a thorough gentleman, and, at the time when in this record his name is connected with vile conduct, he was doing everything that generosity and courtesy would prompt a gentleman to do in protecting and rendering aid, assistance, and comfort to the wives and children of the earliest settlers of Seattle. This testimony is brought in unnecessarily, and I am not willing that it should go out as history, without receiving at least my condemnation.

Now, coming to the facts detailed in the evidence, Mrs. Graham herself has testified to the effect that, from what her mother told her and other reports, she regarded herself as the daughter of Frank Matthias. She has no recollection of ever having been in his house, or in his company, or of speaking to him. In her childhood she avoided him, because her mother taught her to fear him; and in her mature years she was too proud to make advances towards him. He often seemed to be following her, and, for a time after her first marriage, daily passed her dwelling house, and, if her little children were playing outside, he would stop and observe them in an interested manner; but he never in a manly way sought her acquaintance. Her testimony cannot be regarded as tending to prove that her mother was married to Matthias, or that she ever lived with him as his wife, in the sense of dwelling in his house and performing the duties of housekeeper, or that Matthias ever by any public act acknowledged her as his wife. Six witnesses (Samuel F. Coombs, D. B. Ward, Rev. Daniel Bagley, T. D. Hinckley, M. B. Maddocks, and E. A. Thorndike) gave testimony tending to prove that Matthias, for a time before and after the birth of the complainant, maintained relations of intimacy with her mother, who was an Indian woman, named Peggy, and that the couple were reputed to be cohabiting together; but they all fail to testify positively and explicitly to the fact that Peggy did actually live with Matthias openly, or ever performed the duties of housekeeper for him. Three Indians called as witnesses for the complainant, viz. William Rogers, Chief William, and Jake Foster, have testified that Peggy and Matthias were actually married, and that said marriage was followed by actual cohabitation. Foster claimed to have been present when Matthias obtained the consent of the relatives of the bride, and when they conducted her to his house to be married; and that on the next day he attended a feast whereby the marriage was celebrated; and that afterwards he visited the married couple at their house; and that they lived together; and that, while so living, the complainant was born. Rogers and Chief

William testify to the same facts, and also claim to have been present when the marriage ceremony was performed, which they describe in detail and with extravagant eloquence. According to their recital, the chiefs and relatives went in a procession to the shack in which Matthias was then living. Three chiefs, this same William being one of them, then required each of the contracting parties to repeat 12 times the vow to assume marriage relation with each other. According to William, the bride vowed in these words: "Yes, Frank Matthias is going to be my husband, and I shall stay with him until death parts us." These stories are transparent, and manifestly false. Ten other witnesses, viz. Frank Dolan, Ben Solomon, W. F. Haffner, Richard Jeffs, A. S. Pinkham, William Deshaw, D. H. Webster, T. O. Williams, H. A. Spithill, and Mrs. Blakely, all testify, positively, that for three or four years, during which time the complainant was born, Matthias and Peggy did live together as husband and wife. On the other hand, seven witnesses for the defendants, viz. Hillory Butler, A. A. Denny, Dexter Horton, E. M. Smithers, W. H. Surber, Henry Van Asselt, and Mrs. Wyckoff, all of whom were well acquainted with Matthias, never saw Peggy at his house, nor heard that she lived there. Mr. Matthias being a prominent man in a small town, as Seattle was then, their testimony, although negative, is equal in power to positive testimony contradicting the statement that Peggy and Matthias lived together.

From consideration of all the evidence, I am well convinced that Matthias and Peggy were never married. I am also convinced that Frank Matthias was the father of this complainant. To entitle her to inherit his estate, being his daughter, it is not absolutely necessary that there should be proof of a marriage between her parents. If they lived together as man and wife during the period of time within which she was born, their so living together would, for the purpose of determining the rights of their child, be equivalent to a marriage, under a statute of Washington territory, enacted at its first session. That is the third section of an act entitled "An act in relation to marriage" (Laws Wash. T. 1854, p. 404), which provides that "All children born of marriages declared void by the preceding section, and all children born of persons living and cohabiting together, as man and wife, and all children born out of wedlock whose parents shall intermarry, shall be legitimate." This statute is somewhat peculiar. It is made for the protection and benefit of children. Without attempting to legislate as to the status of the parents, or determining or fixing their rights as married people, it does give rights to the innocent offspring; and, having that object in view, effect should be given to it according to its spirit, because it is a just law. Where children are born under such circumstances as to leave no just ground for doubting their parentage, and where there is no probability of injustice being done by imposing upon a man spurious offspring, it seems to me right that his children should inherit his estate. This law provides not only for the children of void mar-

riages, and children born out of wedlock whose parents afterwards married; but provides specifically for children of unmarried persons who live and cohabit together as man and wife, and declares that such children shall be legitimate. Now, if the testimony of Richard Jeffs, David H. Webster, and those other people to the actual fact that Peggy and Frank Matthias did live together as man and wife, and kept house together before and after the birth of this plaintiff, be true, then, under that law, she is entitled to all the rights of a legitimate child of Frank Matthias. *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222.

The question which I have to decide on this evidence is whether it is proved that Frank Matthias and Peggy did so live together. The testimony of Mr. Smithers and Mr. Butler and others, who were intimate friends of Frank Matthias, that they did not know that to be the fact, is perhaps inconsistent with the fact. It is hard to imagine that it could be so, and neighbors and friends of Mr. Matthias not know it; but I cannot say that it is impossible. He may have been cunning with them, and less guarded with others. These other witnesses who testified positively to the fact had equal means of knowledge with those who deny it. They had every opportunity to know it if it were so. They have no interest in this case to induce them to testify falsely, and, unless Frank Matthias and Peggy lived together, they have willfully, and without any inducement or reason for it, testified to that which is absolutely untrue, and which they must have known was untrue. Now, there are 10 of them, I find, who have with particularity and positiveness asserted that upon different occasions they found this woman in Frank Matthias' house, doing his housework; that he recognized her as his woman, and made no concealment of it. I might possibly discredit the testimony of some of these witnesses, on the ground that they are not worthy of belief; but it is straining matters a great deal to discredit the testimony of 10, including men of mature age and good repute. I do not believe that Mr. Smithers, Mr. Van Asselt, and Mr. Horton have made any misstatements, and I do not have to find that they testified falsely in order to find the fact in favor of this complainant. It is hard to understand how they could have been deceived in that matter. Still, it is possible that they might have been.

My conclusion is that there is a fair preponderance of the evidence, in favor of this complainant, to the fact that her mother and Frank Matthias lived together as man and wife before and after the complainant's birth; and, upon that preponderance of evidence, she is entitled to a finding in her favor. The laws of this state in force at the time of the death of Frank Matthias entitle this complainant, as his only lineal descendant, to receive his estate; and I will decree that she is so entitled.

NORTHERN PAC. R. CO. v. TEETER.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 382.

1. MASTER AND SERVANT — INJURIES TO RAILWAY BRAKEMAN — PROVINCE OF JURY.

Where a brakeman was injured while coupling cars by stepping into a hole covered with snow and slush, *held*, that it was the province of the jury, there being a conflict of evidence, to say whether the company had discharged its duty of keeping the track in reasonably safe condition, and, if not, whether its neglect was the proximate cause of the injury, unmixed with any negligence on the brakeman's part.

2. TRIAL—WITHDRAWING CASE FROM JURY.

When, by giving credit to plaintiff's evidence, and discrediting defendant's, plaintiff's case is made out, the court cannot withdraw the case from the jury.

3. SAME—ABSTRACT INSTRUCTIONS.

The giving of an abstract instruction, which, in view of the state of the evidence and of other correct and applicable instructions, could not have misled the jury, is no ground for reversal. Sanborn, Circuit Judge, dissenting, on the ground that the jury may have been misled, and that the presumption is that error produces prejudice.

In Error to the Circuit Court of the United States for the District of Minnesota.

J. H. Mitchell, Jr. (Tilden R. Selmes, on the brief), for plaintiff in error.

Moses E. Clapp (Mr. McDonald and L. D. Barnard, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the circuit court of the United States for the district of Minnesota by the defendant in error, Eugene Teeter, against the plaintiff in error, the Northern Pacific Railroad Company, to recover for personal injuries received under the following circumstances: The defendant in error was in the service of the railroad company, as a brakeman on a freight train, from December 31, 1891, until March 9, 1892, on which last-named day he received the injury complained of, while in the act of coupling cars on the side track at Jewett's Mills, Wis. At the time the accident occurred, the track where it occurred was covered with a thick slush of snow, ice, and water, to the depth of one or two inches, which concealed from sight the condition of the track under it. At the moment of making the coupling, which was done at a proper place, and in the usual and proper manner, the plaintiff was compelled to take a step forward, when his foot went through the slush, and down into a hole in the track from six to twelve inches in depth, which pitched him forward with so much force that, to save himself from falling between the cars and being run over by them, he threw his hands out to catch something to support himself, and one hand caught on the drawbar, and was on the instant crushed, as the cars "slacked back." He could not see the hole he stepped into on account of the slush, and did not know it

was there. There was no testimony tending to show that the hole in the track was of recent origin, or that it was not a defect in the original construction of the track; and there was testimony tending to show that the side track where the injury occurred was not well ballasted or surfaced. The plaintiff had never seen this track when it was not covered or more or less obscured from view by snow and slush, and had never done any work on it at the place where the accident occurred before that day. There were a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

The defendant, at the close of the whole evidence, asked the court to instruct the jury to return a verdict for the defendant, and the refusal of the court to give this instruction is the first and principal error relied on to reverse the judgment. The request was rightly refused. The company owed the duty to its brakeman to keep its track where the coupling of cars had to be done in a reasonably safe condition for the performance of such work. It was the function of the jury to say, upon a consideration of all the evidence, whether the defendant had discharged this duty, and, if not, whether its neglect to do so was the proximate cause of the plaintiff's injury, unmixed with any negligence on the part of the plaintiff. The jury found these issues against the defendant, and, under the evidence in the case, this court cannot, according to the well-settled rule, disturb their findings. *Railroad Co. v. Mortenson* (decided by this court at the present term) 63 Fed. 530; *Railroad Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railroad Co. v. Kelley's Adm'rs*, 10 U. S. App. 537, 3 C. C. A. 589, and 53 Fed. 459, and authorities cited.

There was, as there commonly is in all cases of this character, some conflict in the evidence, but it was the province of the jury to say whether and how far the evidence was to be believed. When by giving credit to the plaintiff's evidence, and discrediting that of the defendant, the plaintiff's cause is made out, the court cannot withdraw the case from the consideration of the jury. *Railroad Co. v. Conger*, 5 C. C. A. 411, 56 Fed. 20.

The court in its charge, after stating correctly the rules of law applicable to the case under the evidence, added:

"It is the duty of the master to search for latent or hidden defects in appliances furnished the servant to work with, that would render them unsafe; but the servant is required to notice only such defects as are patent to ordinary observation."

The defendant excepted to this part of the charge. In the brief of the learned counsel for the plaintiff in error it is said:

"This instruction, as a mere principle of law, if stated by itself, might not be considered reversible error, or statement which could be considered as having done any harm (*Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50); but in this instance it was accompanied by a statement which was intended to direct the attention of the jury to the fact that it was used for the very purpose of laying down a rule of law establishing the relation between the master and the servant in this particular case, the court in the course of his instructions saying: 'This rule I want to lay down for your guidance in determining what was the duty of the railroad company and the duty of the brakeman.'"

In view of the record and the facts in the case, and the clear and accurate statement of the law applicable to the particular facts of the case which preceded and followed this clause to the charge, it might well be held to be surplusage, or abstract and irrelevant, but clearly it was not prejudicial error. The court told the jury that, although the injury may have resulted from the neglect of the company to keep its track where the coupling of the cars was done in a reasonably safe condition for such work, yet the plaintiff could not recover if he knew, or had a reasonable opportunity to know, of its unsafe condition; saying to the jury in this connection that:

"If the injury was caused by reason of the simple fact that there was snow and ice and sleet upon the side track, and that was plainly seen by the plaintiff, then he ought not to recover; but if the injury was caused by reason of the side track not being properly built, not being filled up between the ties, and not being leveled, and the snow and water and ice prevented the plaintiff from seeing that, then it is carelessness on the part of the railroad company, for which the plaintiff ought to recover in damages."

On the question of the defendant's negligence, the pleadings and the evidence related solely to this hole in the track into which the plaintiff stepped. No other defect in the track was alleged in the complaint or proved at the trial, and no other ground of recovery was stated in the complaint or claimed at the trial. The only defect in the track, latent or patent, was the hole, and the only act of negligence charged upon the defendant was the maintenance of this hole. Under the pleadings and the evidence, the jury could not have found that there was any other defect in the track, or any other act of negligence on the part of the defendant, and could not, therefore, have been misled in any way by the instruction. The only possible application of the instruction to the facts of the case which the jury could have made under the pleadings, the evidence, and the instructions, taken together, was that the fact that the alleged hole in the track was latent,—that is, concealed from sight by the slush at the time of the accident,—would not excuse the defendant, or impose on the plaintiff the duty of searching it out.

The judgment of the circuit court is affirmed.

SANBORN, Circuit Judge (dissenting). The defect complained of in this case was a hole in the roadbed, so filled with melting snow that the surface appeared to be level. The court, in its charge to the jury, said with reference to this defect:

"It is the duty of the master to search for latent or hidden defects in appliances furnished the servant to work with, that render them unsafe; but the servant is required to notice only such defects as are patent to ordinary observation. This rule I want to lay down for your guidance in determining what was the duty of the railroad company and the duty of the brakeman."

The hole would have been patent to ordinary observation if it had not been concealed by the snow, and this proposition is, in effect, that, in a country whose surface is covered with snow four months in the year, the servant of a railway corporation is not required to notice any defects in the roadbed or appliances of the company, otherwise patent, that are concealed by the snow, and thus made

latent, but the corporation is required to search for such defects, and to remove the snow from them, so that they will become patent again before the servant is called upon to notice them. I am unable to assent to this proposition. In my opinion, it is not the law. Nor can I bring myself to concur in the theory that because the court below, in another portion of the charge, stated the converse of this proposition,—stated the law correctly,—no prejudice could have resulted to the plaintiff in error from this erroneous declaration. The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error complained of neither did prejudice, nor could have prejudiced the party against whom it was made, that the rule that error without prejudice is no ground for reversal is justly applicable. *Deery v. Cray*, 5 Wall. 795, 808; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471. The court below, in its charge, gave the jury a correct and an erroneous instruction upon the same subject. I am unable to discover from the record whether the jury were governed in their action by the former or the latter, and in my opinion, the judgment should be reversed, and a new trial ordered.

NORTHERN PAC. R. CO. v. MORTENSON.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 419.

1. MASTER AND SERVANT—INJURIES TO RAILWAY BRAKEMAN — BRIDGES WITH OVERHEAD BEAMS—PROVINCE OF JURY.

Where a brakeman, standing on the running board of a furniture car, which is higher than box cars, in the discharge of his duty, was struck by the overhead tie beams of a bridge which the train was crossing, *held*, that it was the province of the jury to say whether the company was negligent in maintaining a bridge having such low beams, without giving warning by telltales or otherwise.

2. SAME—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

The brakeman having crossed the bridge several times standing on top of box cars, *held*, further, that it was a question for the jury whether he was guilty of contributory negligence in not ascertaining, by measurement or accurate observation, that he could not safely pass while standing on the running board of a furniture car.

3. TRIAL—WITNESS FIXING DATE BY MEMORANDUM — RIGHT OF INSPECTION — ERROR WITHOUT PREJUDICE.

Plaintiff, in testifying as to the length of time he was in defendant's employ, fixed the date of entering the service by a memorandum, but the court refused to permit defendant to inspect the memorandum. *Held*, that this was error, but, the length of his service being fully established by other evidence, the error was without prejudice.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action by Andrew Mortenson against the Northern Pacific Railroad Company to recover damages for personal injuries. Verdict and judgment were given for plaintiff, and defendant sued out this writ of error.

C. D. O'Brien (J. H. Mitchell, Jr., Tilden R. Selmes, and T. D. O'Brien, on the brief), for plaintiff in error.

C. A. Severance (W. S. McClenahan, W. A. Fleming, C. K. Davis, and F. B. Kellogg, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. The defendant in error was in the employ of the plaintiff in error as head brakeman on a freight train running between Brainerd, Minn., and Fargo, N. D. In making this trip the train crossed a bridge having overhead tie beams. This bridge was within the limits of the company's yards at Fargo. The duties of the defendant in error required him to be upon the top of his train while passing through the Fargo yards and over this bridge. His usual position was on top of the second or third car from the engine, and he had to stand on the running board of the car in a position that would enable him to receive the signals of the conductor and rear brakeman, and transmit them to the engineer. On the 22d of March, 1890, while standing on the running board of a furniture car in the proper position to receive and transmit the signals, and in the attitude of doing so, as the train passed over the bridge, he was struck on the head by one of the overhead timbers of the bridge, and received the injuries for which this suit was brought. Furniture and refrigerator cars, which are in common use on the defendant's road, are about 2½ feet higher than ordinary box cars. The defendant in error had crossed the bridge in safety a dozen times or more while standing on the top of the box cars.

The principal questions discussed by counsel are: (1) Was it negligence for the company to maintain a bridge having overhead tie beams too low to admit of the safe passage of a brakeman standing on the running board of a furniture car, in the discharge of his appropriate duties, when no warning of the dangerous character of the bridge was given by telltales or otherwise? (2) Was the brakeman guilty of contributory negligence in not ascertaining, by measurement or accurate observation, that he could not pass safely under the overhead beams of the bridge while standing on the running board of a furniture car? Under the evidence in this case, these were not questions of law, but questions of fact for the jury. Under proper instructions, the jury found both of these issues against the plaintiff in error, and we cannot disturb the finding. On the evidence, the case was plainly one for the jury. *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railroad Co. v. Foley*, 10 U. S. App. 537, 3 C. C. A. 589, and 53 Fed. 459; *Railroad Co. v. Carpenter*, 12 U. S. App. 392, 5 C. C. A. 551, and 56 Fed. 451; *Dorsey v. Construction Co.*, 42 Wis. 583.

It is claimed that the defendant in error had notice in fact that the tie beams across the top of the bridge were too low to admit the safe passage of a brakeman standing on the top of a furniture car; but the defendant in error denies this, and the jury found this issue in his favor.

The defendant in error was examined touching the length of time he had been in the service of the company, and, for the purpose of fixing the date he entered the service, he referred to a written memorandum in his possession. After testifying from this memorandum, the court refused to permit the plaintiff in error to inspect the same. This was error, but it was error without prejudice. The length of time the defendant in error had been in the service, if material, was fully established by all the evidence to be that stated by him.

The judgment of the circuit court is affirmed.

CHICAGO, R. I. & P. RY. CO. v. SHARP.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 414.

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action for personal injuries, the appellate court will not weigh conflicting evidence, pass upon the veracity of witnesses, and determine the case according to what it thinks to be the weight of the evidence appearing in the record, but will resolve all conflict in the evidence in favor of the party for whom the verdict was rendered.

2. RAILROAD COMPANIES—ACCIDENT AT CROSSING—NEGLIGENCE.

A railroad company is bound, independently of statute, to take reasonable and proper means of notifying the public of the approach of its trains to a public crossing after night; and it is a breach of this duty to back a train of flat cars over a crossing in the suburbs of a city, without having on it any brakeman, or any light or other signal of its approach.

3. SAME—DUTY OF TRAVELER—CONTRIBUTORY NEGLIGENCE.

One who, on approaching the crossing, looks and listens, but hears nothing except a locomotive, which is so far off that he can easily pass before it, is not negligent in failing to surmise that the company would attempt to back a train of flat cars, which makes little noise, over the crossing, on a dark night, without any lights or signal to warn the public.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Stephen S. Brown (J. E. Dolman, on the brief), for plaintiff in error.
William Henry and W. H. Haynes, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This is an action brought by James M. Sharp, the defendant in error, against the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, to recover damages for a personal injury received at a railroad crossing. The plaintiff recovered judgment below, and the defendant sued out this writ of error.

In this, as in most cases of this character, the first assignment of error is that the court erred in not directing a verdict for the defendant upon the whole evidence; and in this case, as has frequently occurred in other cases of like character, we are pressed

to weigh conflicting evidence, pass upon the veracity of the witnesses, and determine the case according to what we think is the weight of evidence appearing in the record. To do these things would be a flagrant invasion of the functions of the jury, and a denial to the plaintiff of his constitutional right to have the facts of his case tried by a jury. *Railroad Co. v. Teeter* (decided by this court at the present term) 63 Fed. 527; *Railroad Co. v. Mortenson* (decided by this court at the present term) Id. 530; *Railroad Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railroad Co. v. Kelley*, 10 U. S. App. 537, 3 C. C. A. 589, and 53 Fed. 459.

The following is a summary of the material facts which the plaintiff's testimony tended to establish: The defendant's road crosses on the level the public highway leading south from the city of Maysville, Mo., at its station near the city where there are three tracks, known as the "main track," the "passing track," and the "stock track," and two switches. At the point of crossing, the railroad runs east and west, and the highway north and south, and the station stands on the north side of the railroad track and west line of the highway. At 9 o'clock at night, on the 10th of November, 1892, the plaintiff, riding in a cart (which, on the smooth dirt road, made no noise) drawn by one horse, going south, approached this crossing. The night was very dark. When within 20 or 30 feet of the crossing, he looked and listened. Looking west, he saw a switch light 500 or 600 feet west of the crossing; and, looking east, he saw a switch light 364 feet east of the crossing, and a little way beyond this he saw the smoke of a locomotive, but could not tell certainly whether it was moving or not, or, if moving, in what direction, though he thought it might be moving towards the crossing. He heard no sound but the puffing of the locomotive. The bell was not ringing and the whistle was not blowing. There was no flagman at the station, and no light there or elsewhere between the two switch lights, and nothing could be seen on the track between the locomotive and the crossing, and, satisfied that he could cross the track in safety before the locomotive could reach the crossing, even if it was coming towards him, he started to do so. His horse crossed the track in safety, but the hind end of his cart was struck by a moving flat car, and he received the injuries complained of. It turned out that the locomotive was pushing three or more flat cars towards the crossing, which, owing to the darkness, the plaintiff could not see, and which he did not hear, and which had no light or flagman or other agency on them to give warning of their approach.

There was conflict in the testimony as to some of these facts, but, when an appellate court is asked to set aside the verdict of a jury in a common-law action upon the facts, all conflict in the evidence must be resolved in favor of the party in whose favor the verdict was rendered. In other words, if, by giving credit to the plaintiff's evidence, and discrediting that of the defendant, the plaintiff's case is made out, the verdict must stand. *Railroad Co. v. Conger*, 5 C. C. A. 411, 56 Fed. 20; *Railroad Co. v. Teeter*, 63 Fed. 527; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. *The Missouri*

statute (Rev. St. 1889, § 2608) requires the bell to be rung or the whistle to be sounded at all public crossings, and a failure to comply with the statute is negligence per se. *Crumpley v. Railroad Co.*, 98 Mo. 34, 11 S. W. 244. But the negligence of the company does not rest alone on the statute. Independently of the statute, in moving its cars and engines over the public crossing after dark, the company was bound to take reasonable and proper means to notify the public of the approach of its cars. In this case no precautions whatever were taken.

But, although the company may have been guilty of negligence, the plaintiff cannot recover unless that negligence was the proximate cause of the injury, and the plaintiff himself was free from negligence. The obligations, rights, and duties of railroad companies and travelers at highway crossings are mutual and reciprocal. No greater degree of care is required of the one than of the other. *Improvement Co. v. Stead*, 95 U. S. 161, 165. As was well said by Judge Thayer in delivering the opinion of the court in the case of *Railway Co. v. McClurg*, 8 C. C. A. 322, 59 Fed. 860: "A person may reasonably be expected and required to take as great precaution to avoid getting hurt as others are required to take to avoid injuring him." These rules were clearly and fully stated to the jury in the charge of the learned court that tried the cause. The jury were repeatedly told that, in approaching the track, it was the plaintiff's duty to use his senses, and to look and listen for approaching trains, and, if necessary, to stop for that purpose, and that, in approaching and crossing the track, he was required to exercise that degree of care that a prudent and careful man would exercise under like circumstances. Was there evidence from which the jury might infer the plaintiff did observe these requirements? He looked and listened as he approached the crossing, and saw and heard nothing but the locomotive. He estimated, and estimated correctly, that he could cross the track many feet ahead of that. The flat cars being pushed ahead of the locomotive he did not hear, and could not see on account of the darkness. We are unwilling to lay it down as a rule of law that the plaintiff was negligent in not anticipating the particular act of negligence of the defendant which occasioned the accident. *Hutchinson v. Railway Co.*, 32 Minn. 398, 21 N. W. 212; *Weller v. Railway Co.* (Mo. Sup.) 23 S. W. 1061, affirmed on rehearing 25 S. W. 532. The jury, by their verdict, have said that the plaintiff was not required to conjecture or surmise that the company would attempt to back a train of flat cars, which made little or no noise, over a public crossing, in the suburbs of a city, on a dark night, without a brakeman or light or other signal on them to warn the public of their coming; and we concur in that conclusion. Where the negligence of the railroad company, which is the proximate cause of the injury, is clearly established, in order to defeat a recovery, as a matter of law, on the ground of contributory negligence, the defense must be clearly made out. *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. If inferences other than that of contributory negligence may be fairly drawn from all the evidence, and facts shown to exist, then the question is one

of fact for the jury, whose verdict must stand. *Bluedorn v. Railway Co.* (Mo. Sup.) 18 S. W. 1103; *Weller v. Railway Co.* (Mo. Sup.) 23 S. W. 1061. The charge of the court stated the law correctly applicable to the facts of the case. It was as favorable to the defendant as it had any right to ask. The judgment of the circuit court is affirmed.

LICHTY et ux. v. LEWIS et ux.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

JUDGMENT—RES JUDICATA—COMMUNITY PROPERTY.

A judgment in an action against a husband only, to determine adverse claims to land, is a bar to a subsequent action by such husband and his wife against the plaintiff in the former action, involving the same questions adjudicated in the first action, though the land is community property.

This was an action of ejectment by Harvey M. Lichty and wife against Joseph R. Lewis and wife. Heard on demurrer to answer. Demurrer overruled.

Parsons, Rudkin & Saylor, for plaintiffs.

Whitson & Parker, Harold Preston, and J. R. Lewis, for defendants.

HANFORD, District Judge (orally). This is an action of ejectment by Harvey M. Lichty and wife against the defendants, J. R. Lewis and wife, to determine adverse claims to real estate situated in Yakima county, in this state. Plaintiffs claim a community property interest, which the defendants dispute. On that ground they seek a judgment establishing against the defendants the validity of their title and rights as cotenants. The answer contains a plea setting forth that in a suit between Joseph R. Lewis and Harvey M. Lichty all the questions involved in this case were adjudicated by the superior court for Yakima county, and that decision has been affirmed by the supreme court of this state. *Lewis v. Lichty*, 3 Wash. 213, 28 Pac. 356. Plaintiffs demurred to said plea on the ground that a judgment between Harvey M. Lichty and Joseph R. Lewis is not binding as an estoppel against the same Harvey M. Lichty and his wife. The plaintiffs' position is that, the parties being different, and this being community property, no court would have jurisdiction to determine the questions involved without the presence as parties of the wives as well as the husbands interested. It is my opinion that, the state court having considered and passed upon the question as to whether Harvey M. Lichty had any title to the property, and having adjudged that his grantors had been divested of their title, so that their quitclaim deeds to him, constituting the basis of his claims, are for that reason invalid, its decision is determinative of the whole matter. I do not think that the same question can be again litigated without establishing a principle which would be pernicious. To allow a married man to come into a court of competent jurisdiction and submit a contro-

versy for final determination, and, being defeated, then bring his wife into court, and go through the same litigation over again, would be harassing, and prejudicial to the best interests of the public. I do not think that the legislature, in enacting the community property law, ever contemplated that the law would admit of any such abuse of judicial process. I think that while a limitation is placed in the community property law upon the right of a husband to sell or dispose of community real estate without the consent of his wife, it was not intended to tie his hands so that the ordinary business of the country cannot be conducted in the way that business is usually conducted by the head of the family; and it was to guard against such a clog upon business that a provision was put into the law, giving to the husband the management and control of the community real estate. That carries with it the right, where litigation affects the title of a husband and wife to any property, to employ counsel to defend, and do whatever is necessary in making a full presentation of the rights of the community; and when a husband does submit such a controversy to adjudication he should be deemed to be acting honorably, and for the interests which he represents in his capacity as manager of the community property; and unless the proceedings be assailed on the ground of fraud, duress, or collusion between the husband and the adverse party, a final judgment in such a case is conclusive upon both the husband and wife. The reason for this is that the interests of husband and wife in their community property are mutual, and all suits affecting such property come within the general rule that the person who represents another in legal proceedings and the person who is represented have a legal identity, and whatever binds one with respect to the subject of their common interest binds the other also. 1 Herm. Estop. 204. The supreme court, in an opinion by Mr. Chief Justice Waite, in the case of *Litchfield v. Goodnow*, 123 U. S. 549, 8 Sup. Ct. 210, recognizes this rule, saying that: "To give full effect to the principle by which parties are held bound by judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings;" and that "the term 'privity' denotes mutual successive relationship to the same rights of property." And in the case of *Plumb v. Goodnow*, 123 U. S. 560, 8 Sup. Ct. 216, the court makes a practical application of the rule. Upon the authorities and for the reasons stated I hold that the facts alleged in this plea, if true, are a bar to this suit. Demurrer overruled.

J. M. ARTHUR & CO. v. BLACKMAN et al.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

1. PROMISSORY NOTE—FAILURE OF CONSIDERATION.

Plaintiff delivered to defendants certain machinery, and took notes and a contract which provided that, on the payment of the notes at maturity, plaintiff would sell and transfer the machinery to defendants,

and that the title thereto should remain in plaintiff until the notes were paid. *Held*, that if such machinery was destroyed by fire, without defendants' fault, while in their possession, and before the notes were paid or the title transferred, the consideration for the notes failed.

2. CONTRACT—CONSTRUCTION.

A provision in such contract that the property should "be kept insured by" plaintiff, in its favor, "at the expense of" defendants, did not obligate plaintiff to protect defendants by having the property insured.

This was an action by J. M. Arthur & Co., a corporation, against Blackman Bros., on a promissory note. Heard on demurrer to answer.

L. L. McArthur and Greene & Turner, for plaintiff.
Ronald & Piles, for defendants.

HANFORD, District Judge (orally). This action is founded upon a promissory note and contract in favor of J. M. Arthur & Co., a corporation, signed by Blackman Bros., in which the defendants promise to pay a certain sum of money with interest, and following that there is this contract, over their signature:

"The above note is given upon and for the sole consideration that the said J. M. Arthur & Co. have agreed and promised that upon the payment of said note, principal and interest, at maturity, they will sell and transfer to the undersigned * * * [certain machinery which is described], which the said J. M. Arthur & Co. have intrusted to the care of the undersigned. It is admitted and agreed that the said property so intrusted is the property of said J. M. Arthur & Co., and the legal title thereof is in said J. M. Arthur & Co., and shall remain in them until they shall make the aforesaid sale and transfer, after the interest and principal aforesaid shall be paid. And the undersigned agree to return the said machinery to said J. M. Arthur & Co., if requested, at any time before said sale and transfer, in good order, and such return shall not extinguish or alter the liability of the undersigned to pay the interest and principal aforesaid. Above property to be kept insured by J. M. Arthur & Co., in their favor, at the expense of makers."

There is a number of these notes and contracts, and they are all sued on, each one being a separate cause of action. The defendants have answered, pleading two separate affirmative defenses. The first defense is that there has been a failure of consideration, and they show that this machinery, while it was in the defendants' possession as bailee for the owner, was destroyed by fire without the fault of the defendants, so that the plaintiff is not in a position to be able to comply with the contract to sell and transfer the title of this property upon payment being made. The second defense is that the plaintiff neglected to avail itself of the provision in the contract for keeping the property insured for its own benefit. The case has been argued and submitted upon a demurrer to these two defenses.

In support of the demurrer to the first defense, that there has been a failure of consideration, it is urged that the defendants obtained what they contracted for. They had possession, and although, under the contract, the lawful possession remained in the plaintiff, the defendants had the use and beneficial possession of the machinery until it was destroyed; and that beneficial use, they

say, is a sufficient consideration for the promise to pay the money. I will admit that the actual delivery of the machinery to the defendants, although they took it as bailees, would be sufficient to constitute a lawful consideration for the giving of the note, if it were left for the court to give effect to that transfer of possession; but plaintiff has taken from the defendants a written contract, which not only specifies what are to be the rights of the parties until the payment is made, but goes on and specifies precisely what is the consideration for the defendants' promise to pay this amount of money. This writing declares that the above note is given upon and for the sole consideration that the said J. M. Arthur & Co. have agreed and promised that upon the payment of said note, principal and interest, at maturity, they will sell and transfer the property. Undoubtedly the object of making the contract in that form was to protect the plaintiff against attaching creditors of the defendants, if there should be any question arising as to this property being subject to execution for the defendants' debts to other parties. But, whatever the purpose may have been, the contract which the parties themselves have made is valid and binding upon both; and, in determining whether there is a consideration for the note, I think this court is bound by that provision in the contract, and unless there is that consideration there is no consideration. Now, according to the agreement of the parties, there are interdependent promises,—defendants promise to pay money, the plaintiff promises to transfer property on payment of the money. I do not think that the plaintiff can exact the payment of the money when it is made to appear to the court that it never can transfer the property. I consider this a valid defense. The demurrer to it will be overruled.

The second affirmative defense is based upon the supposition that the plaintiff was obligated to protect the defendants by having the property insured. I do not so understand the contract. There is a provision put in, to keep the property insured at the expense of the defendants, and it was entirely optional with the plaintiff to claim that privilege, and no fault or blame can be imputed for neglecting that precaution. Certainly the defendants are not prejudiced. If the property had been insured the insurance money would go to the plaintiff and not to the defendants. The plaintiff had the legal title to the property, and an insurable interest, whether the defendants had or not. It is a mooted question whether the defendants could insure for their benefit. Probably they could. Whether that is so or not, they are not prejudiced in any way by the plaintiff's failure to insure, and I think, if they were otherwise liable upon this note, they are still liable, notwithstanding the property was allowed to burn up uninsured. The demurrer to the second defense is sustained.

BOYLE v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, D. Washington, E. D. September 17, 1894.)

SECURITY FOR COSTS — AFFIDAVIT FOR LEAVE TO PROSECUTE IN FORMA PAUPERIS—SUFFICIENCY.

27 Stat. 252, c. 209, provides that any citizen entitled to commence any action in any United States court who is unable to prepay fees or give security for costs may have process, and all rights of other litigants, and counsel, free of charge, by making a sworn statement in writing showing such facts. *Held*, that such sworn statement must show that plaintiff is a citizen, and that there is no person interested who is able to pay or secure the costs.

At Law. Action to recover damages for a personal injury caused by negligence. Heard on motion to require plaintiff to give security for costs, and counter motion by the plaintiff for leave to prosecute this action in forma pauperis.

W. H. Plummer, for plaintiff.

Jay H. Adams, for defendants.

HANFORD, District Judge (orally). By an act of congress approved July 20, 1892, any citizen of the United States entitled to commence any suit or action in any court of the United States who is unable, by reason of poverty, to prepay fees or give security for costs, may have process and all the rights of other litigants, and may have counsel assigned to represent him, free of charge, by making a sworn statement in writing showing the above facts, and that he believes himself to be entitled to redress by such suit or action. 27 Stat. 252, c. 209. I consider the affidavit upon which the plaintiff asks for leave to prosecute this action as a poor person insufficient, for two reasons: First, it does not show that the plaintiff is a citizen of the United States; and, secondly, it does not controvert the defendants' charge that plaintiff's attorneys have undertaken to conduct the case for a contingent fee. There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes. That is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue in forma pauperis, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: that, after a contract has been made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is

unjust for the court to allow the litigation to go on for their benefit without expense, on the pretense that the plaintiff is unable to pay. I shall require a showing that the plaintiff is unable to pay or secure the costs, and that there is no person interested, by contract or otherwise, in the cause of action, or entitled to share in the recovery, who is able to pay or secure the costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason. I have had lawsuits tried before me in this court room, to recover damages against railroad corporations, resulting in nonsuits, which were conducted by attorneys who took up the causes after other attorneys here in Spokane, finding the facts insufficient to constitute a cause of action, had refused to appear for the plaintiffs. Such cases make expense, and are burdensome to the people, and there is no motive for bringing them except the hope that, by harassing the railroads, they will be compelled to compromise. That class of litigation must be discouraged. There must be some check to it. The plaintiff ought to be subjected to pay at least the costs of the litigation. If he is not able to pay a lawyer to carry it on for him, and contracts to divide with his attorney, I think the attorney should be made to pay. This much of a check on litigation undertaken for contingent fees is reasonable and right. The order I make is that the plaintiff, within 10 days, file security for costs, or show cause for not doing so; and, until security is given or cause shown, further proceedings in this cause will be stayed. Application for leave to sue in forma pauperis is denied, with leave to renew upon making a further showing.

CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO.

(Circuit Court, N. D. California. August 13, 1894.)

1. MINING VEINS.

To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well-defined, with hanging and foot walls.

2. SAME—UNION OF VEINS—EVIDENCE.

On the question of whether two veins unite in disputed ground it may be shown that their directions outside of as well as within the disputed ground are such that, if continuous, they would meet.

3. SAME—EXTRALATERAL RIGHTS.

Where a vein enters an end line of a claim, and continues nearly parallel with the side lines for the greater part of the length of the claim, the owner of the claim is not deprived of the extralateral rights attached to the vein, under St. 1872 (Rev. St. § 2322), because the vein crosses a side line before reaching the other end line, but his extralateral rights will extend from the end at which the vein enters to the point at which it crosses the side line.

4. SAME—BURDEN OF PROOF.

Under St. 1872 (Rev. St. § 2322), giving a locator the right to all veins throughout their entire depth, the apexes of which lie within the surface lines of his claim, though in their course downward they extend outside

the vertical side lines of the claim, a locator cannot take mineral from the claim of another without showing by a preponderance of evidence that it is part of a vein having its apex in his own claim.

5. SAME—LOCATION OF VEIN—PATENT.

Extralateral rights of a locator are determined by the actual location of a vein, and not its location as marked on the patent of a claim.

6. INJUNCTION—ACCOUNTING.

In case of trespass on a mining claim it is not necessary to bring separate actions for injunction and an accounting, but both may be had in the same suit.

Action by the Consolidated Wyoming Gold Mining Company against the Champion Mining Company. Decree for complainant.

John M. Wright and W. S. Wood, for complainant.

Edward Lynch and Lindley & Eickhoff, for respondent.

HAWLEY, District Judge. This is an action of trespass, with a prayer for equitable relief, for an accounting, and an injunction. It was commenced in the superior court of Nevada county, and removed to this court by respondent, upon the ground that it involved a construction of the United States statutes relating to mining claims.

1. A motion was made by complainant to remand the cause to the state court upon the ground that there was a prior judgment in the state court between the same parties, which left no issue to be litigated except the fact and extent of the trespass, and that no federal question was involved. This motion was denied, and a plea in abatement to the jurisdiction of this court was overruled by the circuit judge. Complainant is the owner of the Wyoming and Ural quartz lodes and mines, for each of which it has a United States patent. The patent for the Wyoming lode was issued September 19, 1874, and is based upon a location or occupancy of the lode claim prior to 1872. The patent recites the fact that it is granted under the law of 1866, and the acts amendatory thereof of 1870 and 1872. It grants 2,270.40 linear feet of the Wyoming lode and certain surface ground, which is particularly defined by metes and bounds. The patent to the Ural lode for 2,000 linear feet and the surface ground was issued May 12, 1880. It recites the fact that it is issued under certain sections of the Revised Statutes of the United States, which includes the statutes of 1866, 1870, and 1872. Both of said patents contain a grant of the mining premises substantially in the language of section 2322, Rev. St. U. S. The respondent is the owner of the New Year's and New Year's Extension, upon which it particularly relies, and of the Olimax and certain other claims, which need not be specifically mentioned, and its title thereto is evidenced by a certificate of purchase from the United States land office, which is admitted to be equivalent to a patent from the government. The title of complainant to its Wyoming and Ural claims is prior in point of time to that of the respondent to its claims. There is no dispute whatever as to the surface lines of the respective claims. It is admitted by complainant that whatever its rights to the Wyoming

and Ural lodes were prior to its application for a patent, when it had these claims surveyed by the United States surveyor, and permitted him to draw the end lines, it is estopped, under its patent, from any further claim outside of the lines that were fixed by the surveyor; and that its extralateral rights—which constitute the principal bone of contention in this case—are confined to planes drawn downward through the end lines of the survey, and extended indefinitely, and that at a certain depth these end-line planes would come together, and its extralateral rights would be entirely cut off. The former judgment in the state court was rendered in an action brought by the Champion Gold Mining Company (respondent in this action) against the Consolidated Wyoming Company (complainant here). The trespass there alleged was upon the Philip ground belonging to the Champion,—which is not here involved,—but the Champion in that action set up its title to the Philip, Champion, Climax, New Year's, New Year's Extension, and the Annex mining claims, and included the ground in controversy in this action. The question of end lines was there in issue, and the court found that a certain course described in the pleadings was the course of the southern end line of the Ural quartz mine. The question of the junction of the Wyoming and Ural lodes was also presented. The judgment in that case reads as follows:

"Now, therefore, it is considered, adjudged, and decreed that plaintiff have judgment against the defendant for the sum of one hundred and twenty dollars, with its costs therein expended up to the time of filing of the answer to the amended complaint; that plaintiff is not entitled to any injunction or other relief against defendant; that defendant is entitled to work its Wyoming mine along and all points below the junction thereof with the Philip mine of plaintiff, and that it is entitled to work both its Wyoming and Ural mines at any point below where either of said mines, on its dip, may unite with the New Year's or Climax or New Year's Extension or Annex mines of the plaintiff; and that defendant have and recover its costs herein expended since the filing of its said answer to amended complaint."

An appeal was taken to the supreme court, and the judgment was affirmed. *Champion Min. Co. v. Consolidated Wyoming Gold Min. Co.*, 75 Cal. 78, 16 Pac. 513. The admissibility of this judgment as evidence was passed upon by the circuit judge in deciding that this court had jurisdiction of this case, and these questions will not be reviewed.

The following diagram shows the surface boundaries of the respective claims and the lode lines of the respective lodes as defined and represented in the patents, and contains the stipulation of the parties in regard thereto, and with reference to the former judgment between the same parties in the state court. [See Diagram A.]

The lode lines represented on this diagram are ideal, as distinguished from the actual lines of the lodes as shown by the testimony. The line of outcroppings of the Wyoming and Ural lodes, with the underground workings of the Wyoming and Champion companies, are shown upon the following diagram. [See Diagram B.]

The outcrop of the respective lodes upon the surface is not continuous nor well-defined, but it has been exposed in a sufficient number of places to show—when taken in connection with the underground workings—that the general course of the croppings as delineated on the diagram is substantially correct. The apex of the Wyoming lode is clearly established within the surface boundaries of the Wyoming claim, and the lode extends throughout the entire length of said claim through the northern and southern end lines thereof. The apex of the Ural is shown to be in the Ural claim, and the lode extends from the northerly end line through the claim in a southerly direction for about 1,400 feet, and then crosses the eastern side line of the Ural as delineated on the diagram, at a point about 600 feet from the southerly end line of the Ural surface location. The walls of the Wyoming lode are both slate, and in the testimony the Wyoming is called the “slate” vein. The Ural lode has a hanging wall of granite or diorite, and the foot wall is slate, and this is called the “contact” vein. The slate vein extends downward into the earth at an angle of about 25 degrees to the southeast. The contact vein extends downward in the same general direction at an angle of about 35 degrees.

There are numerous controverted questions of fact, as well as of law, that will have to be solved in order to determine the rights of the respective parties.

2. Before discussing any of the controverted, conflicting, and somewhat complicated questions of fact, it is proper to say that both parties had several large maps carefully drawn, and prepared in such a manner as to materially aid them in presenting the testimony of the respective witnesses in a clear and concise manner. Each party also introduced a large model of the underground workings, by reference to which the court was able to follow the witnesses as they gave their testimony concerning their examination of the several drifts, tunnels, upraises, winzes, and levels exposed in the underground workings of the respective claims. The testimony was presented, and the whole case tried, in an intelligent and satisfactory manner. Counsel were fair and courteous to the court, to the witnesses, and to each other. Questions not in real dispute were readily admitted. Each party pursued a similar line of examination by introducing first their surveyors; second, the superintendent or underground foreman; third, practical and experienced miners; and, fourth, one expert on each side. The witnesses were intelligent men, and favorably impressed the court that they intended to tell the truth, and detail the facts as they appeared to them, without any hesitation or equivocation. Both counsel and witnesses demeaned themselves throughout the long and tedious trial in such a manner as to receive the commendation of the court for their honesty, frankness, ability, and courtesy. The case was tried with extreme caution, so as to cover every possible phase that might be taken of the numerous questions involved. The result is that many of the questions raised and much of the testimony taken became unimportant in the light of the conclusions reached by the court. It is not deemed necessary to enter into any extended statement of the facts. The record is large, perfect, and complete.

The various links in the chain of evidence are too numerous to warrant any minute attempt to show how they are welded together.

3. The principal contention upon the part of the complainant is that the Wyoming or slate vein and the Ural or contact vein, in their downward course from the surface, unite and form a junction, and that from the point of junction downward there is but one lode or vein, and that is a contact vein between granite and slate walls. The contention of respondent relative to this question is that there is a middle vein between the 300 and 400 foot levels from the Champion shaft, which is a separate and wholly independent vein, in a different fold of slate from the Wyoming lode, which has its apex within the lines of respondent's claims; that the Wyoming lode or slate vein does not unite with, intersect, or touch the contact vein.

From the impressions received at the trial, and from a careful review and examination of the testimony, as it appears in the record, my conclusion is that the union of the Wyoming and Ural lodes is clearly established by the weight of the evidence as contended for by the complainant. In this connection some general views will be given as to what constitutes a lode or vein. In *Book v. Mining Co.*, 58 Fed. 121, I stated that the statute upon this subject "was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind or character of formation the mineral might be found. It should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located." The character of the formation in which the veins and lodes are found in the ground in controversy is entirely different from that which was found to exist in *Book v. Mining Co.*, but the quotation therefrom is as applicable to fissure veins as it is to the mineralized zones. In defining lodes and veins the text-books and several of the decisions speak of them as fissures in the earth, filled with quartz in place, carrying gold and silver or other minerals. But true fissure veins and lodes often exist and are continuous without having any filling in certain points or places of mineral matter. A majority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. In slate formations, as was said by Prof. Brown in giving his testimony in this case, it frequently occurs that one of the walls has been subjected to a certain amount of fracture, which results in the formation of a number of seams, and in the decomposition of the material included between the seams of unaffected wall rock, which miners designate as "horses." To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places short or long distances between the quartz bodies or pay chutes where no

quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, the selvages, slickensides, striation, and ribbing of the walls are frequently as strong evidence of the indication of permanency and continuity as the existence of the quartz itself. Under this definition the existence and continuity of the slate and contact veins were proven to exist in length and depth throughout the various underground workings by evidence of a convincing character.

During the trial respondent objected to any testimony being given as to the condition or existence of the lodes upon the surface or in the underground workings in the northern portions of the ground, as only the southern portion was really in dispute. I am of opinion that this testimony was admissible—although, in the light of the former judgment, and of other features in the case, perhaps unnecessary—as bearing more or less directly upon the question of the union of the two veins in the southern part. It was shown that the complainant's witnesses, in tracing the slate vein downward in the southerly part of the claim, where nearly all of the contests between the parties exist, followed the foot wall of said vein through divers tunnels, inclines, etc., bringing them directly to the contact vein, where, as they testify, there was a distinct union of the lodes, the quartz of the slate vein in some places, that were closely examined, entering and joining with the quartz of the contact vein. This condition of affairs is not only found to exist in the southern part, specially in conflict, by the weight of evidence, but it is shown by undisputed testimony to have existed at several points in the middle and northern portions of the ground where the ore in the veins has been extracted. The established line of croppings extending through the northern, middle, and a portion of the southern part of the ground, running as they do in substantially the same general direction, and descending into the earth at the different angles specified, shows clearly that, if both lodes are continuous, they would naturally come together, because you cannot have two separate lodes of ore or vein matter going into the earth at the angles and in the manner shown to exist here without their coming together, if both are continuous. Then, again, there are two branches or separate lodes or veins of ore—one in slate, the other in contact—above the point of junction, and there is but one vein below that point. Without entering into the field of geological science as to the formation of veins and the filling of the cracks or fissures in the earth, it is evident that all the fissures in the ground in controversy were filled, as Prof. Janin states, at the same period of time, by the same force of nature, whether filled from above or laterally or came up from below. All of these facts tend more or less to sustain and strengthen the positive testimony of complainant's witnesses that there is a union of the two lodes. It will be observed that this conclusion is reached independent of any question as to the extent and effect of the former judgment. It is therefore unnecessary to discuss the question upon which respondent relied, and in regard to which numerous authorities were cited, whether respondent, by its certi-

ificate of purchase from the government, had obtained a subsequently acquired title that could be set up against the judgment. Respondent contends that, if it should be established by the evidence, to the satisfaction of the court, that the slate vein unites with the contact, yet it is a union on the strike, and not upon the dip. Upon this question there is also a conflict of evidence, the weight of which establishes the fact to be that the line of the union is irregular. It cannot accurately be said that there is a union on the strike only, or a union on the dip only. The line of union varies at different places. The union at the north and south ends of the ground is found at a greater depth than in the middle part. The fact is that the union is partly on the strike and partly on the dip. The weight of the testimony touching this point establishes the fact that the union is more upon the dip than upon the strike.

The views already expressed are conclusive upon the point that complainant, by virtue of its ownership of the slate vein in the Wyoming, is entitled to an injunction to prevent respondent from working northerly of a line drawn downward vertically with the southerly end line of the Wyoming claim. If no other portion of the ground was in controversy, the decision of the case might be safely rested here without any discussion of the many other questions presented at the trial, because the laws of the United States provide that, "where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Rev. St. U. S. § 2336. This provision is held not to be in conflict with the provisions of section 2322. *Wilhelm v. Silvester* (Cal.) 35 Pac. 997; *Mining Co. v. Leach* (Ariz.) 33 Pac. 418. Complainant would, therefore, take the ground to the full extent stated,—that is, between the end-line bounding planes of the Wyoming claim extended in their downward course,—independent of any rights it may have by virtue of its patent to the Ural lode and surface location.

4. What are the rights of the complainant under the Ural location and patent? Respondent's counsel claim that no extralateral rights attached to the contact vein, because it crossed the easterly side line of the surface location of the Ural claim before reaching the southerly end line of the location. This point was not seriously urged, but it was intimated and suggested that the opinion of the supreme court in *King v. Amy & Silversmith Min. Co.*, 152 U. S. 222, 14 Sup. Ct. 510, is susceptible of that construction. If that case is not fairly susceptible of such a construction, then it is, of course, conceded that *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. 284, and *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. 557,¹ are conclusive in favor of complainant's right to all that portion of the Ural lode the apex of which is within the surface ground of the Ural survey and location. I am of opinion that the decision of the supreme court of the United States is not in conflict with the *Tyler Cases* decided in the court of appeals for this circuit. It is a universal rule of construction that the decisions of courts are to be in-

¹9 C. C. A. 613.

terpreted with reference to the facts in each particular case. In the Amy Case the court held that the side lines of the claim constituted the end lines of the location. Why? Because "the lines marked as side lines cross the course of the strike of the vein, and do not run parallel with it." It would be a contortion of the facts and of the law to construe the principles announced in the Amy Case as applicable to a location like the Ural, where the lode, as located by the surface claim, crosses through the northerly end line, and runs nearly parallel with the side lines for a distance of about 1,400 feet, when it changes its course, and crosses the easterly side line of the surface location about 600 feet north of the southerly end line of the location. It cannot, it seems to me, consistently be said that complainant is deprived of any of its extralateral rights to the 1,400 feet, more or less, which is all entirely within the surface lines of the Ural patent, and substantially parallel with its side lines as marked upon the surface ground. The statute of the United States is not, in my opinion, susceptible of any such construction, and no decision of any national or state court has ever gone to that extent. The supreme court of the United States in the Amy Case simply decided that when a mining claim is located across, instead of along, the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Rev. St. § 2322, the dip cannot be followed outside the vertical plane of the original side lines into an adjoining claim. There is nothing in either of the opinions of the circuit court of appeals in the Tyler Cases which is at variance with this principle. On the contrary, this rule is expressly recognized. But it is true that there is an expression in the Tyler Cases to the effect that the question whether the lode crosses the side lines more nearly at right angles than along the course of the side lines should always be considered. This particular position, which is deemed sound and just, was not discussed in the Amy Case, and was not, perhaps, involved in that decision. One illustration will be sufficient to show the justice of the position as stated in the Tyler Cases, although that particular question is not here involved: Let us suppose that a location is made under the act of 1872, in the form of a parallelogram 1,500 feet in length and 600 feet in width; that the lode enters one of the side lines within 5 feet of one of the end lines of the location; that it then continues upon its strike, nearly parallel with the side lines, until it comes within 5 feet of the other end line, and then changes its course so as to cross the other side line. This lode does not pass through either end line, yet, under the rule announced in the Tyler Cases, the locator would be entitled to 1,490 feet lengthwise upon the lode, and to follow it for that distance upon its dip vertically downward, as expressed in the statute. I am of opinion that in such cases the statute is definite enough and clear enough to make the end lines parallel at the point of the entrance and of the departure of the lode across the side lines, and to draw them crosswise of the general course of the lode within the limits of the surface location, and that this should always be done so as to give to the locator just what the statute evidently intended he should have, instead of depriving him of all extralateral rights because, by some mistake or

oversight in marking his lines, or by lack of judgment or knowledge as to where the lode ran, he had failed to get his lines exactly parallel with the lode, and had marked his end lines at a point beyond where the lode was found to exist upon its strike within the surface lines of his location. But, be that as it may, the Amy Case does not go to the extent of deciding that if the lode passes through one end line, and in its entire course is nearly parallel with the side line, which it crosses before reaching the other end line, the locator would be deprived of all his extralateral rights. In a majority of cases where mining locations are made in the form of a parallelogram under the act of 1872, the lode or vein located does not run lengthwise directly parallel with the side lines of the location. The statute is based upon ideal locations of parallelism that seldom, if ever, exist. It is in fact almost impossible to make a perfect surface location, the side lines of which would be absolutely parallel with the lode, or the end lines precisely at right angles with the strike of the lode, no matter what length of time is taken before marking the surface boundaries of the location. If the locator makes his location crosswise instead of lengthwise of the lode, then the end lines of the location become side lines, and he can only take so much of the lode lengthwise as lies within the surface lines of his location. But if the lode runs like the contact vein does through the Ural surface ground, there is no substantial reason that would justify a court in declaring that the locator would not be entitled to any extralateral rights. No such construction has ever been given to the statute. There is but little, if any, force in the suggestion often made that the locator should postpone the marking of his boundaries until sufficient explorations are made to ascertain the "true course and direction of the vein." The present case furnishes a fair example of the difficulties so often encountered by the miner in his efforts to determine the direction of the vein he has discovered.

The Wyoming vein has been located, and at different times worked upon, during the past 40 years, and it is still a disputed and closely contested question as to where the lode actually runs; and, in addition to all the regular workings of the mine, it has required the expenditure of money, time, and labor in order to enable the witnesses to testify with any degree of certainty to the "true course and direction of the vein." Every practical miner knows the difficulty that is often experienced in ascertaining these facts. The truth is that the miner is often compelled by the law to make his lines of location upon the surface ground before such facts can be ascertained. There is a limit to the time he can take before marking the boundaries of his claim. He is required to exercise his best judgment from the developments he has been able to make, and he is, of course, confined to his surface location, whether his judgment was right or wrong. The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor, so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. When the prospector discovers a vein of ore of sufficient value to

justify the expenditure of time, labor, and money to open up and develop the same, he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." These are their extralateral rights, which should neither be extended nor restricted by the courts. The only limit placed by the statute is that "their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute.

It may be admitted, as was suggested by counsel in this case, that it would be an herculean task to endeavor to fathom the complications that are liable to arise in the construction of this statute, and to provide for their solution upon any defined method of interpretation. One thing, however, is certain: that, unless it can be done, then the statute is radically wrong, and the sooner amendments are made thereto to avoid such difficulties, the better it will be for the mining industry of the country. In fact, it is a question worthy of consideration whether it would not be advisable to have the mining laws amended so as to adopt the Spanish, Mexican, and Roman rules, and give to the miners a greater width of ground upon the surface,—making a square location,—and confine the owner of the claim to the ground within the boundary planes of his location in length, width, and depth, the same as agricultural land, so as to avoid any further conflict over side and end line propositions that are becoming such fruitful themes of endless dispute and litigation.

This is a question, however, that is solely within the province and discretion of congress.

It will be noticed that the end lines of the Ural are not parallel with each other. The location was made under the law of 1866, which did not require parallelism of the end lines. *Walrath v. Mining Co.*, 63 Fed. 552, and authorities there cited. It was admitted upon the trial by complainant that the northerly end line of the Ural location was the more easterly instead of westerly part thereof, to wit, the line from C. M. 11, "S. 56, 10 W. 5, 13 Ch." to C. M. Co., No. 4, as shown in the diagram taken from the stipulated map. A line drawn across the Ural location parallel with this northerly end line so as to strike the point where the Ural or contact vein crosses the easterly side line of the Ural location would be the southerly end line of the contact vein, and these end lines extended vertically downward would define the rights which complainant is entitled to under its ownership and patent of the Ural lode.

5. What are the rights of complainant, under and by virtue of its patent to the Ural ground, to the southerly part of the Wyoming or slate vein after it crosses the southerly end line of the Wyoming location? Section 2322 of the Revised Statutes, heretofore quoted, gave to the owners of the Ural lode and surface location all other "veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." This portion of the Wyoming lode was not located by complainant. It was the Ural lode for which the patent was obtained, and under the law of 1866 this was the only lode that was granted; but when the act of 1872 was passed it was so framed as to apply to all mining locations theretofore made as well as to all others to be thereafter made, and the complainant is the owner of so much of the slate or Wyoming vein as has its apex within the surface of the Ural location. But here we are met with the difficulty of determining from the evidence how far the apex of this vein is shown in the Ural claim after leaving the south end line of the Wyoming surface location. This is the most difficult and doubtful question of fact that is presented to the court for its determination. The testimony as to the existence of the slate vein to certain points southerly, near the mouth of the Wyoming shaft, may be said to be fairly established by the evidence. South of that point to the southerly end of the Ural it is not well defined, and is not clearly proven. The court is left in doubt as to the truth. The impression received from an examination of the record might be said to be that the probabilities are in favor of that vein extending through the Ural ground, as claimed by complainant. But the court is not prepared to say that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Year's and New Year's Extension claims, belonging to respondent. The respondent has the undoubted right to say to complainant, "Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has

its apex within your surface claim, of which you are the owner!" Judge Hallett, in *Leadville Min. Co. v. Fitzgerald*, 4 Morr. Min. R. 385, Fed. Cas. No. 8,158, expresses the true rule upon this subject as follows:

"Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by a preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere."

See, also, *Doe v. Mining Co.*, 54 Fed. 937; *Duggan v. Davey* (Dak.) 26 N. W. 892.

The facts do not show by a preponderance of evidence that the slate vein extends any further south than the southerly end-line plane of the Ural, and, as the slate vein is not clearly shown to pass that line going south, I am of opinion that complainant is not entitled to any further or other rights than have already been given to it by virtue of its patent to the Ural or contract lode. The same result would be reached if the court should accept the doctrine announced in *Patterson v. Hitchcock*, 3 Colo. 533, and followed in *Armstrong v. Lower*, 6 Colo. 399, that, "if the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond such point is defeasible, if not void."

6. With reference to complainant's rights there is one novel proposition, seriously and earnestly advanced by complainant's counsel, that demands consideration. It is substantially to the effect that where the patent conveys a lode, and independently and clearly marks it out, as the land office has a right to do, and did do in this case, then no collateral attack can be made to the patent so as to show that the lode is in another place from that marked out in the patent; and it was argued that there was a distinction, which should be observed and followed by the courts, between a patent where there is no lode distinctly granted by a specific definition, where the courts must naturally inquire as to its existence and extent in order to determine the rights of the parties, and a case where a patent recites the direction and course of the lode. In the latter case it is claimed that, while the government of the United States might inquire as to its truth, no collateral attack could be made upon it by the owners of other mining locations; that the court is absolutely bound to proceed and act upon the theory that the land office ascertained the facts before it granted the patent; that the definition of the Ural is as complete and perfect to all intents and purposes as it is to the surface boundary lines of the ground itself within which it is included, and upon these grounds complainant denies the right of respondent to show that the Ural or contact vein does not run along the dotted line of the patent—as shown in the diagram—clear through the Ural claim, from end to end of the location and survey. The reply to this is that respondent is not assailing the patent in any manner whatever. It does not deny its validity. It admits that complainant has the title to the contact vein, and to every other lode or vein within the limits of the surface location

of the Ural claim. It denies, and has the right to deny, that any portion of the Ural lode situate southerly from the point where it crosses the easterly side line of the Ural location has its apex within the Ural claim. The answer heretofore given, that complainant must prove that the vein it claims within the surface lines of another mining company has its apex within the lines of its own claim, is directly applicable to this contention. This court cannot presume that the land office determined the course of the lode. The marking of an ideal line across the survey and diagram did not have the effect of putting a lode into the ground if there was no vein there. The respondent has the right to show what the facts are. Mr. Justice Miller, in answering a somewhat similar contention, in his instructions to the jury in *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413, said:

"The plaintiff has asked certain instructions which I have refused, * * * and I regret that they should have been introduced. * * * I am asked by him to state that the patent which he has received from the United States for the Iron mine is conclusive that the sheet of mineral matter in question is a vein, within the meaning of the statute. I decline to give this instruction. Certainly, outside of the vertical projection of the side lines of the plaintiff's patented ground, if the defendants can show that the mineral matter which is the subject of this controversy is not a vein, they have the right to show it. Outside of the side lines of the plaintiff projected perpendicularly downward defendants have the right, if they can, to show that the vein, or thing which is called a vein, is not a vein."

7. One more question, and the case is disposed of. It is claimed by respondent that under the form of the pleadings in this case the complainant is not entitled to an accounting; that this action is really an ancillary action at law; and that complainant should have divided its case, and gone upon the law side for its damages and upon the equity side for its injunction. Such is the common, and, as I think, the better, practice, and more in accordance with the rules of this court. But a vast number of authorities were cited by counsel, the weight of which seems to sustain the right of complainant, under the pleadings, to an accounting as well as to an injunction. Let a decree be drawn in conformity with this opinion for an injunction and for an accounting.

WALRATH et al. v. CHAMPION MIN. CO.

(Circuit Court, N. D. California. August 13, 1894.)

1. MINING—EXTRALATERAL RIGHTS—END LINES.

Under Act 1872 (Rev. St. § 2322), giving one who had theretofore located a vein and received a patent therefor, by which he obtained a right only to that particular vein, and to the surface ground as surveyed as incident merely to the vein, all other veins throughout their entire depth, the apexes of which lay within such surface lines extended downward, his extralateral rights as to such other veins are determined by the original end lines of the location.

2. SAME—ESTOPPEL—STATEMENT IN RELOCATION.

Where, by reason of an overlap in the N. claim onto the P. claim, a relocation of the N. claim is made, the designation, in the relocation, of a certain line as the north end line of the P. claim, and the express abandonment of all that portion of the N. claim, for surface and lode, lying south of such line, do not estop the owner of the N. claim to deny that such line is an end line of the P. claim for the purpose of extralateral rights.

3. SAME—ABANDONMENT.

The abandonment by the relocation of the N. claim was to any and all lodes within the surface boundaries of the P. location and survey, and it did not give to the P. claim any greater rights than it previously had by virtue of its location and survey.

4. SAME—STATEMENTS OF SUPERINTENDENT.

A statement by the superintendent of a mining corporation, made without the scope of his authority, that he would not interfere with or cross a line between its claim and another, is not binding on the corporation.

Action by A. Walrath and others against the Champion Mining Company.

Patrick Reddy and J. F. Smith, for complainants.

Lindley & Eickhoff, Fred Searles, and Geo. T. Hoeffler, for respondent.

HAWLEY, District Judge. This action is of the same character as Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., just decided, 63 Fed. 540, and may be said to be a companion case, as it involves the title to a small segment of mining ground of the "contact" vein situate further south. The Providence mine was located in July, 1857, in conformity with the local rules and regulations of the miners in the mining district where the claim is located. On the 28th of April, 1871, a patent was obtained from the government of the United States for 3,100 linear feet of the Providence lode, and for certain surface ground of irregular shape and form. This patent was issued under the provisions of the act of congress of July, 1866, and the grant was "restricted to one vein, ledge, or lode," and to the surface ground, particularly described by metes and bounds. Complainant derives his title to the Providence lode under said patent as a cotenant. The respondent is the owner of the mining claims and ground known as the "New Year's" and "New Year's Extension." Its right to these claims was acquired subsequent to the act of congress of 1872, and is evidenced by a receipt and certificate of purchase from the United States land office, which is the equivalent of a patent. The original location of the New Year's Extension on its southeasterly side overlapped upon the surface of the Providence mine in the form of a triangle. In 1884, the owners of the Providence objected to this overlap upon their patented ground, and the result of this objection was that the respondent caused a relocation to be made by its superintendent, abandoning such portions of the lode and surface ground as were within the patented surface lines of the Providence. The notice of location of the New Year's Extension, omitting certain portions, reads as follows:

"The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 80 feet S., 11 deg. 45 minutes east, of the mouth of the New Year's tunnel, and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S., 46 deg. 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence mine, patented, designated as 'Mineral Lot No. 40,' for the south end of said lode line. * * * And whereas, part of this claim as originally described, and as hereby relocated, conflicts with the rights granted by the letters patent of said Providence mine * * *: Now, therefore, so much of this claim, both for lode and surface ground, as originally designated, conflicted or now conflicts with any portion of the surface or lode

Numerous maps, diagrams, and models were offered by the respective parties. The following diagram is deemed sufficient to illustrate and explain the contention of the respective parties:

The lines a, b, c, d, e, f, g, h, i, k, l, m, n, o, p represent the lines described in the patent of the Providence. The lode line from z to z', running in a northerly and southerly direction, represents the Providence lode, described in the patent. This lode is in granite, and is called the "granite lode." Its dip is to the east. The lode delineated on the diagram and marked x, x' is a separate and independent lode from the granite, and is called by the complainant a "back vein," and by respondent the "contact vein" between slate and granite walls. This lode is the same as was designated in Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. as the "Ural" or "contact" vein. It will be noticed that in its course upon its strike it comes into the New Year's claim across the Ural side line, marked "Wyoming" in the diagram, and passes through the New Year's in a southerly direction to the northerly line of the New Year's Extension, when it changes its direction to a southerly course, and extends through the New Year's Extension and crosses the line f, g, of the Providence surface line, and extends through the Providence ground to the point x, as delineated on the diagram. Its direction beyond that point has not been ascertained, and is entirely problematical, and, as I think, wholly immaterial. If it continues in the same direction, it would cross the line of the Providence between d and f, near the point e; but, for aught that appears in the evidence, it may extend through the Providence ground, and cross the line a, p. Its dip, like the Providence, is to the east. The Providence lode as patented extends northerly about 30 feet across and beyond the line g, h, and about ——— feet southerly beyond the south line a, p, of the surface location. No portion of the surface ground is in dispute. There is no controversy with reference to the Providence lode. The only controversy between the parties is in relation to the "contact" or "back" vein. What portion of this vein, in its downward course, is complainant entitled to? Which line is the northerly end line of the Providence ground, through which the vertical plane is to be drawn downward with reference to the "contact" vein? Complainant claims that the line f, g, on the diagram, is the northerly line of the Providence with reference to this lode, and that this line should be extended to g', and so on indefinitely downward. Respondent claims that the line should be drawn from the point where the lode crosses the southerly line of the New Year's Extension or Annex, covering the same ground from v to v', marked on the diagram as the "line claimed by Champion."

The case was argued ingeniously, with much zeal, force, and ability, upon both sides, and numerous questions of both law and fact were earnestly pressed upon the attention of the court in favor of the respective contentions. Many of the points thus presented were, as in the Consolidated Wyoming Case, novel and new, and all of them were exceedingly interesting, and have received a careful consideration. I shall content myself, however, by stating what is believed to be the proper construction of the statutes of the United States, and announce my conclusion upon the questions involved without attempting to discuss all the legal points advanced by counsel.

As there is no dispute between the parties as to the right of complainant to the Providence lode, it is unnecessary to discuss that question, except so far as it may tend to illustrate or explain the principle that is to be applied to his right to the contact vein. The Providence lode was located, as before stated, prior to the act of 1866, under the rules, regulations, and customs of the miners in the district where the mining claim is situated. The locators were only required to designate the lode in their notice of location. The lode was the principal thing. The surface ground was a mere incident thereto, for the convenient working thereof. The notice of location designated the number of feet that was claimed upon the lode, and the locators were entitled to that number of feet, if allowed by local rules, in whatever direction the lode ran, and to all its dips, spurs, angles, and variations. The subsequent acts of congress did not interfere with these rights, but were in all respects confirmatory thereof. The Eureka Case, 4 Sawy. 323, Fed. Cas. No. 4,548; Wilhelm v. Silvester (Cal.) 35 Pac. 997. The act of 1866 provided a method whereby the owners of mining claims located prior to the passage of the act, who had complied with these local customs, rules, and regulations, might, upon certain conditions, receive a patent therefor from the government of the United States. Parties applying for patents were required, among other things, to "file in the local land office a diagram of the same so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract, and receive a patent therefor," etc. Under the act of 1866 parallelism of end lines was not required, but by the act of 1872 parallelism of end lines is made essential. A survey of the surface ground must be made before it can be patented, and the surface lines of such survey should be marked upon the ground, whether patented under the law of 1866 or of 1872. The intent of both acts, in this respect, is substantially to the effect that the mining locations made thereunder should be along the lode lengthwise, and the surface boundaries should be marked upon the claim. It was not intended by either act that the locator would have any right to follow the lode upon its strike beyond the surface lines of his location. The term "location" as used in both acts refers to the surface ground as well as to the vein or lode. The lode claim, whatever its nature, character, or extent, is to be limited to the survey of the surface location, and the title to the lode upon its strike is not given to any portion thereof which departs beyond the surface lines of the location. In *Mining Co. v. Tarbet*, 98 U. S. 463, familiarly called the "Flagstaff Case," the supreme court of the United States declared that under the act of 1866, as well as under the act of 1872, the location of a mining claim upon a lode or vein should be made along the same lengthwise of the course of its apex at or near the surface, and, in the course of its opinion, said:

"The act of 1872 is more explicit in its terms, but the intent is undoubtedly the same as it respects end lines and side lines and the right to follow the dip outside of the latter. We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend

perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface."

See, also, *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, 118 U. S. 208, 6 Sup. Ct. 1177; *The Eureka Case*, 4 Sawy. 323, Fed. Cas. No. 4,548; *McCormick v. Varnes*, 2 Utah, 355, 9 Morr. Min. Rep. 505.

The patent to the Providence mine was confined to the Providence lode and to the surface ground as surveyed and marked on the diagram filed in the land office. It granted no right to the owners of the Providence to the "back" vein. It was a grant to the Providence lode only, and in express terms excluded all others. The effect of the act of 1872 was to grant to the owners of the Providence surface location all other "veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, in whatever course or direction they might run." In *Wilhelm v. Silvester*, 35 Pac. 997, the supreme court of California, in discussing this question, after quoting from section 2322 of the Revised Statutes, said:

"This language is clear and explicit, and in designating the property rights of locators is in no wise ambiguous or uncertain. It expressly, and in language which needs no construction, grants to such locators every ledge or lode the top or apex of which lies within the surface lines of the location; that is, such part of the ledge as lies within such lines. And there is no limitation or exception of any such ledge on account of the direction it may run. It may be parallel with the original discovered ledge, or may approach it at right angles, or at an obtuse angle, or at an acute angle; it may intersect it or not; and still it may be clearly within the language of the said section."

The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. And it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. It necessarily follows that the end lines of the Providence survey must be considered by the court as the end lines of any and all other lodes or veins which lie "inside of such surface lines;" otherwise endless confusion would arise in the construction of the statute. End lines would have to be constructed in different directions if the separate lodes or veins found within the surface lines did not run parallel with each other, and the result would be that these lines extended might give to the owners of the claims a greater length along the lode as it extended downward than they had upon the surface. If the same end lines which bind the extralateral rights of the Providence surface survey apply to the contact vein and to all other veins, if any are hereafter found, then no such difficulty can arise. This is the rule that applies to all locations made after the act of 1872, and it ought not to

be presumed that congress, by its grant to prior locators, intended to give greater rights to them than were given and granted to subsequent locators under the same act.

It is settled by the decision of the supreme court of the United States in *Iron Silver Min. Co. v. Elgin Min., etc., Co.*, that the same end lines bound all extralateral rights as to all veins or lodes within the surface boundaries of the claim. Justice Field, in delivering the opinion of the court, speaking of the rights of locators of mining ground to follow the lode in its depth, said:

"It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bound by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at right angles to the courses of all the veins if they are not identical."

In the present case the end lines of the Providence—a, p, and g, h—are conceded to be substantially parallel with each other, and that the Providence lode, in its course lengthwise, passes these end lines. Complainant's contention would take the "back" or "contact" vein outside of the plane of the northerly end line of the Providence drawn downward vertically, and give to him extralateral rights not granted by the patent, nor given to him by the granting provisions of the act of 1872. But in this connection it is argued by complainant that respondent is estopped from asserting any claim to any vein or lode lying southerly from the line f, g, because: (1) In its relocation of the New Year's Extension claim it recognized and designated that line as the "northerly end line of the Providence mine," and expressly abandoned all that portion of the original New Year's Extension claim "for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north, 43 deg. 10 min. east, across the S. eastern corner of this claim." (2) Testimony was offered, and admitted, against the objection of respondent, tending to show a further estoppel, which was to the effect that before the Champion shaft was started the plans therefor were submitted, by the then superintendent, to the board of directors of respondent, and approved by it, and that the shaft was sunk, in pursuance of such plans, parallel with the line f, g, extended in the direction of g; and that the superintendent had conversations about that time with complainant and his brother, a co-owner in the Providence, and stated that he would never interfere with that line, and would never cross it, and that this line was practically agreed upon by them at that time as the boundary line between the two claims. This testimony, giving it full scope and effect, is not sufficient to create an equitable estoppel. The corporation is not bound by such declarations of its superintendent, made without the scope of his agency or authority from the corporation. If respondent was given the line for which it contends, it would take that portion of the lode which it expressly abandoned by its relocation. The abandonment, which is binding upon it, was to any and all lodes within the surface boundaries of the Providence location and survey; but this abandonment or agreement, or whatever it may be called, did not give to the

Providence any greater rights than it previously had. The acquiescence and agreement between the parties amounted to nothing more than a recognition of both parties that the line f, g, was the boundary line between the two companies. There is nothing in the facts of this case which gives to complainant any right to extend that line, as a boundary line, any further than to point g, at which point it comes to the line g, h, which, as before stated, is the northerly end line of the Providence surface location, and beyond which, in a vertical line drawn downward, the complainant has no right to any part or portion of the "back" vein, either by virtue of the Providence location, patent, act of 1872, or any agreement or estoppel between the parties. Let a decree be drawn designating the boundary plane fixing the rights of the parties in conformity with the views expressed in this opinion, for a perpetual injunction, and for an accounting, if so desired; each party to pay their own costs.

EDISON ELECTRIC LIGHT CO. v. MATHER ELECTRIC CO.

(District Court, D. Connecticut. June 12, 1894.)

No. 723.

EXAMINER'S FEES—TYPEWRITTEN TESTIMONY.

Examiner's fees are restricted in the second circuit to \$3 a day and 30 cents a folio for typewritten testimony.

Appeal from Clerk's Taxation of Costs as to Examiners' Fees.

Under the head of "Examiners' Fees" the complainants presented the following items for taxation, viz.:

Examiners' fees: 6 days occupied @ \$3.....	18 00	
8 exhibits filed & identified @ 25 cents.....	2 00	
6 witnesses sworn @ 10 cents.....	60	
442 fol. evidence taken @ 20c.....	88 40	
Examiners' & typewriters' fees for do.....	84 60	192 60

The clerk taxed the bill as follows, viz.:

6 days occupied @ \$3.....	18 00	
8 exhibits filed & identified @ 25c.....	2 00	
6 witnesses sworn.....	60	
All examiners' & typewriters' fees, 442 fol. @ 20c.....	88 60	109 20

The testimony was typewritten, and there was typewritten therein what was claimed to be a valid stipulation in the case, although it did not otherwise appear in the record, as follows, viz.:

It is stipulated by counsel for the respective parties that the testimony of the witnesses may be taken stenographically, and that the transcription of the stenographer's notes may stand as the testimony of the witnesses, subject to inconsequential changes.

It is also stipulated that the stenographer may subscribe the witnesses' names to the depositions, in lieu of the signatures of the witnesses themselves.

The certificate of the examiners showed that the testimony was taken under such stipulation by a stenographer, counsel for the respective parties being present, and that the stenographer caused his notes to be typewritten thereafter, and that the testimony

so written out was never read over to or signed by the witnesses, as required by the sixty-seventh rule, as amended May 2, 1892. The complainant claimed that the new amendment to the sixty-seventh rule expressly authorized the expenses of both typewriter and stenographer to be taxed in addition to the 20 cents folio fee of the examiner, and did not limit the amount of such expense, and that the effect of the stipulation was to constitute the typewriter the attorney in fact of the witness, and authorize him to sign whatever he should write down as the evidence of the witness. The defendant claimed that the testimony filed was mere consent evidence, and that it was taken in obvious avoidance of the sixty-seventh rule, and was not entitled to be taxed under that rule or any other. That, if the attendance and tacit agreement of defendant's counsel at that time managing the case concluded defendant from now objecting to the validity of the evidence, still the defendant was not concluded from now objecting that the examiner, who did not take down any testimony, and the typewriter who did take it down, were both entitled to 20 cents folio fee for doing the same work.

Dyer & Seely, for complainant.

Perkins & Perkins, for defendant.

TOWNSEND, District Judge. The practice in this circuit is to charge 30 cents per folio and \$3 per day in such cases, the same being intended to cover both examiner's and stenographer's fees. Let this bill of costs be taxed accordingly. No costs to be taxed on this motion.

IMPERIAL LIFE INS. CO v. NEWCOMB.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 343.

Motion for Rehearing.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Charles Hagel and Chas. W. Bates, for plaintiff in error.

PER CURIAM. A motion for a rehearing in this case (62 Fed. 97)¹ is made upon the ground that the court has not considered the sufficiency of the statement of the cause of action in the complaint, and of the record, to sustain the judgment. If we concede that these questions were properly presented the motion must still be denied, because they were both considered and decided adversely to the plaintiff in error at the hearing, and the opinion clearly states that the opinion of the circuit court overruling the demurrer was approved, and that no just exception to the report of the referee was taken. The motion is denied.

¹ 10 C. C. A. 238.

ATWOOD et al. v. JAKES.

(Circuit Court, W. D. Missouri, W. D. July 2, 1894.)

No. 1,840.

1. TAXABLE COSTS—EXPENSE OF AFFIDAVITS ON MOTION FOR PRELIMINARY INJUNCTION.

A respondent who succeeds in defeating an application for preliminary injunction is entitled to have taxed the cost of the notarial certificates and seals attached to the affidavits used by him on the hearing, but not the expense of writing the affidavits in the form of depositions.

2. SAME—PRINTING EVIDENCE AND ABSTRACT OF RECORD.

The expense of printing evidence and abstract of record is not taxable in the circuit court, in the absence of any rule of court or special order requiring such printing to be done.

3. SAME—COPIES OF TESTIMONY

Payments to stenographer for making carbon copies of testimony for use of the party or his counsel is not taxable.

Motion to Retax Costs.

Barton & Brown and Gage, Ladd & Small, for complainants.

J. S. Brown, for respondent.

PHILIPS, District Judge. Motion is made in this case by complainants to retax part of the costs taxed by the clerk against them. Objection is made to the charge of \$26.50 for affidavits used on behalf of respondent upon complainants' application for preliminary injunction. It is quite apparent from the amounts charged for these affidavits, respectively, that they include the writing of the affidavit in the form of a deposition. The law and the practice do not warrant this charge. *Stimpson v. Brooks*, 3 Blatchf. 456, Fed. Cas. No. 13,454. But it seems to me, inasmuch as the complainants invited the issue on the application for a temporary injunction, and such applications are heard only upon affidavits, that it would be but equitable and right that the prevailing party should at least be accorded the sums paid out by him to the officer administering the oath and certifying thereto; and therefore I shall allow to the respondent as costs the sum of 50 cents for the notary's certificate and seal to each affidavit, aggregating \$15.50.

The next item of costs objected to by complainants is the charge of \$506.65 paid by respondent to printing company for printing evidence and abstract of record on behalf of respondent. In the absence of any rule of court requiring this to be done, and in the absence of any special order by the court in this case, or any agreement between the parties that the same should be printed, and charged as costs in the case, there seems to be no warrant, under equity practice, for this charge. *Hussey v. Bradley*, 5 Blatchf. 210, Fed. Cas. No. 6,946a.

The next and final item objected to is the sum of \$60.20 paid to Frances E. Mullett by respondent for carbon copies of testimony taken by her, as stenographer. As these copies were evidently for the use of respondent or his counsel, they are not chargeable as costs in the case; and the motion, to the extent above indicated, is sustained, and the costs ordered to be retaxed accordingly.

EWERS' ADM'R v. NATIONAL IMP. CO.

(Circuit Court, W. D. Virginia. April 2, 1894.)

1. NEW TRIAL—MISCONDUCT OF JUROR.

Proof that while a case was pending, and before the testimony was concluded or the charge given, one of the jurors privately measured the distances testified to in the case, and told several persons that he had made up his mind, and would hold out for heavy damages, is ground for setting aside the verdict.

2. SAME—EVIDENCE—AFFIDAVITS OF JURORS.

On motion for a new trial on the ground of misconduct of a juror, affidavits of fellow jurors are admissible to sustain the verdict.

Action by Ewers' administrator against the National Improvement Company. The verdict was rendered for the plaintiff, and defendant moves for a new trial.

Ford & Ford, for plaintiff.

Harrison & Long, for defendant.

PAUL, District Judge. This motion is based upon the following grounds, to wit: First, that the verdict is contrary to the law and the evidence; second, on account of the misconduct of a juror.

The court does not care to discuss the evidence in the case, as it is involved in the first ground, and will confine its views to the second ground, on which the motion is based. The charges against the juror, as contained in the affidavits filed by the defendant, are: That while the case was pending before the jury, and before the evidence was concluded, before the jury had received instructions from the court, and before the case had been argued by counsel, the juror, when separated from his fellows, had taken private measurement of distances testified to by witnesses in the case; had, in conversation with two different persons, at different places, about the same time, made himself the special champion of the character of the mother of the dead child, who was a witness in the case, the child being the same to recover damages for whose death this action was brought. There had been some criticism, the evening before, during the progress of the trial, of the conduct of the mother, Mrs. Ewers, on account, as was alleged, of her efforts to influence some of the witnesses in their testimony. The juror said to two persons that he believed her to be a lady. That he knew where she lived on Daniel's hill: To one he said he had been out on Rivermont bridge that morning, and could see her house; to the other he said he had gone over to Mrs. Ewers' house the evening before, to see her, but did not find her at home. To one of these persons he said: "Some of the witnesses had testified that the little girl was running down Sixth street, and some that she was not, but that it did not make any difference; that the car certainly struck her, and her mother ought to have some damages. He further stated that he had it all down in his mind then exactly what he would do. That a few days before that he had been on a jury that tried a man for counterfeiting money, and that he was the only man who stood bullheaded, and hung the jury." That conversation lasted 10 or 15 minutes.

To two other persons the juror said, immediately after a verdict had been rendered for the plaintiff, that he had talked during the trial to a man, not a witness in the case, who had seen the accident, and that the sight of the blood and bones had made the man sick so that he vomited. The juror Chewning, in an affidavit filed by counsel for the plaintiff, denies in great part the statements contained in the affidavits of Shelton and Jones, filed by the defendant. Under all the circumstances of this case, the corroboration of Shelton by Jones, etc., in several particulars, requires the court to receive the evidence of Shelton and Jones, rather than that of the juror. The juror admits what is stated in the affidavits of Krise and Burroughs. In his affidavit Chewning says he had made up his mind in the case before he had the conversations with Shelton and Jones, and counsel for the plaintiff file, in support of the juror's affidavit denying the charge of misconduct, the affidavits of several of his fellow jurors. While the rule is that the affidavits of jurors cannot be received to impeach their verdict, such affidavits may be received to sustain their verdict. *Thomp. & M. Juries*, § 446. These several jurors, with a view, manifestly, of sustaining their verdict (and to whom no misconduct is imputed), make oath that the juror Chewning, before the conversations set forth in the affidavits of Shelton and Jones, had expressed himself as in favor of heavy damages; "that he stated in their presence that he was made up in his mind for the plaintiff, and said that he would give a verdict for large damages; and that all this took place before the conversations with Shelton and Jones." With this evidence before us, there is but one conclusion at which the court can arrive; that is, that the misconduct of the juror evinces on his part a prejudgment of the case. He did not wait for the evidence to be fully introduced and concluded. He did not wait for the instructions of the court to be given to the jury as applying the law to the evidence in the case. He did not wait to hear the argument of counsel on the evidence, and the law as laid down by the court. But he makes a statement to an outside party to the effect that his mind is made up. He states in his own affidavit that at the time he talked to these outside parties he had already made up his mind as to his verdict. The plaintiff introduces the affidavits of his fellow jurors to prove that the conversations he had with outside parties had no influence with them in finding their verdict, and in the same affidavit his fellow jurors say that he (Chewning) had declared himself in favor of heavy damages before these conversations were had with outside parties. The prejudgment of a case by a juror could not be more clearly established, and the verdict in this case cannot be said to be the result of a fair trial.

In the language of the court in *Pool v. Railroad Co.* (Cir. Ct. U. S. Iowa) 2 McCreary, 251, 6 Fed. 844:

"There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat. Now, the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections

than similar declarations which he may hear uttered by another person. When most men commit themselves publicly to any fact, theory, or judgment, they are too apt to stand by their own public declarations in defiance of evidence. This pride of opinion and constancy belong to human nature. Where, therefore, a juror talks outside of the jury room about a case pending and undetermined before him, he gives the clearest evidence that he is not an impartial juror. The very discussion of any matter anywhere by a juror elsewhere than in the jury room tends to the forming of false impressions and prejudgments. Nor will it do for a moment to accept the statement of the juror that what he has said or heard has not affected his judgment or influenced his verdict. Almost any juror, when detected in such misconduct, and arraigned for it, will disclaim the influence upon his own mind of what he has uttered in violation of his duty."

For the court, with the evidence before it, to allow this verdict to stand, would be a stigma on the administration of justice, and well calculated to destroy that confidence of litigants and the public in the fairness, impartiality, purity, and justice of jury trials, and their faith in the integrity of the courts, so essential to the maintenance of an honest, just, and effectual administration of the laws. An order will be entered setting aside the verdict and granting a new trial.

In re STORROR.

(District Court, N. D. California. August 2, 1894.)

No. 11,092.

1. WITNESS—PRIVILEGED COMMUNICATIONS—MESSAGES IN HANDS OF TELEGRAPH COMPANIES.

Telegraphic messages in the hands of telegraph companies are not privileged communications, so far as the companies are concerned, and their production will be compelled by subpoena duces tecum, in aid of an investigation by a grand jury of supposed criminal acts of the senders and receivers of the messages, with which such companies and their officers are in no way connected.

2. SUBPOENA DUCES TECUM FOR PRODUCTION OF TELEGRAMS—SUFFICIENCY.

By the petition of the United States attorney for a subpoena duces tecum, directed to, and to be served on, the superintendent of a telegraph company, requiring him to appear as a witness before the United States grand jury, and produce certain telegrams, it appeared that such jury was investigating certain alleged violations of the laws of the United States relating to the obstruction of the mails and carriers of the same, and relating to conspiracies in restraint of interstate trade and commerce, during the recent strike on the Southern Pacific Railroad, directed by the American Railway Union, which is a matter of general public notoriety. *Held*, that such subpoena was not defective because it called for telegrams between a number of parties, without describing the messages, by date or otherwise, so as to identify the particular messages required, where the facts and circumstances of the case indicated that telegrams had passed between the parties, and their general character, and where the subpoena described them with such particularity as appeared to be practicable. *Ex parte Jaynes*, 12 Pac. 117, 70 Cal. 639, distinguished.

3. SAME—WITNESS—RIGHT TO COMPENSATION IN ADVANCE.

It is no cause for quashing a subpoena duces tecum, requiring a witness to appear before the United States grand jury, that no compensation has been tendered the witness for his outlay in making the necessary search for telegrams which he is required to produce, since the United States is not required to tender witness fees in advance.

This is a motion to quash a subpoena duces tecum. Motion denied.

W. S. Wood, for the motion.

Charles A. Garter, U. S. Atty., opposed.

MORROW, District Judge. This is a motion to quash a subpoena duces tecum issued upon the petition of the United States attorney, directed to and served upon L. W. Storrer, superintendent of the Postal Telegraph-Cable Company, requiring him to appear as a witness before the United States grand jury, and bring with him, and produce, certain telegraphic messages. It appears from the petition of the United States attorney that there is pending before the United States grand jury an investigation as to certain alleged violations of the laws of the United States relating to and prohibiting the obstruction and retarding the mails of the United States, and of the carriers carrying the same, and relating to and prohibiting conspiracies and combinations in restraint of trade and commerce between the several states and territories of the United States and foreign countries, and that the telegraphic messages relating to the matters under investigation are material and necessary evidence in said investigation and in the cases being investigated. The telegrams described in the petition indicate that they relate to the recent railroad strike, which appears to have been directed by the president and executed by the members of the American Railway Union and others.

In support of the motion to quash this subpoena, it is objected that it was issued without authority of law; that it is too vague and uncertain, and fails to specify what telegrams are to be produced; that it fails, in numerous instances, to furnish the witness with either the date, address, destination, or signature of the telegrams mentioned therein; that it calls for the search by the witness for telegrams in numerous places in this state, far removed from each other, and no compensation has been tendered him for his outlay in making such search; that it calls for the search by the witness, and the production by him of all messages from a number of persons to many other persons, between certain specified dates, without pointing his attention to any particular message or messages; that it calls for the production by the witness of messages which are not shown to be relevant evidence in any matter now pending before the present grand jury; that it calls for the production of messages by the witness in violation of the provisions of section 619 of the Penal Code of the state of California; and, finally, that the subpoena does not conform to the order issuing the same.

The authority of the courts of the United States to issue subpoenas duces tecum appears to be derived from section 716 of the Revised Statutes of the United States, which provides that the supreme court and the circuit and district courts shall have power to issue "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." At common

law every court having the power to hear and determine any suit had the inherent power to call for all adequate proofs of the facts in controversy, and to that end to summon and compel the attendance of witnesses, and if the witness was expected to produce any books or papers in his possession a clause to that effect was inserted in the writ, which was then termed a "subpoena duces tecum." 1 Greenl. Ev. § 309; 3 Bl. Comm. 382. The writ was of compulsory obligation. *Amey v. Long*, 9 East, 473. The controversy in this case is not, however, with respect to the power of the court to issue a subpoena duces tecum in a proper case, but it is contended that telegraphic communications are confidential, so far as the telegraph companies are concerned, and therefore, in their hands, such messages are in the nature of privileged communications, which it is the policy of the law to protect and keep inviolate. Judge Cooley, in his work on Constitutional Limitations, adds a note on page 327 (of the second edition), in which he takes this view. In the *American Law Register* for February, 1879, there is also an article by the same author entitled "Inviolability of Telegraphic Communications," in which the whole subject is ably discussed, and his conclusions summed up in favor of the privileged character of these communications, based upon the principles of law declared in *Entinck v. Carrington*, 19 State Tr. 1030, and *Wilkes v. Wood*, Id. 1154, and upon our own constitutional provisions for the protection of private papers and personal rights. But the courts have certainly not adopted this view of the law, and legislation has not been in that direction. It is to be observed that no claim is made here that these telegrams are to be used in evidence in any prosecutions against the telegraph company, or any of its officers. It is apparently conceded that the grand jury is investigating the conduct of the parties who sent or received the telegrams, and not the relation of the telegraph company to the alleged violations of law involved in the act of transmitting the telegrams between the parties. The case is not, therefore, within the liberal construction of the constitutional provisions in favor of defendants, as declared by the supreme court in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524. There is no statute law of the United States making telegraphic messages, as such, privileged communications; and, if we assume that under section 858 of the Revised Statutes of the United States the law of this state establishes the rule of decisions in this case, we find that it does not give to them that character, but, on the contrary, provides specifically that they may be disclosed by the lawful order of a court. Section 619 of the Penal Code of California, as amended in 1880, provides as follows:

"Every person who willfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable," etc.

The article of Mr. Henry Hitchcock in the *Southern Law Review* (volume 5, N. S. 473), to which reference was made in the argument, reviews the provisions of law on this subject as judicially determined in the several states; and Mr. Ordronaux, in his work on

Constitutional Legislation (pages 246-249), discusses the question, and arrives at practically the same conclusions reached by Mr. Hitchcock. He says:

"The present legal status of the telegram, as judicially determined by the cases cited, is substantially as follows: (1) Telegraphic messages, however confidential, are not privileged communications in the hands of third parties, who may be compelled to produce them, or testify to their contents in the absence of the telegram. (2) That, where the statutory prohibition is only against the willful and unlawful disclosure of messages, they may still be brought into court by compulsory process, under subpoena duces tecum. (3) That, even where the statutory prohibition is unqualified, there is always an exception implied in favor of legal process, since obedience to a subpoena is obligatory upon all. (4) That the same rule which governs search warrants in general should govern in the case of telegraphic messages. But, in view of the peculiar character of such writings, the particular message needs to be stated and specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may know what is wanted of him, and have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relevant evidence. (5) But either party to a message may waive its privilege in the hands of a telegraph company."

These conclusions are supported by *Ex parte Brown*, 72 Mo. 83; *U. S. v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484; *U. S. v. Hunter*, 15 Fed. 712; *Henisler v. Freedman*, 2 Pars. Eq. Cas. 274; *National Bank v. National Bank*, 7 W. Va. 544; *State v. Litchfield*, 58 Me. 267; *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484; *Waddell's Case*, 8 Jur. (N. S.) pt. 2, 181. It follows that the telegraphic messages called for in the subpoena cannot be treated as privileged communications unless it appears hereafter that they come within that designation by reason of some fact other than their mere possession by the telegraph company.

We come now to the sufficiency of the subpoena. It is urged that it is defective because it calls for telegrams between a number of parties, without describing the messages, by date or otherwise, so as to identify the particular messages required. With respect to this objection, and others of this character, relating to the form and substance of the subpoena, it will be sufficient to say that it follows very closely the one held to be sufficient in the case of *U. S. v. Babcock*, supra, and appears to me to conform to the opinion of the court in the case of *U. S. v. Hunter*, supra; but, further than this, the court cannot ignore the character of the alleged violations of law which the grand jury is about to investigate, and to which this subpoena relates. It is a matter of general public notoriety that for more than two weeks a strike prevailed along the line of the Southern Pacific Railway Company, which had the effect of suspending the movement of interstate commerce and the transportation of the United States mails. The whole business of a large section of country was so completely paralyzed, and disorder so general and aggressive, that the president deemed it his duty to use the forces of the United States to restore tranquility, and secure the orderly operation of agencies within the control and protection of the general government. The parties engaged in these disturbances appear to have become effective in organization and formidable in action by the use of the telegraph in sending orders and exchan-

ging reports concerning the operation of the strikers. Many of these telegrams were published at the time as part of the current news of the day, and have been copied into the subpoena as published, while others are supposed, from the reported declarations of the parties and their concerted actions, to have been sent and received by them. In *Ex parte Jaynes*, 70 Cal. 639, 12 Pac. 117, the court held that the subpoena in that case, commanding the witness to search for and produce all messages from and to a large number of persons therein named, between specified dates, did not identify the particular messages required, and hence the witness was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received. The subpoena in that case was obtained by counsel for respondent, and presented to the court for examination and comparison with the subpoena in the present case. There is no question but that in many particulars they are very similar. But the state court, in commenting upon the former subpoena, said that it "was an evident search after testimony;" that is to say, that it called for an indiscriminate search among the papers in the possession of the witness,—for no particular paper, but for some possible message or communication that might throw some light on some issue involved in the trial of a civil case. This is a very different affair from an examination before a grand jury, involving an original inquiry into the conduct of parties with respect to criminal acts, where the telegraphic messages were probably the effective means of carrying out their unlawful purposes. The subpoena now under consideration calls for the production of telegrams, describing them with such particularity as appears to be practicable; and, under all the circumstances, I think they are sufficiently described to indicate, to an ordinarily intelligent person, the particular communications required.

The objection that no compensation has been tendered the witness for his outlay in making the necessary search for the telegrams is without merit. The United States is not required by the statute to tender witness fees in advance, and, as there is no suggestion that the appropriation for the payment of witness fees for the current year has been exhausted, it is sufficient that he will be paid his legal fees in due course, when he shall have responded to the subpoena. The subpoena *duces tecum* is, in my opinion, sufficient. The motion to quash is therefore denied.

HUNT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 335.

BAIL IN CRIMINAL CASES—DEFENSE TO RECOGNIZANCE—ESTOPPEL.

It is no defense to a recognizance that it was taken and acknowledged before the clerk of the district court, where this was done by order of the district judge, made at the request of the accused, and to secure his speedy discharge.

In Error to the District Court of the United States for the Western District of Missouri.

This was a proceeding by the United States to enforce, by scire facias, a forfeited bail bond against Robert H. Hunt and Hugh C. Ward, the sureties thereon. The district court rendered judgment for the United States, and the defendants sued out a writ of error. This court heretofore affirmed the judgement below (10 C. C. A. 74, 61 Fed. 795), but defendants have now petitioned for a rehearing.

Hugh C. Ward, for the motion.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. In this case a petition for rehearing has been filed, supported by an elaborate brief, which we have carefully read and duly considered. The chief complaint is that the decision heretofore rendered makes a void contract binding by the application of the principle of estoppel or waiver, which ruling, as counsel assert, "has not the support of a single authority." It is said that as the opinion concedes that there was no statute, state or federal, authorizing the clerk of the United States district court to admit parties to bail, the bail bond in question was absolutely null and void, and could not be validated by any application of the doctrine of estoppel or waiver. There is, as we think, a fundamental error in the line of thought pursued by counsel, in that it is taken for granted that the clerk of the district court admitted the accused to bail. This was not the fact. Besides approving the sureties, the act of admitting an accused person to bail involves the determination of two questions, in the decision of which the officer acts judicially. In the first place, it must be determined whether the offense of which the party stands accused is bailable, and, secondly, what amount of bail ought to be required. The decision of this latter question is always important, as article 8 of the amendments to the federal constitution declares that "excessive bail shall not be required." When an order has been made by the proper officer, allowing bail and fixing the amount thereof, the sureties tendered must, of course, be accepted or approved, and the release of the offender after the sureties have signed the bond is a sufficient approval. But no law of which we are aware requires the sureties to appear personally before the judge, unless they are to become bound by a technical recognizance, such as is entered into in open court, and spread upon the journal of its proceedings. When a bail bond is taken, as in the present case, and the obligation assumed by the sureties is evidenced by their signature to the bond, and not by the court record, it is not essential that they should appear personally before the court or judge. In accepting a bail bond, a court or judge may undoubtedly act upon knowledge of its own, or upon knowledge derived from third parties, as to the solvency of the sureties and as to the genuineness of their signatures. In point of fact they do frequently so act in the interest of personal liberty; and it would sometimes lead to great hardship if they

should act otherwise by requiring sureties to be brought from a great distance, at great inconvenience and expense, to merely sign a bail bond in the presence of the judge. From what has been said, it is manifest that the clerk of the district court did not admit the accused to bail as counsel have erroneously assumed. The district judge discharged each important judicial function in connection with taking bail. He decided that the offense was bailable, and fixed the amount of the bond. He also ordered the clerk to approve the bond when it should be signed by two sureties. This order addressed to the clerk was tantamount to an approval in advance of a bond signed by two sureties whom the clerk might accept as sufficient. We are not prepared to admit that the action taken by the district judge in the matter of thus approving the bond was even irregular; but, conceding that it was irregular, such action was induced by the request of the accused that the bond might be so executed, so as to secure his more immediate release; and, as we have heretofore held, and still think, it was competent for the accused and his sureties to waive the irregularity, and they should be adjudged to have done so.

In conclusion, it is proper to add that we have examined the additional cases cited by counsel in support of the proposition that the bail bond now in suit is null and void, for the reason that it was signed in the presence of the clerk, and not in the presence of the judge. With reference thereto it may be said that the cases cited are generally cases where a person who was wholly unauthorized to take bail for the particular offense assumed to do so on his own motion, and to discharge each judicial function connected therewith, or they are cases where the bail was taken contrary to the provisions of some express statute, which fact was held to render the obligation void. *Com. v. Otis*, 16 Mass. 198; *Chinn v. Com.*, 5 J. J. Marsh. 29; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184; *Clink v. Circuit Judge*, 58 Mich. 242, 25 N. W. 175; *Butler v. Foster*, 14 Ala. 323. We think, upon an examination of the cases, that none of the citations in question are in necessary conflict with the views which we have expressed, and the principles upon which we have predicated our decision. The petition for a rehearing is accordingly denied.

McEWAN BROS. CO. v. WHITE.

(Circuit Court, D. Connecticut. October 22, 1894.)

No. 752.

PATENTS—ANTICIPATION—PAPER BOARD.

The McEwan patent, No. 492,927,—claiming, as a new article of manufacture, a superior paper board, formed from printed newspapers ground to a pulp, and having the particles of printers' ink minutely subdivided and uniformly distributed, so as to impart an even tint to the board,—was not anticipated by previous processes, in which the ink was utilized as part of the coloring matter by the use of an alkali which saponified the oil in the ink, after which the saponified matter was washed out; it appearing that such process required additional expense, and also weakened the fiber of the board.

This was a suit in equity by the McEwan Bros. Company against George L. White for infringement of a patent.

Briesen & Knauth, for complainant.

Geo. E. Terry, for defendant.

TOWNSEND, District Judge. This is a suit upon letters patent No. 492,927, granted March 7, 1893, to Robert B. McEwan, Jessie L. McEwan, and Richard W. McEwan, for an improvement in paper board. The object of the alleged invention was to obtain a superior quality of paper board at a reduced cost. The specification states that this is accomplished by such processes as subdivide and preserve the permanent particles of printers' ink in newspaper stock, so that they may be blended with the fibers of the paper without impairing the strength of the fibers by bleaching out the ink. The claim is as follows:

"As a new article of manufacture, a paper board formed from printed newspaper, or the like, ground to a pulp, and having the permanent particles of the printers' ink minutely subdivided and uniformly distributed throughout the body of the board, whereby a smooth and even tint is imparted to the board."

Infringement is not denied. The only evidence in the case is that of one witness for the complainant. The defendant claims that certain admissions made by him show that the patent is void for want of novelty. It appears that prior to the alleged invention paper board had been made from newspaper stock, in which the ink was utilized as part of the coloring matter. The process by which this was accomplished included the use of an alkali which saponified the oil in the ink, and the saponified matter was then washed out. It is admitted that this process involved additional expense. It is not denied that the fiber of the finished product was weakened thereby. It would seem that this was one of the "more or less expensive attempts to bleach out the ink" referred to in the patent in suit, the objectionable results of which the patentee sought to obviate in his product. The patented product consists of paper stock ground to a pulp, and permanent particles of printers' ink so minutely and uniformly distributed throughout as to produce an even tint. The product relied upon as an anticipation is a paper pulp tinted by the coloring matter originally forming one of the constituents of the printers' ink. In the former there is mechanical disintegration; in the latter, chemical solution. Without other evidence that such product did not involve inventive skill, with the allegations of the patentee that it was stronger in fiber and superior in quality, and the admission that it was produced at less expense, I think the complainant is entitled to the benefit of the presumption in favor of the validity of the patent. Let a decree be entered for an injunction and an accounting.

BOWERS v. VON SCHMIDT.

(Circuit Court, N. D. California. July 23, 1894.)

No. 10,244.

1. PATENTS—EXTENT OF CLAIMS—PIONEER INVENTION — DREDGING MACHINES.

The Bowers patents, No. 318,859, for dredging machine, and No. 355,251, for hydraulic dredging apparatus, are valid, and cover inventions of a pioneer character, and the claims are entitled to a broad construction.

2. SAME—CENTER OF OSCILLATION.

Two forms of centers of oscillation are described in the Bowers patents, viz. one consisting of a turntable rotating in a circular well in combination with two spuds or vertical anchors passing through apertures in the turntable; the other consisting of a single spud when the turntable is made stationary. The claims which specify, as one of the elements, "a center of oscillation," include and cover both forms, and are not limited to the first form, and Bowers was not anticipated in the latter form by Angell or the defendant.

3. SAME—FUNCTIONAL CLAIMS.

The element designated in the Bowers claims as "a rotary excavator with inward delivery" is not functional in form, but means a rotary excavator of such construction as will produce an inward delivery.

4. SAME—ROTARY EXCAVATOR WITH INWARD DELIVERY.

Two forms of rotary excavators with inward delivery are described in the Bowers patents,—one containing an inner chamber or shield, within the cutter head, having an opening in the top for admission of the spoils; the other with said inner chamber or shield cut away until only enough remains to support the excavator and shaft. The claims containing the element, "a rotary excavator with inward delivery," include and cover both forms, and are not limited to the first form.

5. SAME—AMENDMENT OF SPECIFICATION IN PATENT OFFICE.

Where an applicant for a patent is the original and first inventor of a form of device, but his original specification does not sufficiently describe it, so as to entitle it to be claimed therein, it is competent for him to amend his specification so as to include it, at any time prior to issuance of his patent, even though such amendment be made in reference to another patent, applied for and issued prior to the issuance of the applicant's patent, but subsequent to his invention.

6. SAME—ANTICIPATION—EARLY MODELS AND DRAWINGS.

An apparent anticipation may be avoided by a complainant by proving priority of invention over the alleged anticipation, and models or drawings, if sufficiently plain to enable those skilled in the art to understand them, are competent proof of such priority.

7. SAME—INFRINGEMENT.

The excavator shown in the Von Schmidt patents, Nos. 277,177, 300,333, and 306,368, though differing in the mode of mounting and in the shape of the cutting blades, is essentially the same, and operates in substantially the same way, producing the same result, as the Bowers excavator.

8. SAME—SUBSEQUENT PATENT.

A subsequent device may be an infringement of a prior patent notwithstanding the fact that such subsequent device is in itself an invention, and patented.

9. SAME—AGGREGATION AND COMBINATION.

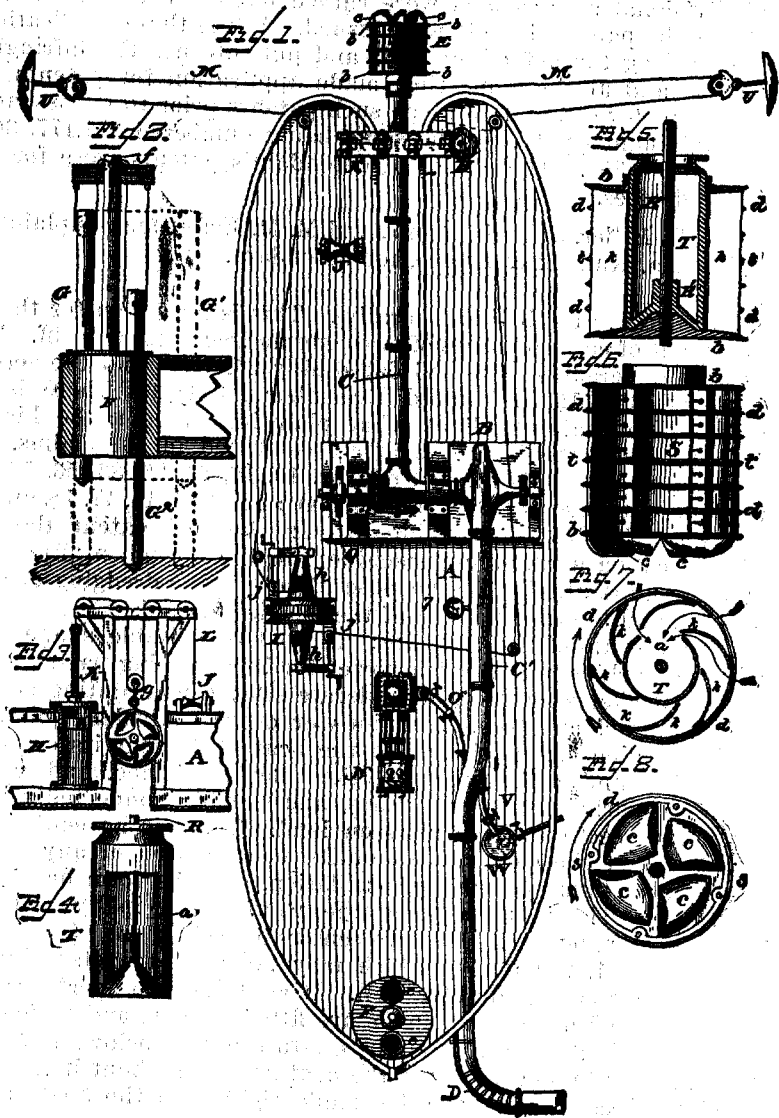
A combination, to be patentable, must produce a different force or effect or result, in the combined forces or processes, from that given by their separate parts. There must be a new result by their union. If not so, it is only an aggregation of separate elements. The Bowers claims bear the test of all the definitions. They are true combinations, and not aggregations.

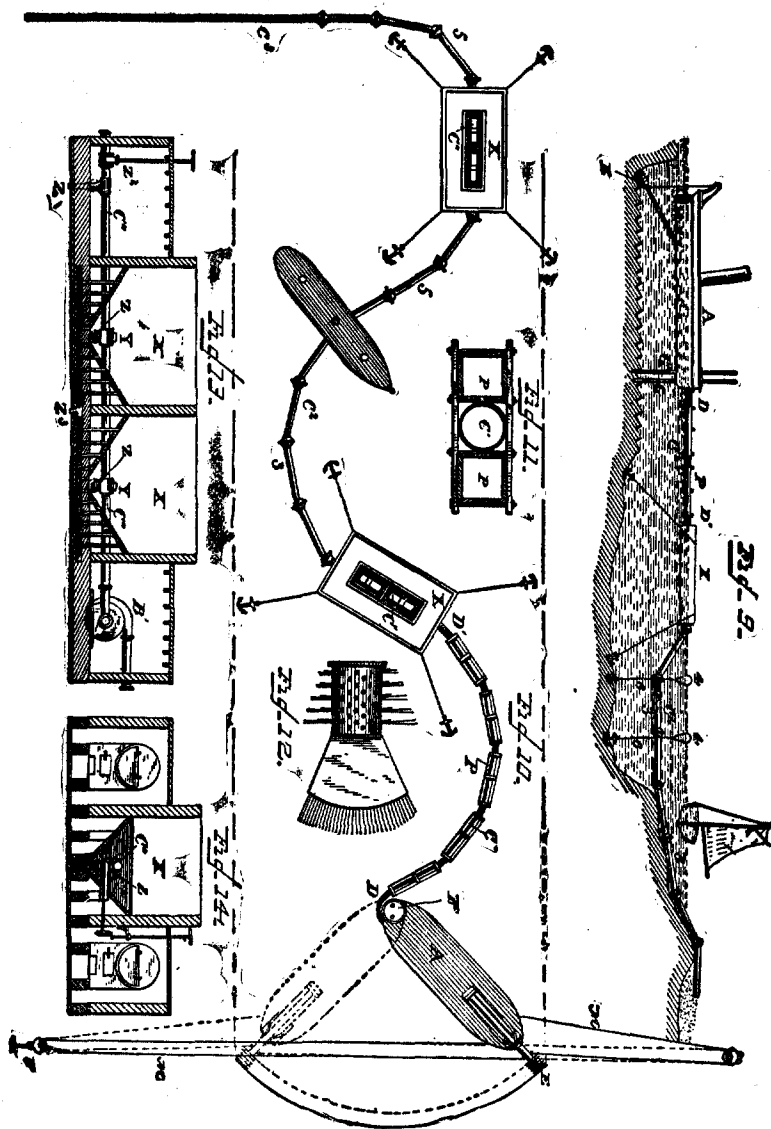
This was a suit by Alphonzo B. Bowers against Allexey W. Von Schmidt for infringement of two patents on dredging machines. The original application therefor was filed December 9, 1876. Several divisional applications were carved out of it, and upon two of them the patents in suit were issued. While these applications were pending the defendant built and put into use the infringing machine, and at the same time made application for patents for his specific devices, and obtained such patents prior to the issuance of complainant's patents; the same being numbered 277,177, 300,333, and 306,368. The claims of defendant's patents were for his specific devices.

John H. Miller, John L. Boone, and M. M. Estee, for complainant.
Wheaton, Kallock & Kierce, for defendant.

McKENNA, Circuit Judge (orally). This is an action for the infringement of certain claims of two patents issued to plaintiff. The first is numbered 318,859, and dated May 26, 1885, and the second numbered 355,251, and dated December 28, 1886. There is no claim which contains all of what plaintiff claims to be his invention. Its elements are variously combined in 103 claims. Of these, infringement is alleged of Nos. 10, 16, 25, 26, 33, 53, 54, 59, and 75 of patent No. 318,859 (Exhibit A), and of 13, 14, 17, 18, and 22 of patent No. 355,251 (Exhibit B). In the first patent the machine is called a "dredging machine;" in the second, a "hydraulic dredging apparatus." The purpose of both is the dredging of river bottoms, and the transporting of the "spoils" to land.

The elements of the first are: A boat of suitable shape, with suitable machinery to furnish power for its operating parts; a bottomless bucket excavator, of moderate size; a nonrotating suction pipe, mounted on strong trunnions or other equivalent joints; a discharge pipe flexibly joined to the boat at or near its center of oscillation, and consisting of sections flexibly joined, and resting on or supported by hollow floats, and flexibly connected with a nonflexible section which rests on land. There is no controversy about any of the elements, or of the construction of any, except the form or kind of center of oscillation, and the form or kind of excavator. The issue between the parties principally turns on them. The patent describes two centers of oscillation: One a turntable (Figs. 1, 2, and 10), which may be made to rotate by any suitable means in a circular well. It contains two apertures, into which vertical anchors or spuds are fitted loosely, and which may pass through, as occasion requires, into the mud below, and which hold the turntable stationary, the boat swinging about it from side to side. Second, the turntable made rigid with the boat, and so adjusted that the vertical anchors or spuds are arranged on either side of the central line of the boat, enabling each spud, alternately, as it is dropped into the mud, to act as a pivot upon which the boat may swing.





The operation of dredging, as described in the patent, is as follows:

"The vertical anchors and excavator being raised to allow freedom of motion, the dredger is placed in position, with the turntable in line with the longitudinal axis of the proposed cut. The turntable is then rotated until the vertical anchors are also in line with said axis, and both anchors are dropped into the mud. The discharge pipe is placed in position, the blocks, U, U, anchored at suitable points for swinging the machine, and the dredger swung round until the excavator reaches the side of the proposed cut, as shown in Fig. 10. The lines, M, M, are drawn taut, and the excavator lowered below the surface of the water. The pump, B, is then primed and started, and the excavator set in motion, and lowered, its entire diameter, into the mud. The proper winding drum is then engaged, and the dredger, swinging on the turntable as a pivot or center of oscillation, rapidly cuts its way to the opposite side. To secure a steady side feed, the friction coupling of the unwinding drum may be adjusted to keep the unwinding line sufficiently taut to prevent the veering of the dredger with wind or tide. Upon reaching the opposite side the winding drum is disengaged, the excavator again lowered its full diameter, the side feed reversed, and the dredger cuts back again. This process is repeated until the proper depth is obtained. The excavator is then raised above the bank in front, the anchor, G, raised, as shown in Fig. 2, and the turntable rotated upon the anchor, G², until G is squarely in front of G², in line with the longitudinal axis of the proposed excavation, as indicated by the broken-lined outline, G³ (Fig. 2). G is then dropped into the mud, and the work proceeds as before; the dredger having been fed forward the distance between the centers of the vertical anchors, which is fixed to correspond with the cut capable of being made by the excavator. This arrangement for feeding forward keeps the center of oscillation of the dredger coincident with that from which the arc to be cut by the excavator should be described. A less perfect forward feed is secured by placing the dredger so that the excavator is at the side, and the turntable is in line with the longitudinal axis of the proposed excavation. The turntable is then rotated until the vertical anchors are in a line parallel with the transverse axis of the dredger, where it is made stationary. This leaves one anchor diagonally in advance of the other, the dredger lying diagonally across one-half of the line of the proposed excavation. The forward anchor is now dropped into the mud to form a pivot, upon which the dredger swings as it cuts to the opposite side. The dredger then lies diagonally across the other half of the line of the proposed excavation, the swing having brought the rear anchor to the front. This anchor in turn is dropped to form a new pivot, and the other anchor is then raised. The dredger swings first upon one and then upon the other anchor, these anchors being alternately raised and lowered for this purpose. As this mode of feeding by swinging alternately upon two different pivots gives a wedge-shaped cut, requiring two full swings to make one full cut, it is equivalent to a loss of one-half of the time, and it is used only to prevent stoppage of work when the apparatus for rotating the turntable is stopped for repairs or other cause, in which case it becomes valuable."

The use of the spuds as centers of oscillation, it will be observed, the patent says, secures a less perfect forward feed than the turntable, and it was not described in the original specification, but was inserted afterwards, and defendant claims, after a patent to one Angell, and plaintiff had seen a dredger constructed by defendant. If so, it was not a part of his original invention, and he must be confined to the turntable as a center of oscillation. That the use of the spuds alone was not described in the original specification is true, but the evidence does not sustain the other contention of defendant, that plaintiff copied from defendant, or was anticipated by Angell. Plaintiff exhibited a drawing made as early as July 13,

1864, in which two spuds are shown as self-contained pivots and centers of oscillation, and in which the turntable is not shown. On the drawing of July 13, 1864, describing the use of the anchors, he said:

"The dredge swings on a vertical anchor, or on two—first on one, and then on the other. But this makes a wedge-shape cut, requiring two full swings to make one full cut. I think I can find some way to get around this."

The anchors, as pivots or centers of oscillation, were also shown in models made prior to Angell's application.

The defendant's counsel, however, seem to urge that the date of an invention cannot be shown by a drawing or a model. I say "seem," because their meaning is not clear. They say:

"Under the law and the facts of this case, the patented invention of Mr. Bowers can only date from the time of the filing of the application for his patent. It has been repeatedly decided that a conception of an invention, even when reduced to drawings or shown in models, does not constitute an invention."

That models or drawings will not constitute invention, so as to amount to anticipation, may be true, but models or drawings may constitute invention to avoid anticipation. Walker (section 61) makes the distinction depend upon the statute, as well as the authority of cases; and in *Loom Co. v. Higgins*, 105 U. S. 594, the supreme court say:

"An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it."

The drawings and models of Bowers comply with the condition, and he was therefore the first inventor of a vertical anchor as a center of oscillation in combination with devices capable of working with a side feed, and a use by others in the combination stated in his claims is an infringement. It is an element of claim 10, combined with devices for swinging and working the boat, a suction pipe, exhausting apparatus, and a rotary excavator. It is an element of no other claim sued on. An excavator is an element, besides of claim 10, of claims 25, 53, 54, and 59. In claims 10 and 25, it is described as rotary only; in claims 53 and 54, it is described as rotary, and as having "inward delivery through said excavator;" and, in claim 59, as rotary, and "with inward delivery."

Two objections are urged to these claims:

(1) That they are functional, or, in the language of defendant's counsel, "they describe the action of a machine, and not the machine itself."

(2) That the excavator of claims 10 and 26 must be considered the same as those of claims 53, 54, and 59, and all confined to particular forms described in the specification and drawings.

The first objection is easily answered. It is met completely by the language of the claims. Assuming, then, for the purpose of the objection, that the excavators mentioned in all of them have inward delivery, it is clear that the claim is for an excavator of such construction as will produce inward delivery, and such construction

is described in the specification with the clearness required by the statute.

The second objection requires more consideration. As has been observed, the excavator mentioned in claims 10 and 25 is described only as rotary; and, it is hence claimed by counsel for plaintiff, "it is unlimited in form and construction,"—it may have either an "inward or an outward delivery." "The essence of this claim," they further say, "is in the self-contained pivot on which the boat swings while the excavator is digging." It was undoubtedly competent to combine the self-contained pivot with an excavator capable of combination with it, but it would seem that the only kind capable of such combination is one with side-cutting edges,—the only kind suitable for working with a side feed,—and this kind is described in the specification as having inward delivery. And it may also be urged that the combination of claim 25 is only useful with a similar excavator. But the view I take of the defendant's excavator makes it unnecessary to decide this point. I may assume that the excavators, in all the claims we are considering, must have inward delivery.

The plaintiff, in describing his invention, says:

"It consists of a rotary bottomless bucket excavator wheel, of moderate size, novel construction, and great capacity, combined with a hydraulic transporting device of equal capacity, by means of which the spoils may be cheaply carried to a distance of several miles over land or water, and across navigable channels, without interruption of navigation, together with novel feeding devices, through which the percentages of earth excavated by the cutting wheel, and of the water therewith delivered, are adjustable to the precise amount of each necessary for most economical working, and by means of which clean work is done; the excavator going twice over no ground, and missing no ground, thus saving much time, and effecting a material reduction in the cost of apparatus, repairs, and cost of dredging and of disposing of the spoils, these being the chief objects of the invention."

The working of the invention and its various parts is elaborately described and illustrated. Of the excavator, he says:

"E is a rotary bucket-wheel excavator, having radiating bottomless buckets, k (Figs. 4, 5, 6, 7), firmly secured at each end to the discal ends, b, b, of said excavator. These buckets may be stiffened, strengthened, and protected by rings or screens, d, passing around, secured to, and preferably projecting beyond, the edges of said buckets (Figs. 1, 5, 6, 7, 8). These rings may be sharp, to cut like the revolving disk cutters of plows, and serve to subdivide the material entering the buckets, and to exclude substance too hard to be cut, and too coarse to pass through the pipe and pump. They serve also as fenders to enable the cutter to ride over obstructions without catching and breaking. The edges of the bucket are sharp, and may be provided with detachable steel knives or cutters, S (Fig. 6), for working in hard material. The outer discal end (Figs. 1, 3, 6, 8) may be provided with cutting edges, lips, or scoops, c, to obviate the danger of breaking from jamming against a hard bank as the dredger heaves in the swell of the sea. In making the necessary openings in the discal end to admit the silt from said scoops, said end plate becomes changed to the form of a spider or series of arms, which may be strengthened by the lower ring, d, which, in turn, may be regarded as forming a series of braces extending between the said arms at or near the outer parts. The several parts of this excavator may be made separate and detachable, or it may be cast in a single piece. I do confine myself to the precise mode described of mounting this wheel, or of freeing it of its contents. It may be of any desired size and proportion of parts, and may dis-

charge its contents inward through itself into any suitable conduit or receiver. The rings, d, may be omitted in soft mud, free from substances too coarse to pass through the pipes and pump, though always at the risk of the projecting buckets catching upon obstructions and getting broken." "T is an inner chamber or shield, around which the bucket wheel revolves, and into which it discharges. This chamber is provided with a strong flange, by which it is secured to a similar flange on the end of the suction pipe. It is also provided with a large opening, a (Figs. 2, 7), through which the spoils enter from the buckets, and through this opening (Fig. 4) is seen a portion of the driving shaft in the interior of said chamber. This chamber or shield forms a bottom for the buckets, k, until they reach the opening, a, as shown in the cross section of the wheel and chamber (Fig. 7). As the buckets pass this opening, they discharge mud and water into the chamber, as indicated by the inner arrows, the outer arrow showing the direction of rotation. The office, in part, of this chamber or shield, is to prevent too large a percentage of water from entering with the mud; but when the spoils are of a character to require a large percentage of water to carry them up the suction pipe, or to send them through the discharge pipe, as may sometimes be the case, the chamber may be cut away until only enough remains to support the excavator and shaft, R."

No other excavator is described.

The patent, therefore, describes two forms of excavator,—one containing an inner chamber with an opening on top, the sides of the chamber making bottoms to the buckets in their revolutions, except when over the opening in the chamber; and the other form the same as the first, except with the inner chamber cut away until only enough remains to support the excavator and its shaft. The advantage of each is mentioned. The first is to be used when the spoils do not require a large percentage of water to carry them up the suction pipe; the second, when the spoils are of a character to require a large percentage of water. Both have an inward delivery.

With but one remark, attention may be confined to the second form. Counsel for defendant contend that plaintiff should be limited to an excavator with an inner chamber or shield; that this was his original invention, and that the other form was suggested by an excavator which appeared on the Angell dredger in the year 1883; and that his specifications were amended to include and claim it. But this charge is not sustained by the evidence. It is true that he amended his specification, but that he had conceived an excavator with inward delivery without an inner chamber or cylinder is shown by Exhibit N. This model was made in 1868. Model II, made about the same time, also shows the inner cylinder cut away. It was certainly competent for the patent office to permit him to amend his specifications so as to embrace his invention; and it has been held that this may be done even though the change be made in reference to another patent, applied for and issued after his invention. *Western Electric Co. v. Sperry Electric Co.*, 7 C. C. A. 164, 58 Fed. 186.

The second form of excavator will be considered, therefore, as covered by his claims, and the question is, has the defendant so far copied it, and in such combination, as to be guilty of infringement? An answer to this question involves an inquiry into the character and extent of plaintiff's invention.

The evidence is very voluminous as to the state of the art, and anticipating devices, and it would extend this opinion at too great a length to review or comment on them. It is sufficient to state my conclusion from the evidence, which is that plaintiff's excavator is broadly new, and entitled to a liberal rule of equivalents, and, applying such, the defendant's excavator is an infringement of it. There is a difference in the mountings of the two excavators,—differences in the shapes of their cutting blades,—but they are essentially the same, and operate substantially the same way, producing the same result. It may be, as is claimed, that defendant's excavator is the better. It may be, as it appears to be conceded by plaintiff, that it is an invention. But this does not prevent it from being an infringement, under the decision of *Morley Sewing Mach. Co. v. Lancaster*, 9 Sup. Ct. 299, and the cases there cited and reviewed. *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859; *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 310; *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.* (decided by the court of appeals for the first circuit April 20, 1894) 61 Fed. 958.

Against the conclusion that the defendant's excavator is an infringing copy of the plaintiff's, defendant's counsel urge that plaintiff limited the form of his excavator to avoid an interference with the defendant, and therefore cannot now enlarge it. If the fact is true, there is no doubt about the conclusion. But the fact is not established by the evidence. It is attempted to be established by claiming (1) a resemblance between the excavator which is one of the subjects of this suit and the excavator of a prior patent issued to Von Schmidt; (2) by the admission of plaintiff that the latter is not an infringement, it having no inward delivery; and (3) by a letter of Bowers to the patent office. But the excavators are not alike, and the letter only attempts to show this, expressing no dread of interference, or desire to avoid it. Bowers, it is true, in his testimony, concedes to the second excavator the merit of invention, but claims, nevertheless, its subservience to his.

Besides the claims above mentioned, claim 75 of those asserted to be infringed is the only other one which has for an element a rotary excavator. It is as follows:

"In dredging machines, a nonrotating suction pipe, in combination with a rotary excavator provided with excavating devices arranged to deliver inward to a space in the interior of said excavator."

I am not sure that it can be distinguished from claim 53. It seems like a repetition, but, as it is only urged to cover a contingency of the inner cylinder being held necessary to claim 53, it may be dropped from further consideration.

The other claims of which infringement is charged are 16, 26, and 33. They are as follows:

"(16) A dredge boat and oscillating section of a conduit discharge flexibly joined to a nonoscillating section, to allow said boat to feed forward, and said oscillating section to swing upon the flexible joint connecting said oscillating and nonoscillating sections." "(26) A conduit for transporting earthy and semiliquid substances; said conduit consisting of an outer, rigid, nonoscillating section, flexibly joined to an inner, oscillating section, the inner end of said oscillating section being flexibly joined to a discharging device."

"(33) A submerged discharge pipe, in combination with excavating devices adapted to cut up the mud, and with mud-forcing apparatus."

The elements of 16 are (1) a dredge boat; (2) a floating pipe composed of sections flexibly joined together; (3) a land pipe; (4) a flexible joint between them. The defendant uses these elements in the same combination and hence infringes. The elements of 26 are: (1) land pipe; (2) floating pipe, composed of flexible sections; (3) a flexible joint between them; (4) discharging device; (5) a flexible joint between the floating pipe and the discharging device. The difference between this claim and claim 16 appears to be in words. In the latter the floating pipe is flexibly joined to a dredge boat. In the former it is flexibly joined to a discharging device. Surely, this is what is meant by claim 16. The connection of discharging pipes with a dredge boat would have no purpose, unless the connection was with a discharging device. The new element of claim 33 is a submerged discharge pipe combined with excavating devices and a mud-forcing apparatus. That is a rotary excavator with inward delivery, and a centrifugal pump or other forcing device. I do not think that there is a patentable difference between this and claim 16. It is claim 16, with the pipe, or some portion of it, submerged.

The plaintiff also claims infringement of claims 13, 14, 17, 18, and 22 of patent No. 355,251. The claims are as follows:

"(13) In combination, a dredge boat, exhausting device, telescoping suction pipe, and a rotary excavator provided with detachable cutting edges. (14) In combination, a dredge boat, exhausting device, telescoping suction pipe, and a rotary excavator with inward delivery through itself to said pipe, said excavator being provided with detachable cutting edges." "(17) In combination, a dredge boat, exhausting device, telescoping suction pipe, and a swinging section of discharge pipe, flexibly joined to the boat and to an outer stationary section, to allow said boat to feed forward, and said oscillating pipe to swing on the joint connecting the oscillating and nonoscillating sections. (18) In combination, a dredge boat, exhausting device, telescoping suction pipe, rotary excavator, and a swinging section of discharge pipe, flexibly joined to the boat and to an outer stationary section, to allow said boat to feed forward, and said oscillating pipe to swing on the joint connecting said oscillating and nonoscillating sections." "(22) In combination, a dredge boat, exhausting device, telescoping suction pipe, rotary excavator having cutting edges arranged to work with a side feed, and an oscillating section of discharge pipe, flexibly joined to the boat and to an outer nonoscillating section, to allow the boat to feed forward, and the oscillating section to swing on the joint connecting the oscillating and nonoscillating sections."

The new element in these claims is a telescoping suction pipe, and what has been said applies, with little change, to these claims. Under the assumption that the excavator of all claims means one with inward delivery, claims 13 and 14 are substantially alike, and claims 18 and 22 are also substantially alike, because side-cutting edges are made a characteristic of excavators with inward delivery. The combination of these claims and claim 17 is used by the defendant.

There are three general defenses urged by the defendant: (1) That the claims are aggregations, not combinations; (2) that the invention was abandoned before application for a patent, or (3) after such application.

The extreme cases of combinations and aggregations are easily distinguished, and, as counsel say, "It is evidently only an aggregation when an additional car is added to a train of cars." The added effect is equal to the added cause, and we are not confused because our purpose could not be accomplished without the additional car. An aggregation thus formed is clearly seen to be, to use the language of Justice Matthews, "the mere adding together of separate contributions." But is this true of the combinations of plaintiff's patents?

Counsel for defendant say (page 257 of their brief), "In this case the action of the transporting device is separate and independent from that of the dredging device, and constitutes but an aggregation," and claiming also that the center of oscillation, whether turntable or vertical anchor, is separate in its action, insist that claims 10, 16, 25, 26, and 33 of the first patent, and 17, 18, and 22 of the second patent, are aggregations. In support of this, on page 261, after some argument, counsel further say:

"Now we ask the court to recognize this well-established rule of law that a combination which does not create a new action that is made up of the commingled actions of the combined devices is not a patentable combination, but is that kind of a combination which comes under what the courts have defined to be aggregations; that, in all cases where the action of each of the combined devices remains its own individual action, there is no patentable combination, no matter how such individual action of each device may act or operate upon the other devices, or how much such separate action of the devices may contribute to the general result; nor is the question affected by the fact that the devices act simultaneously."

And counsel somewhat wearily add, "We have tried very hard, heretofore, to have this principle applied by the courts here." Under one construction of this language, I should feel no wonder that they have failed. If, however, it is but an elaboration of the statement of the supreme court in *Hailes v. Van Wormer*, 20 Wall. 353, that "the result must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements," it states the law correctly.

My attention is especially invited to *Hailes v. Van Wormer*, 20 Wall. 353, and *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 58. These cases support each other. The former case is the well-known Base-Burning Stove Case, and needs no explanation. In *Royer v. Roth* the claim of the patent was as follows:

"In combination with the drum, A, of a rawhide fulling machine operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous, substantially as described."

In both cases there was but the assembling of old devices, without the exercise of invention. And in *Hailes v. Van Wormer*, if not as obviously, fully as surely, as in the illustration of the aggregation by the addition of the car, to quote the language of Justice Gray in *Heating Co. v. Burtis*, 121 U. S. 289, 7 Sup. Ct. 1034, "There was no specific quality of the result which could not be definitely assigned to the independent action of a single element." In *Royer v. Roth*

the court says that there was no invention in the application of the shifting device to a fulling machine.

But, if these cases are at all doubtful, what they mean is determined by other decisions. In *Reckendorfer v. Faber*, 92 U. S. 347, the supreme court say:

"The combination, to be patentable, must produce a different force or effect or result, in the combined forces or processes, from that given by their separate parts. There must be a new result by their union. If not so, it is only an aggregation of separate elements."

The court seemed to feel that this language needed illustration, and illustrations were given. I select one:

"Another illustration," the court say, "may be found in the frame of the sawmill, which advances the log regularly to meet the saw, and the saw which saws the log. The two co-operate, and are simultaneous in their joint action of sawing through the log."

The moving frame performed, of itself, no other office than moving frames do. The saw performed no other office than saws do; but, each performing its particular function, they together "sawed through the log."

It is well settled that the action of the elements need not be simultaneous, and Judge Acheson said in *Stutz v. Armstrong*, 20 Fed. 847:

"It is by no means essential to a patentable combination, as the defendant's argument implies, that the several devices or elements should coact upon each other. It is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only."

See, also, *Yale Lock Manuf'g Co. v. Norwich Nat. Bank*, 6 Fed. 394.

Other cases but repeat and illustrate in various ways these views. To make a combination there must be a patentable relation between the elements (*Bussey v. Manufacturing Co.*, 110 U. S. 146, 4 Sup. Ct. 38); that one element must qualify or modify the other (*Double-Pointed Tack Co. v. Two Rivers Manuf'g Co.*, 109 U. S. 121, 3 Sup. Ct. 105; *Stephenson v. Railroad Co.*, 114 U. S. 158, 5 Sup. Ct. 777); that there must be more than a juxtaposition of parts (*Reckendorfer v. Faber*, 92 U. S. 347); that they must co-operate in one result,—each must influence or affect the action of the other. If each fulfills its office, and nothing more, it is not a combination (*Beecher Manuf'g Co. v. Atwater Manuf'g Co.*, 114 U. S. 524, 5 Sup. Ct. 1007).

But further quotations would be tiresome, and I have made these, not because they are necessary to define the law, but because counsel feel or feign despair of having the cases they cite read or applied.

Applying the principle of law counsel advance, and which I have quoted, counsel, on page 264 of their brief, say:

"Now, in the *Bowers Case*, the action of the dredge in using the rotary suction pump, the excavator, the suction pipe, and all that portion of the discharge pipe which is upon the dredger, is precisely the same, whether there is an additional extension of that discharge pipe by means of flexible joints or not."

Of course not, if we disregard the office of the flexible joints, and the office of flexibly joining the discharge pipe to the dredge. But this office cannot be disregarded. It enables the action of the dredging machine to be continuous as it swings on a side feed and excavates. This is the essence of the invention, the new result which was not accomplished before, and bears the test of all the definitions of combinations to which I have been cited. The same remarks are applicable to the turntable or vertical anchors, which ever be used. Counsel say, "If any other holding is substituted for the turntable and spuds, the dredge does its work just the same." It would only do some work "just the same," and besides the turntable or spuds have other offices than "holding." It permits swinging as well,—work on a side feed, work on a forward feed. This is ignored by counsel.

The length of this opinion makes it impossible to consider at length the defenses of the abandonment of the invention or of the application. I think the evidence shows sufficient excuse for delay. For the same reason,—that is, it would make this opinion too long,—I have refrained from a detailed comparison of plaintiff's apparatus and devices with those which defendant asserts anticipate or limit them. Such a comparison, to be sufficient or satisfactory, would necessarily have to be very long.

I have assimilated claims 16 and 26 of patent No. 318,859; 13 and 14, 18 and 22, of patent No. 355,251,—and between claims 16 and 33 I find no patentable difference.

Decree will be entered holding infringement of claims 10, 16, 25, 53, 54, and 59 of patent No. 318,859, and 13, 17, and 18 of patent No. 355,251

SIMONDS MANUF'G CO. et al. v. E. C. ATKINS & CO.

(Circuit Court, D. Indiana. October 5, 1894.)

No. 8,667.

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—CROSS CUT SAWS.

The Simonds patent No. 269,728, for a cross-cut saw, as an article of manufacture, if valid at all, is limited to a saw formed by curvilinear grinding along lines parallel with its cutting edge, so as to be of substantially the same thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness in the direction of its width from cutting edge to back; and the patent is not infringed by a saw having a curved cutting edge and straight back, and made from a plate of steel rolled so as to have a gradually diminishing thickness from cutting edge to back, and ground on straight lines, so that it has a slightly greater thickness along the central part of the cutting edge than at the ends, and a uniform thickness along the back from end to end.

2. SAME—PATENTABLE INVENTION—CHANGE IN SIZE.

It would seem that a patent for a special form of cross-cut saw as an article of manufacture cannot be sustained when it appears that there previously existed a small saw for cutting fire wood, of substantially the same form; for the change is one merely of size or proportion, which is not patentable.

This was a suit to obtain an injunction and damages for an alleged infringement of a patent.

Robert S. Taylor and Causten Browne, for complainants.

Chester Bradford, Wm. M. Eccles, and Augustus Lynch Mason. for defendant.

BAKER, District Judge. This is a suit in equity brought by the Simonds Manufacturing Company, a Massachusetts corporation, and George F. Simonds, a citizen of Massachusetts, against E. C. Atkins & Co., an Indiana corporation, to obtain an injunction and damages for an alleged infringement of letters patent 269,728, dated December 26, 1882, granted to George F. Simonds for an alleged improvement in cross-cut saws. The defenses interposed are noninfringement; that George F. Simonds is not the first or original inventor of the patented device; that the same, or substantially the same, device was in public use or on sale in the United States for more than two years prior to the application for such patent; that there is no invention exhibited in the patented device; that the patent was surreptitiously obtained by the failure to disclose the true state of the art; that the same, or substantially the same, device in all its essential features was long before known to and publicly used by various persons named in the answer; that the same, or substantially the same, device, as well as the method of constructing it, were shown or described in other patents of the United States, and in other printed publications set up in the answer; that the same saw, in all its essential features, which the defendant is now manufacturing, and which is complained of as the infringing saw, had been manufactured by the defendant and its predecessors for more than two years prior to the application for the Simonds patent; and that the arrangement and combination of parts and all the essential features of the patented device were known to and generally used by the public for more than two years before the application for the patent was made. The specifications forming part of the letters patent state that the invention has for its object the construction of a thin-backed cross-cut saw that shall cut an even kerf throughout its length, that shall not bind in its cut, and that shall be relatively thickened and strengthened towards the ends, whereby more lumber can be cut, and with less labor, than heretofore. The invention is stated to consist in a cross-cut saw of substantially uniform thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness in the direction of its width from cutting edge to back. After describing the old cross-cut saws, and the various methods of grinding employed in their manufacture, the specifications proceed to state the method of grinding to be employed in making the cross-cut saw which the inventor claimed to have discovered, and which he desired to secure by letters patent, as follows:

"Instead of moving the saw plate to the action of the grindstone in a rectilinear path, I give it such movement as to cause every part of its curved cutting edge, throughout the entire length thereof, to pass successively through-

out the plane which is common to the axis of the presser bar and the grinding line at substantially the same point during any given passage, so that the lines of uniform thickness in the tapered plate are curves running substantially parallel to the general curvature of the cutting edge, because by keeping the cutting edge of the saw plate where it passes the grinding line at the same distance from the apex of the angle of inclination of the presser bar all other portions which pass through any given constant part of the angular space between the presser bar and the grinder, and which are consequently reduced to uniform thickness, will necessarily be acted upon at the same distance from the point at which the cutting edge is maintained, and will therefore be located in a curve which conforms to the curvature of the cutting edge."

The claim is single, and is as follows:

"What I claim as my invention is, as a new article of manufacture, a cross-cut saw of substantially uniform thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness in the direction of its width from cutting edge to back."

In view of the prior state of the art as shown by the proofs, and especially in view of the admission of the complainants' expert, it is doubtful whether the patent in question is sustainable, because lacking in invention. Cross-cut saws, having a curved cutting edge, and thinner at the back than at the cutting edge, were well known and in common use long prior to the complainants' discovery. By the methods of straight or rectilinear grinding then practiced cross-cut saws were not made, and perhaps were incapable of successful manufacture, of such uniform thickness throughout the entire length of their curved cutting edge, and of such gradually diminishing thickness in the direction of their width from cutting edge to back, as are made by the grinding, as practiced by complainants, along curvilinear lines parallel with the cutting edge. The difference in form of the old cross-cut saw and of the saw claimed by complainants is necessarily slight, and the claim of the patent cannot be construed so broadly as to include the old forms of cross-cut saws. Therefore the claim, if sustainable at all, must cover a form of saw embraced within narrow limits of variation. Whether, within these narrow limits, it ought to be sustained, is not free from doubt, in view of the admission of complainants' expert that wood saws were previously known and in public use substantially the same as complainants' saw, viz. "a cross-cut saw [meaning wood saws] of substantially uniform thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness,—i. e. tapered, from cutting edge to back." It is not necessary to determine whether or not the contradicted admission of their expert concludes the complainants, as seems to be held in *Wells v. Jacques*, 1 Ban. & A. 60, 75.¹ Complainants' expert endeavors to differentiate these wood saws from the saw described in and secured by the patent in question by the statements that "wood saws are saw blades intended to be used in a saw frame for cross-cutting comparatively small pieces of wood, such as ordinary fire wood," and that "they are used under wholly different conditions from the cross-cut saws of the Simonds patent,

¹ Fed. Cas. No. 17,398.

although some of them have a curved cutting edge of uniform thickness, and a substantially uniform taper from cutting edge to back," and that "they belong to a different class from the cross-cut saws, and are commonly ground by different machinery and different methods," so that the identity in form of the wood saws and the saw claimed in the Simonds patent would not suggest any way in which the same characteristics might be embodied in a cross-cut saw. The patent in question secures to the complainants their saw solely as an article of manufacture. It does not secure the methods employed in manufacturing it, nor the uses to which it may be devoted. The essential differences pointed out by the expert between the wood saws and the saw of complainants have relation to their relative size, uses, and methods of manufacture, which are features not covered by the patent.

Can a patent for a cross-cut saw, as an article of manufacture, be sustained when it is admitted that wood saws were old and well known in the arts, and were, in fact, cross-cut saws of substantially uniform thickness throughout the length of their curved cutting edge, and of gradually diminishing thickness from cutting edge to back? It is firmly established that mere change in size or proportion does not involve invention. This principle is declared and applied in the case of *Planing-Mach. Co. v. Keith*, 101 U. S. 479, 490. It is there said:

"It may be admitted it would be too weak for general planing work upon boards or plank. It is comparatively a small machine. It would not cease to be the same machine, in principle, if any one or all of its constituents were enlarged and strengthened, so that it might perform heavier work."

And it is further said:

"And it is not perceived why, if enlarged, it would not answer all the purposes of the Woodbury machine. Mere enlargement is not invention. The simplest mechanic can make such modification."

This doctrine has been applied in many other decisions of the supreme court. It has been held that changing the length and size of valve openings in the reed-board of an organ is not invention (*Estey v. Burdett*, 109 U. S. 633, 3 Sup. Ct. 531); that a change in the guide frame or rack of a cider press is not invention (*Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 7 Sup. Ct. 382); that a change in the size of the ridge stone or cap stone and the corresponding width of the roof stones in roofs for vaults is not invention (*French v. Carter*, 137 U. S. 239, 11 Sup. Ct. 90); that a change only in form, proportions, or degree, doing substantially the same thing in the same way by substantially the same means, but with better results, is not invention (*Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601). But conceding that the patent may be sustained notwithstanding complainants' saw differs from the old wood saws only in size, uses, and methods of manufacture, still the claim in question must be limited to a cross-cut saw of substantially uniform thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness in the direction of its width from cutting edge to back. The claim itself does not,

by the general terms employed, conclusively determine the precise form of saw intended to be secured by the patent as an article of manufacture. But reading the claim—as we may—in connection with the specifications, no doubt, it seems to me, can be entertained in regard to the cross-cut saw which the patentee intended to secure, and which he has secured, if his discovery involved invention. It is a cross-cut saw formed by curvilinear grinding along lines parallel with its curved cutting edge, the saw so produced being of substantially uniform thickness throughout the length of its curved cutting edge, and of gradually diminishing thickness in the direction of its width from cutting edge to back. No other method of grinding than that pointed out in the specifications will produce with any degree of certainty or accuracy the form of saw which the patentee conceived he had discovered, and which he intended to secure by his patent. With this construction of the claim, it is conceded that defendant's saw is not an infringement. The defendant uses the old and well-known saw blade or plate of commerce in the manufacture of its saws. It consists of a blade or plate of steel having a curved cutting edge and a straight back, so rolled as to have a gradually diminishing thickness from cutting edge to back, and having a slightly greater thickness along the central part of the cutting edge than at the ends, and having a uniform thickness along the back from end to end. From such blades or plates the defendant manufactures the alleged infringing saws by first cleaning them without any change of form, and then by grinding them in straight or rectilinear lines, the grinding commencing at a part at the back of the blade or plate a few inches from one end, and continuing thence in a right line to a point within a few inches of the other end, and the contact of the grinder at each recurring passage over the blade or plate is shorter than the preceding one. The blade or plate is thus passed under the grinder up to a point within about two inches of the curved cutting edge, thereby producing what is called by the defendant its "segmentally ground saw." The saw thus manufactured, except where thus segmentally ground, retains the exact form of the original blade or plate of commerce, except for such slight and immaterial change as may be caused by polishing. In my opinion, the saw of the defendant, thus made, is not an infringement of the patent in question, even if valid, and the bill will therefore be dismissed for want of equity, at the costs of the complainants.

WESTINGHOUSE et al. v. EDISON ELECTRIC LIGHT CO.

(Circuit Court of Appeals, Third Circuit. September 11, 1894.)

No. 7.

1. PATENTS—LIMITATION OF CLAIMS—"SUBSTANTIALLY AS SET FORTH."

Matters which are only incidentally referred to in the specifications, and not described, cannot be read into the claims by means of the words "substantially as set forth," especially when the claims themselves are unambiguous and exact.

2. SAME—COMBINATION CLAIMS—SEPARATE ELEMENTS.

A claim for a combination carries with it an implication that the separate elements are old. The Corn-Planter Patent, 23 Wall. 181, followed.

3. SAME—PATENTABLE INVENTION—PRIOR ART—ELECTRIC LIGHTING CIRCUITS.

The Edison patent, No. 264,642, for preventing the drop in tension upon electric light wires by combining a feeding circuit with a consumption circuit, the main conductors of which are so proportioned as to maintain such uniformity of pressure upon them that there is practically no variance in the candle power of the lamps connected therewith, is void as to the first three claims, as showing merely the application of mechanical and engineering skill to solve the difficulty as soon as it was made to appear by the production of a practicable incandescent electric lamp. The lack of invention is especially apparent in view of the prior state of the art as shown by the French patent to Khotinsky, of 1875. 55 Fed. 490, reversed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a bill in equity brought by the Edison Electric Light Company against Westinghouse, Church, Kerr & Co. "to restrain the infringement of the Edison patent for an electric distribution and translation system." The circuit court sustained the patent and rendered a decree for complainant (55 Fed. 490), and defendants appealed.

Leonard E. Curtis and Edmund Wetmore, for appellants.

Frederic H. Betts, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

ACHESON, Circuit Judge. This suit was for the alleged infringement by the defendant of letters patent of the United States to Thomas A. Edison, No. 264,642, dated September 19, 1882, granted upon an application filed August 9, 1880, for an "electric distribution and translation system." After stating that the "invention relates to a method of equalizing the tension or pressure of the current through an entire system of electric lighting, or other translation of electric force, preventing what is ordinarily known as a 'drop' in those portions of the system the more remote from the central station," the specification proceeds thus:

"As is well known from patents already granted me, and prior applications pending, I use in my system an electric light formed of a continuous incandescing conductor, large numbers of which are grouped into one system, supplied and regulated from a central station; main conductors leading from and to the central station; each lamp or translating device being in a derived circuit to the main conductors; the entire system being what is known as a 'multiple-arc' system. From a central station the main conductors may proceed, and it is intended that they should, to a great distance, and supply a large number of translating devices. In such cases there is inevitably a difference in tension between various parts of the circuit, due to the resistance of the main conductors. This may be partially remedied by making the conductors very large near or at the station, gradually decreasing their size or conducting capacity, but such plan only lessens slightly the ratio of fall. To obviate the difficulty I provide feeding conductors which extend from the generator or generators to the main conductors of the lamp or consumption circuit or circuits; such feeding conductors not having any translating devices connected therewith, and being connected with the main conductors of the consumption circuit or circuits at the center, ends, or other

points on such main conductors. From a central station several sets of such feeding conductors may run; each set feeding into its own lamp or consumption circuit, or all the sets feeding into a connected system of lamp or consumption circuits. It will be seen that the drop upon the feeding conductors has no effect upon the relative candle power of the lamps of the system, the relative candle power of the lamps being affected only by the drop upon the main conductors of the consumption circuit or circuits between the end of a set of feeding conductors and points most distant from any feeding conductors. In order to maintain practically the same candle power throughout the system, the main conductors of the consumption circuit or circuits should be so proportioned that the drop in tension upon them shall not exceed a definite small limit,—for example, five per cent. This drop will make a difference of less than a candle power in all the sixteen candle power lamps of the system, which difference is not perceptible to the eye. Upon the feeding conductors, however, any loss can be made. This loss will be varied according to localities, and the relative cost of copper for conducting purposes and horse power for generation. This loss upon the feeding conductors in large and extended systems will generally be greater than upon the main conductors of the consumption circuit or circuits. It may be, for example, about fifteen per cent.; but circumstances might make it desirable to diminish the loss upon the feeding conductors down even as low as that upon the main conductors of the consumption circuit or circuits, or to increase the loss upon the feeders to more than fifteen per cent. * * * When it is desired to use a few lamps near the central station they may be placed upon a direct circuit therefrom, with resistance at the commencement or home end of the circuit sufficient to then reduce the tension of the current in such circuit so that it shall only be equal to that in the more distant circuits, and one or more of such circuits may be combined with the circuits before described. When large buildings or blocks of buildings, using many lamps, are to be supplied, it may be desirable to lay therefor separate feeders, insulated from each other. Where several central stations are used in a city, each having feeding conductors leading to lamp-circuit conductors of the description before noted, it may be advisable to connect the feeding circuits of all the stations, equalizing the tension or pressure throughout the entire system of the place where the central stations are located."

The illustrative drawings show different applications of the general form of circuit described in the specification. The patent has six claims, but the defendant was charged only with the infringement of the first, second, and third claims, which are as follows:

"(1) A consumption circuit, in the main conductors of which the drop in tension is not sufficient to vary practically the candle power of the lamps connected therewith, in combination with feeding conductors connecting the consumption circuit with the source of electrical energy, and having no translating devices connected therewith, the drop in tension upon such feeding conductors not affecting the relative candle power of the lamps of the consumption circuit, substantially as set forth. (2) A consumption circuit, in the main conductors of which there is a definite, small drop in tension, not sufficient to vary practically the candle power of the lamps connected therewith, in combination with feeding conductors connecting the consumption circuit with the source of electrical energy, and having no translating devices connected therewith, the loss upon such feeding conductors being greater than upon the main conductors of the consumption circuit, substantially as set forth. (3) The combination of a consumption circuit, in the main conductors of which the drop in tension is not sufficient to vary practically the candle power of the lamps connected therewith, with a feeding circuit having no translating devices, and extending from the source of electrical energy to the center of the consumption circuit, substantially as set forth."

For the proper determination of this case it is essential that the subject-matter of these claims should be clearly understood.

This patent does not deal with the complicated general problem of the distribution of electricity, and the subdivision of the current for the purpose of domestic illumination. The patent is not for an incandescent lamp, or for a dynamo for generating electricity, or for the arrangement of the lamps in multiple arc, or for indicating and regulating devices for controlling the current from a central station, singly or combined. The patent deals with the one particular difficulty of drop in tension or fall of pressure,—loss of electro-motive force,—due to the resistance of the conductors to the electric flow. To remedy the evil effect therefrom the patentee provides special conductors for the transmission of electricity, extending from the generator to the main conductors with which the lamps are connected, and from which they are served. The patent is for a specific arrangement and proportioning of the two sets of conductors, which together constitute the complete circuit. The claims in question are perfectly clear and definite. Each claim is for a combination consisting of two constituents, namely, a consumption circuit in the main conductors of which the drop in tension is not sufficient to vary practically the candle power of the lamps connected therewith, and feeding conductors (a feeding circuit) having no translating devices thereon, uniting the consumption circuit with the source of electrical energy. Any electric consumption circuit, the main conductors of which are so proportioned that the drop in tension therein is not sufficient to vary practically the candle power of its lamps, in combination with feeding conductors on which are no translating devices, falls within the scope of the claims. Plainly, each of these claims is for a single circuit composed of a pair of transmitting conductors and a pair of distributing conductors having the specified characteristics, without regard to any other like circuit. The gist of the alleged invention is in the combination and proportioning of the two parts of the circuit, and not in the scale of use. Contrary to these views, the circuit court was of the opinion that certain unexpressed qualifications are to be incorporated into each of the claims by virtue of the concluding words, "substantially as set forth." After discussing the specified limitations the court said:

"But this statement of the claims would be highly inaccurate, if permitted to stand alone. Other limitations must be regarded. Not only are the circuits, feeding and consumption, unique in their special characteristics, but, as well, are jointly applicable to the lighting by incandescent lamps, in multiple arc, of large areas, of which portions or parcels are very distant or remote from a central station, from which, however, emanates complete control. It is true that these latter limitations are not expressed in terms in the claims under consideration, or in either of them. But, in drafting the claims, Mr. Edison, by the words used, clearly referred to the descriptive phraseology of the specifications of his invention preceding them."

Accordingly, the court construed these several claims as involving the lighting of a "large territory," by the use of "large numbers" of incandescent lamps, and as implying central station regulation whereby variable drop in tension in remote parts of the system may be controlled. But in our judgment these limitations are inadmissible. The fact is, pending the application for this patent

it was sought to amend the specification, and insert a new claim by the introduction of the matter of central station regulation; but the patent office rejected the proposed amendment for the assigned reason that "it describes and claims an invention not even hinted at in the original specification, nor shown in any of the drawings." While central station regulation is incidentally referred to in the introductory part of the specification, it is not described at all, and clearly is no part of this alleged invention. The only described means to secure equality of pressure between the lamps of a circuit near the central station and the lamps of a circuit more remote therefrom are resistance coils put in the supply conductors of the near circuit. This device is covered by the fifth claim, infringement of which is not charged. The claims in question are unambiguous and exact. Upon well-settled principles, then, limitations other than those expressed are to be excluded. *Railroad Co. v. Mellon*, 104 U. S. 112; *Manufacturing Co. v. Greenleaf*, 117 U. S. 554, 6 Sup. Ct. 846; *White v. Dunbar*, 119 U. S. 47, 52, 7 Sup. Ct. 72. As was said in the last-cited case:

"The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

The claims here, we think, were purposely framed broadly, so as to cover the simplest form of the alleged invention.

The claims with which we are concerned, as we have seen, are each for a combination of two elements,—a consumption circuit and feeding conductors having respectively the peculiar properties specified. The primary question for solution, then, is whether it involved invention, in a patentable sense, to combine a circuit for feeding only with a consumption circuit, the main conductors of which are so proportioned as to maintain such uniformity of pressure upon them that there is practically no variance in the candle power of the lamps connected therewith.

Now, a claim for a combination carries with it an implication that the separate elements are old. Says Mr. Justice Bradley, speaking for the court, in the case of *The Corn-Planter Patent*, 23 Wall. 181, 224:

"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration,—as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new."

In the present instance the positive proofs accord with the implication. Most certainly the patent in suit discloses no new means either for transmitting a current of electricity, or for equalizing pressure upon the consumption circuit. It is to be noted that the patent leaves it altogether to the judgment of the electrical engineer or constructor to determine the relative lengths of the two parts of the combined circuit, and the proper thickness of the conductors. As to these points no definite instructions are given. Undoubtedly it was well known prior to the alleged invention that

a large quantity of electrical energy could be transmitted a considerable distance by a conductor of small size. Now, with respect to the loss of pressure upon the feeding conductors, which loss depends upon the thickness of the conductors, the specification tells us that "this loss will be varied according to localities, and the relative cost of copper for conducting purposes and horse power for generation." It is said that in large and extended systems this loss would generally be greater than the loss upon the main conductors of the consumption circuit, and "may be, for example, about fifteen per cent.," but that circumstances might make it desirable to diminish the loss down even as low as that upon the main conductors of the consumption circuit, or to increase the loss upon the feeders to more than fifteen per cent. Thus is it left, where indeed it properly belongs, to the intelligence of the electrical engineer to select feeding conductors of larger or smaller diameter, depending upon the comparative cost of copper and of power, or upon some special circumstances. Of a truth, the feeding conductors of the patent are nothing more than the ordinary supply wires running from the source of the electrical energy. The proper function of such conductors being to transmit the electric current to the point where it is to be utilized, as a matter of course they have no "translating devices connected therewith." The statement in the specification, "it will be seen that the drop upon the feeding conductors has no effect upon the relative candle power of the lamps of the system, the relative candle power of the lamps being affected only by the drop upon the main conductors of the consumption circuit or circuits between the end of a set of feeding conductors and points most distant from any feeding conductors," is the mention of an obvious fact. Indeed, it is put as a self-evident proposition. That no loss upon the supply part of the circuit can affect the relative candle power of the lamps upon the consumption part of the circuit is a quality inhering in the circuit by the very nature of things. It is a necessary incident of any circuit, part of which supplies the current and part of which distributes it.

The specification states that, "in order to maintain practically the same candle power throughout the system, the main conductors of the consumption circuit or circuits should be so proportioned that the drop in tension upon them shall not exceed a definite small limit, for example, five per cent.," but gives no information whatever how this is done. This silence is highly significant. The specification assumes that to secure uniformity of electrical pressure, and thus uniformity of effect, is a matter of common knowledge among those skilled in the electrical art, as indeed it was. The drop or fall in tension or pressure in an electrical current in its passage through a conductor was an observed and well-understood phenomenon long prior to the year 1880. It was known that its cause was the resistance offered by the conductor to the flow of the current, and the laws governing the flow of electricity and the drop in tension had been ascertained and published, and were perfectly familiar to all skilled electricians. They understood the effect upon the drop in

tension of variations in the size and length of the conductor and of changes in the electromotive force of the generator; and the ascertainment of the proportions to be given to a conductor to secure a definite fall in pressure with a given current was a mere matter of calculation, to aid which formulae had been worked out.

In the art of electroplating, as practiced long before 1880, we find an arrangement of circuits substantially the same as that of the patent in suit. Here a large number of articles to be plated simultaneously are suspended in the bath by separate wires attached to a metallic rod placed across the top of the tank; that is to say, the articles are arranged in multiple arc with respect to the electric current. The rod is supplied with the current by conducting wires which connect the rod with the dynamo, and the current divides among the suspended articles. It will be perceived that here one part of the circuit is used exclusively for transmitting the current, and the other part for distributing it. Equality of electric pressure among the articles to be treated is essential to good work, and in fact the distributing rods were made of such size that any material fall in pressure was avoided.

Turning now to the Khotinsky French patent of 1875, which relates to the art of electric lighting, we discover that it shows and describes a circuit of feeding and consumption parts in combination, identical in form with that of the patent in suit. The lamps of Khotinsky's system are incandescent lamps, and they are arranged in multiple arc. He shows a magneto-electric machine located "in the center of this system, or at any other point." From the magneto-electric machine run two "conducting wires," with which no translating devices are connected. These conducting or feeding wires connect with the "main conductors" of the circuit, with which all the lamps are connected. In his diagrams 1 and 3 the feeding conductors connect with the center of the consumption circuit, and in diagram 2 at the end. Undeniably, Khotinsky's combined arrangement of feeding conductors and distributing conductors is precisely the arrangement of the patent in suit. Nothing, indeed, is said by Khotinsky about proportioning the main conductors of the consumption circuit so as to prevent injurious drop in tension. It was, however, wholly unnecessary for him to say anything upon that subject. All that was needful to overcome the difficulty due to drop in tension was to make the main conductors of the consumption circuit of proper thickness. The laws governing the flow and distribution of electricity in conductors were perfectly well known to electricians at the date of Khotinsky's patent, and any electrical engineer of ordinary skill then called on to construct a circuit of Khotinsky's system, it is to be assumed, would have acted in accordance with common electrical knowledge, principles, and practice; in other words, he would have made the main conductors of the consumption circuit sufficiently large to be of practical utility. How can it be affirmed that it would require invention simply to proportion Khotinsky's circuit in the manner contemplated by the patent in suit,—to make his transmitting wires and distributing

conductors respectively of suitable size to perform their intended functions?

Now it is quite true that prior to the year 1880 electric lighting for ordinary domestic purposes was not an accomplished fact. But this was not for lack of anything shown by the patent in suit. The great desideratum was a practical incandescent lamp. Such a lamp, with a filamental carbon conductor of high resistance, and burning with a very small amount of current, was devised in or about the year 1879, and it solved the problem of the practical subdivision of the electric current for incandescent lighting. The principle of this lamp was pronounced by Mr. Justice Bradley, in *Consolidated Electric Light Co. v. McKeesport Light Co.*, 40 Fed. 21, 29, to have been "the grand discovery in the art of electric lighting, without which it could not have become a practical art for the purposes of general use in houses and cities." Such were the views which prevailed in the second circuit in the case of *Edison Electric Light Co. v. United States Electric Lighting Co.*, 47 Fed. 454; *Id.*, 3 C. C. A. 83, 52 Fed. 300,—where it was decided that Mr. Edison was the first and original inventor of this lamp.

Under the proofs, we cannot assent to the suggestion that the alleged invention here in question supplied a long-felt want, or met a difficulty generally recognized in the art as a serious hindrance to the distribution of the electric current. In fact, prior to the application for this patent no incandescent electric lighting plant had been built. There had been no occasion to erect such plants, for no practically successful incandescent lamp had yet been furnished to the public. Hence electrical engineers had not been called upon to deal practically with the problem of drop in tension in the construction of such plants. In truth, the feeder and main system of distribution came naturally, in the ordinary progress of the art of incandescent electric lighting, as and when needed.

In his Cantor Lectures of February, 1885 (put in evidence by the plaintiff below), Prof. George Forbes, speaking of this feeder and main system, well said, "It is a result which would certainly have been arrived at by any one who thoroughly and intelligently worked out the problem." True, he added that, so far as he could discover, Mr. Edison "was the first, by a long time, to hit upon this cure for the evil." But this latter statement is without significance when we reflect that a practical incandescent lamp, without which domestic electric illumination was impossible, was invented so short a time before the application for this patent, and that when the occasion for its use actually arose the feeder and main system was forthcoming.

It is a great mistake, as the proofs demonstrate, to attribute to the patent in suit the merit of having solved the problem of economically supplying the requisite current for extensive use to circuits covering large areas, portions of which are at great distances from the source of electrical energy. Whatever of economy in copper may result from the plan of the patent is confined altogether to the transmitting conductors, and the cost of copper restricts the use of this system to comparatively narrow limits.

The extension of incandescent electric lighting over large areas is really due to subsequent inventions. Conspicuous among the more recent discoveries and improvements which have brought incandescent lighting into extensive and common use is the converter or alternating current system, whereby the electric current is transmitted from the generating station to a very great distance at an extremely high pressure, and is converted at the points of distribution into the low-pressure currents required by the incandescent lamps.

The multiple-arc or derived-circuit system of distribution being confessedly old, and the high-resistance incandescent lamp having been devised, to provide "feeding conductors which extend from the generator or generators to the main conductors of the lamp or consumption current," was, it seems to us, an obvious engineering expedient. Then, as already shown, the proper proportioning of the two parts of the combined circuit involved only the exercise of the common knowledge and skill of the electrician. The facts, we think, clearly bring this case within the principles announced by the supreme court in the case of *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, and in kindred cases. The plan of electric distribution covered by the claims in question is not "the creative work of that inventive faculty which it was the purpose of the constitution and patent laws to encourage and reward." To sustain these claims would be to sanction a monopoly in that which belongs to the public.

In announcing this conclusion we cannot do better than quote some observations of the supreme court which apply with great force to this case, as we read the proofs. In *Atlantic Works v. Brady*, 107 U. S. 192, 199, 2 Sup. Ct. 225, the court said:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences."

The appellant maintains that under the ruling of the supreme court, in the case of *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, the first, second, and third claims of the patent in suit are void, because of the grant of an earlier patent to Mr. Edison, No. 239,147, dated March 22, 1881, which dealt with the evil of drop in tension, and provided a remedy by feeding conductors, having no lamps therein, connected with the mains of the consumption circuits arranged in sets concentrically around the central generating station, and so proportioned as to secure equal electrical pressure throughout the entire system. It is contended that the invention described and claimed in the earlier patent is for one form of the alleged invention described in the later patent, and covered by the first three claims thereof, and that no one could use the invention of the earlier patent without infringing these later claims. The question thus

raised is a serious one, but we do not deem it to be necessary to consider it, inasmuch as the views we have expressed upon the other branch of the case are decisive.

The decree of the court below is reversed, and the cause is remanded, with directions to enter a decree dismissing the bill of complaint, with costs.

BEACH v. AMERICAN BOX-MACHINE CO. et al.

(Circuit Court, N. D. New York. October 15, 1894.)

No. 6,170.

1. **PATENTS—ANTICIPATION—TESTS OF INVENTION—MECHANICAL SKILL.**
Whether it required more than mechanical skill to change an alleged anticipating machine into the machine of the patent is to be determined by the inquiry whether a mere mechanic would derive from the prior machine the suggestion which would lead him to make the change.
2. **SAME—INVENTION—COMBINATION—NEW RESULTS.**
Apparently slight changes producing a new combination and a new and beneficial result raise presumption of invention.
3. **SAME—VALIDITY OF REISSUE—MISTAKE IN DRAWINGS.**
Reissue is warranted by mistake in drawings which renders the machine inoperative in part only.
4. **SAME—AMPLIFICATION OF DESCRIPTION AND CLAIMS.**
A claim may be made more full and complete, by amendment, without new oath, if no new invention is claimed, and the old claim is not materially broadened.
5. **SAME—INFRINGEMENT—PAPER BOX MACHINE.**
Where the two machines perform the same work in substantially the same way, infringement is not avoided by the fact that one part of defendant's machine does a little more, and the other a little less, than corresponding parts in complainant's machine.
6. **SAME—PARTICULAR PATENT.**
The Beach reissue, No. 11,167, for a machine for attaching stays to the corners of paper or strawboard boxes, sustained and declared infringed.

This was a suit in equity by Fred H. Beach against the American Box-Machine Company and Horace Inman and others for the infringement of a patent. On final hearing.

Benjamin F. Lee and John Dane, Jr., for complainant.

Edmund Wetmore and William A. Redding, for defendants.

COXE, District Judge. This action is founded upon reissued letters patent No. 11,167, granted to the complainant May 26, 1891, for a machine for attaching stays to the corners of paper or strawboard boxes. The application for the original was filed June 10, 1885. The original, No. 447,225, was dated February 24, 1891. The application for the reissue was filed April 9, 1891. Prior to the invention it had been customary, says the patentee, to apply the fastening strips over the joints at the corners of the boxes, and paste them there, by hand. This work is now done by the patented machine. The claims involved are as follows:

"(1) The combination, with opposing clamping dies having diverging working faces, of a feeding mechanism constructed to deliver stay strips between

said clamping dies, and a pasting mechanism for rendering adhesive the stay strips, said clamping dies being constructed to co-operate in pressing upon interposed box corners the adhesive stay strips, substantially as described.

"(2) The combination, with opposing clamping dies having diverging working faces, said clamping dies being arranged to co-operate in pressing adhesive fastening strips upon interposed box corners, a feeding mechanism constructed to feed forward a continuous fastening strip, and a cutter for severing the said continuous strip into stay strips of suitable lengths, substantially as described.

"(3) The combination, with opposing clamping dies having diverging working faces, said clamping dies being arranged to co-operate in pressing an adhesive fastening strip upon the corner of an interposed box, a feeding mechanism constructed to feed between the dies a continuous fastening strip, a pasting mechanism for applying adhesive substance to the strip, and a cutter for severing the strip into stay strips of suitable lengths, substantially as described.

"(4) The combination, with opposing clamping dies having diverging working faces, said clamping dies being constructed to co-operate in pressing an adhesive fastening strip upon an interposed box corner, of a movable plunger or strip bender constructed to bend downwardly or inwardly a projecting end of the stay strip, that one of the clamping dies which engages the inner surface of the box corner being movable into and out of its usual working position, whereby it may engage and carry inside of the box corner the said projecting end of the stay strip, substantially as described.

"(5) The combination, with opposing clamping dies having diverging working faces, said clamping dies being constructed to co-operate in pressing an adhesive fastening strip upon an interposed box corner, of a movable plunger or strip bender constructed to bend downwardly or inwardly a projecting end of the stay strip, that one of said clamping dies which engages the inner surface of the box corner having a reciprocatory motion in a direction parallel with the box corner, so as to carry inward and press against the inside of the box corner the said projecting end of the stay strip, substantially as described."

"(7) The combination, with opposing clamping dies having diverging working faces, said clamping dies being arranged to co-operate in pressing an adhesive fastening strip upon an interposed box corner, of a feeding mechanism constructed to feed forward a continuous fastening strip, a cutter for severing the strip into suitable lengths, and a movable part or plunger which bends downwardly or inwardly the projecting end of the fastening strip, that one of the clamping dies which engages the inside of the box corner being constructed to reciprocate in a direction parallel with the box corner, substantially as described."

It will be observed that the first, second and third claims cover combinations designed only to fasten a stay strip over the joints on the outside corner of the box, while the fourth, fifth and seventh claims cover the additional feature whereby the stay strip is folded over the edge of the box and pasted on the inside as well as on the outside of the corner. The elements of the combination of the first claim are: First. Opposing clamping dies having diverging working faces and constructed to co-operate in pressing adhesive stay strips upon an interposed box corner. Second. A feeding mechanism to deliver the stay strips between said clamping dies. Third. A pasting mechanism for rendering adhesive the stay strips. The second claim omits the pasting mechanism of the first claim, repeats, substantially, the remaining elements of the first claim and adds thereto a cutter for severing the continuous strip into stay strips of suitable length to be applied to the box corner to be stayed. The third claim is, in substance,

a combination of all the elements of the two preceding claims. The elements of the combination of the fourth claim are: First. The opposing clamping dies of the preceding claims. Second. A movable plunger or strip bender to bend downwardly or inwardly the projecting end of the stay strip. Third. The anvil die, movable out of and into its usual working position so that it may engage and carry inside of the box corner the projecting end of the stay strip. The fifth claim is substantially the same as the fourth, the only difference being that the anvil die is described as having "a reciprocatory motion in a direction parallel with the box corner." The seventh claim adds to the combination of the fourth and fifth claims the feeding mechanism of the first three claims and the cutter of the second and third claims.

The defenses are, lack of novelty and invention; noninfringement of the fourth, fifth and seventh claims; unlawful expansion of claims in the patent office by amendment; invalidity of the reissue as such, it being the same, in all important respects, as the original; and failure to prove infringement, except as to the defendant Horace Inman.

The application was nearly six years in the patent office. Although placed in interference with five different claimants who contested the complainant's right with unusual pertinacity, he was successful over them all, at every stage of the controversy. Not content with the adverse decision of the patent office officials two of the contestants, one of them a defendant here, sought to have the complainant's patent canceled and awarded to them through the instrumentality of a court of equity. They were again defeated. What the machine of the patent does is this: an ordinary paste-board blank is inserted between the clamping dies and it emerges a completed box, its corners being stayed by strips which have been firmly pasted to the box on the outside, the projecting end being then neatly folded over and attached to the inside also. The corners of the box are adjusted in the dies by the operator—all else is automatic. The box thus made is properly shaped, its corners are reinforced and made strong, and much heavier material is used, owing to the greater force which is applied, than is possible in a hand-stayed box. The machine is much more rapid than the hand process; it increases the production from four to ten fold. It does cheaper, cleaner, stronger, straighter and smoother work than that done by hand. Less material is used, the boxes are more uniform, artistic and symmetrical and are delivered from the machine ready for immediate use. The Beach machine, or one embodying the principle of his invention with some minor improvements added, at once became popular and ousted the hand process and the wire stapling method in many of the larger establishments. It has taken the market, become almost indispensable to the trade and, according to the weight of testimony, has made successful competition well-nigh impossible. This evidence is objected to because it is said that the machine to which the witnesses chiefly referred was the Knowlton and Beach machine,

which contains several patented improvements made by Knowlton. I am convinced that though this machine is an improvement upon the original, it contains the basic idea of the Beach structure, and it is this, and not the subsequent changes, which makes it popular. It would be illogical, in such cases, to attribute success to the nonessential, and not to the essential, features. *Cochrane v. Deener*, 94 U. S. 780, 787; *Mergenthaler Linotype Co. v. Press Pub. Co.*, 57 Fed. 502, 505, 506.

But without the proof of the popularity of the machine there is ample evidence in the record to sustain the invention. The inventor does not pretend to be the first who attached stays of paper or muslin to the corners of paper boxes. The patent expressly admits that this had previously been done by hand. He does insist that he was the first to do this by machinery and asks only for a construction broad enough to prevent others from using his machine, or its equivalent. He asks nothing more. This statement of the complainant's position disposes of a large number of the exhibits offered by the defendants. These would be of value if a construction were sought covering the entire art of box-making, but such is not the case. The defendants have introduced 47 patents showing improvements in machines for making boxes, for inserting wire staples, for flanging boiler plates, for sticking labels and revenue stamps, for bending stiffeners for the heels of shoes and for applying shoe-button fasteners. It is conceded by the defendant's expert that none of these anticipates, and, as the counsel for the complainant admitted at the argument that the elements of the combinations, considered separately, were all old, the discussion is narrowed down to the consideration of two or three prior patents only. As I understand the defendants' position the infringement of the first three claims is not denied. The defense as to these claims is that they are void for lack of patentability. In approaching this subject it should be remembered at the outset that no one before Beach had attached adhesive staying strips to box corners by machinery. No machines in the box-making art, or any other art, would do this work. Beach was the first to accomplish this result. His was not a broad invention. His operations were confined to the improvement of a single step in the art of making paper boxes. He succeeded, and, in that limited sense, is a pioneer. The question is, whether in view of what is shown, it required more than mechanical skill to produce the machine of the first three claims. The patent No. 303,992, granted to Dennis and York, August 19, 1884, for improvements in addressing machines, is unquestionably the defendants' best reference. The improvements relate to machines "in which a strip of paper with the addresses printed thereon is run through the machine, the addresses being cut off in slips and automatically affixed to the newspapers, envelopes, or other articles by a descending knife and platen." The machine has a feeding and pasting mechanism, a vertically reciprocating gate, provided at its lower end with a knife to cut off the addresses, and a platen by which they are carried down and fastened

to the newspapers or envelopes. The bed on which the papers rest, and which is the only part of the machine which bears the slightest resemblance to the lower die of the Beach patent is called "a follower." Instead of being rigid this "follower," as the name implies, is supported upon light coiled springs and by lever action, so that it will move up and down freely and produce "just enough pressure under all circumstances to receive the pasted slip upon the upper sheet." The impact of the platen and plunger resembles the pat given to a freshly applied postage stamp. Being designed to do this light work the machine is lightly constructed and differs in many minor particulars from the Beach machine.

The defendants insist that a mere mechanic could construct the Beach machine from the Dennis and York machine, and, to illustrate this contention, they have produced a model of the Dennis and York structure so altered that, experimentally, it will, in a crude and awkward way, attach stay strips to boxes. The principal alteration is the removal of the platen and follower and the substitution thereof of the clamping dies of the Beach patent, the lower die being firmly fixed, or comparatively so. It is argued that a mechanic could do this. Possibly he might after having seen the Beach machine. But is this a fair criterion? There is hardly a patent that could stand such a test. The question is not whether a mechanic, having seen a box-staying machine, could alter the Dennis and York device into such a machine; not whether a mechanic, if he were told that such a box-staying machine was needed, could construct such a machine, although he had never seen one, from the Dennis and York device. The question is whether a mechanic, before any one had thought of pasting stay strips to the corners of boxes by machinery, would construct the Beach machine after seeing the labeling machine. Would the latter suggest the idea and the embodiment of the idea? Would the thought enter the mind of the skilled mechanic with the Dennis and York device before him on his work bench; and if it did, would it not be a creative thought whose presence would convert the mechanic into an inventor? The language of Mr. Justice Brown in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, is applicable to the present situation. At page 161, 145 U. S., and page 825, 12 Sup. Ct., he says:

"While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Angur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer, but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

The ability to conceive and carry out such changes as were here necessary is not found in the mere routine plodder no matter how skillfully he may handle his tools. Mechanics by the hundred had

seen the Dennis and York and kindred structures; workmen by the hundred had for years been sticking stay strips to box corners with their hands, and yet no one of them all had hit upon the Beach device. The advantages of a change from hand labor to machinery are obvious, and yet the idea, which is now said to be self-evident, never entered the mind of a single one of this large army of mechanics. Suppose Beach's machine had never been built, the art, unless some of those who claimed to be prior inventors in the patent office had supplied the want, would be in the primitive state that it was before 1885. No other machine could take its place. The fingers of women and children would still be doing the work of the "opposing clamping dies." Has not the art been materially advanced by the contribution of Beach? The proposition cannot be maintained that the ingenious mechanism which has revolutionized this branch of the trade is only the product of mechanical skill. In the defendants' brief the proposition is bluntly stated as follows: "Surely it cannot be contended that the substitution of angular dies for the flat dies of the Dennis and York machine amounts to invention." Of course this is not the question presented by the record, but if it were, the court is by no means certain that the change suggested, considering all that it has accomplished, would not involve invention, even if this were all. Infinitely less were the changes required in substituting a wire barb for one cut from an iron plate; in placing a rubber back upon the packing for stuffing boxes; in substituting a torsional spring for coiled or flat springs in a telegraph key; and in substituting hard rubber, in lieu of materials previously used, for a plate for holding artificial teeth. And, yet, the supreme court has decided that to do these things required invention. Barbed-Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 450; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71; Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670; Smith v. Vulcanite Co., 93 U. S. 486. A very slight alteration in an existing structure will often yield the most astonishing results. If the product of the change is a new combination and a beneficial result never attained before, it is safe to assume that its author is an inventor. The five applicants, including the active defendant, Horace Inman, who disputed in the patent office so vigorously with the complainant for the honor of being the inventor of the patented machine, evidently, at that time, thought something more than mechanical skill was involved. Indeed, the court might almost adopt as its own the language of the defendants in describing the genius and ability necessary to advance the art to its present condition. A catalogue issued by one of the defendants—the American Box-Machine Company—contains the following:

"The Inman Manufacturing Co., of Amsterdam, N. Y., recommends to the paper-box manufacturers of this country their new No. 6 corner stay machine, for staying the corners of boxes and turning the stay in at the same time. The demand for just such a machine is now met. First the wire stitcher came in and answered the purpose because nothing better could be had. Afterwards we got out the cloth-stay machine, which put the stay on the flat surface of the corner. This was a great improvement, but did not meet the full wants and demands of the box-making public.

They wanted a machine that would put the stay on the corner, and turn it under the same as the old hand method. This was a very difficult thing to do, but we have fully accomplished all—and more than we anticipated.”

It is not necessary to examine the other patents introduced by the defendants. If the Dennis and York patent does not invalidate the Beach patent none of the others does. The Orr and Wright patents, Nos. 58,466 and 67,669, and the Munroe patents, Nos. 244,919 and 298,879, relate to the covering of boxes by winding paper around them. There is nothing in the machines described and shown to suggest the Beach machine. The other patents are still further remote.

The foregoing applies with even greater force to the combinations of the fourth, fifth and seventh claims. I am not quite convinced after reading the defendants’ brief whether it is contended that these claims are void for lack of invention. The defendants’ expert expressly concedes patentability as I understand his deposition. However, it is unnecessary to discuss the matter, as it is manifest that if the first three claims are valid these claims are also valid.

The patent was reissued three months after the original to correct a mistake in one of the drawings. The defendants contend that the law does not permit a reissue to correct inconsequential mistakes. The defense is wholly technical. No one but the patentee was in any way harmed by the reissue. The defense is without merits and does not appeal to a court of equity, which should hesitate long before destroying a valuable patent upon a mere abstraction. No authority is cited to sustain the defendants’ theory and it is thought that no tribunal will ever take the harsh and narrow view contended for; certainly this court will not be the first to do so. It appears from the original patent, assuming it to be properly in evidence, that there was a clear mistake in the drawings. Though this mistake did not render the patent wholly inoperative it was of such a character that a machine constructed in accordance with the drawings would have been inoperative for some purposes which the inventor was entitled to cover by his claims. It is doubtful whether a mechanic following the drawings would have made the machine which the inventor intended to describe. By the terms of the statute (section 4916) it is not necessary that the patent should be wholly inoperative. If inoperative in part it is sufficient. *Hartshorn v. Roller Co.*, 18 Fed. 90. This question was submitted to the commissioner and his decision is entitled to weight and will not be reviewed unless error is manifest from the record. *Machine Co. v. Frame*, 24 Fed. 596; *Topliff v. Topliff*, 145 U. S. 156, 171, 12 Sup. Ct. 825. There is nothing in the record to overcome the presumption of validity arising from the patent itself.

As I understand the defendants’ position regarding the unlawful expansion of the claims it is that the amendment, dated November 7, 1890, was unauthorized and unlawful for the reason that the first three claims were broadened and no new oath was required. The new description and claims are undoubtedly more full and complete

than the original, but I cannot find that a new invention is claimed or that the old invention is materially broadened. The only paragraph which introduced new matter was corrected by order of the examiner. It should be remembered that for years the patentee was powerless to act by reason of the persistent manner in which his right to the invention was contested by others. When at last he had triumphed over all adversaries it is safe to assume that he was a wiser man. He had learned some things during the long controversy. That he was entitled to a patent which fully protected his invention there can be no doubt. If the invention as patented is different from the invention as described in 1885 the court has been unable to discover it. There can be no dispute that an inventor is entitled so to amend his specification that it will employ perspicuous and artistic language and enable him to hold all that he has invented. This specification does nothing more. In the language of the attorneys who filed the amendment, "care has been used to include nothing in the drawings or specification which was not contained in the same originally filed." Is there one of the claims that could not have been ingrafted on the original description? If so, which one? General accusations are made, but no feature is pointed out which is not found in the original specification. Grant that the description is not so clear, the fact cannot be disputed that every element of the combinations in dispute is found in the first description filed. There is no doubt about the rule of law laid down in *Railway Co. v. Sayles*, 97 U. S. 554, and the numerous authorities which follow it. The difficulty here is with the facts. If it could be shown that the scope of the original had been enlarged so as to enable Beach to appropriate other inventions the rule would apply. But this has not been shown. A new oath was not necessary because the amendments introduced no new invention. Nothing in the rules of practice of the patent office or the law required it. The grant of the patent is *prima facie* evidence that the necessary conditions precedent were complied with. *Crompton v. Belknap Mills*, 3 Fish. Pat. Cas. 536, Fed. Cas. No. 3,406; *Whittemore v. Cutter*, 1 Gall. 429, Fed. Cas. No. 17,600; *Hartshorn v. Roller Co.*, 18 Fed. 90, and cases cited; *Walk. Pat. § 122*.

Infringement of the first three claims is, practically, conceded. The complainant's expert says regarding these claims that the defendants' machine is a copy of the Beach machine. I do not find this statement anywhere contradicted, except, perhaps, in a qualified way in the testimony taken September 11, 1894, and from the examination which I have given the two machines it certainly seems to be borne out by the facts. The combinations of these claims have, unquestionably, been appropriated. The rule applicable to the infringement of the other claims is clearly stated by Mr. Justice Blatchford. He says:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine

may contain improvements in the separate mechanisms which go to make up the machine." *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299, and cases cited.

In *Proctor v. Bennis*, 36 Ch. Div. 740, Lord Justice Bowen said:

"The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance and essence of the invention."

There is no doubt that the defendants' machine operates to paste the stay on the outside of the box, turn it downwardly and inwardly and paste it on the inside of the corner also. In other words, it does the precise work that the Beach machine does and it does it by parts so nearly identical that even the experts find it difficult to state, not the differences of form, for these undoubtedly exist, but the differences in function and principle. The chief points of dissimilarity are—first, the alleged absence of the strip bender, and, second, the absence from the lower clamping die of the feature of "being movable into and out of its usual working position." There is a part in the infringing machine which corresponds exactly to the strip bender and is capable of performing the identical work. The defendants maintain that when the machine is properly adjusted the strip bender only operates to press the strip down upon the outer surface of the box corner and that it does not descend below the plane of that surface. The complainant insists, on the contrary, that, though the machine may be so adjusted, this is not the proper adjustment, not the one which the defendants intended, not the one which a sensible mechanic would adopt. That when the machine is properly adjusted its action in this respect is identical with the Beach machine. In confirmation of the latter contention it may be said that if this part performs no function additional to the pressing action of the upper die it is not easy to understand why it was placed in the machine at all. But even if the defendants are right upon this point there can be no doubt that the part in question forces, or bends, the projecting end of the stay strip downwardly. It can bend it in no other direction. True, it does not bend it down as far as the Beach strip bender, but it does bend it far enough, so that it is caught by the reciprocating lower die, or tucking finger, and carried inside of the box corner. The defendants' strip bender may do less work and their tucking finger more work than the complainant's, but it is perfectly plain that the two parts together perform the identical work that the corresponding parts perform in the Beach machine. Their action may not be synchronal, there may be structural differences, the defendants may have introduced improvements, and yet the fact stands out clear and indisputable, that the defendants' machine does the same work as the complainant's machine, if not by the same, certainly by equivalent means. Assuming that the complainant needs to invoke the doctrine of equivalents, surely it is not carrying that doctrine too far to hold the defendants' device an infringement when it is remembered that no one pretends that the

machine of the fourth, fifth and seventh claims ever existed before. "The range of equivalents depends upon the extent and nature of the invention." *Miller v. Manufacturing Co.*, 151 U. S. 186-207, 14 Sup. Ct. 310.

As to the other point it is true that the lower clamping die, as a whole, does not, in the defendants' structure, move out of and into its usual working position. The lower die is divided, about half thereof remains stationary and the other half moves into and out of its usual position, or reciprocates in a direction parallel with the box corner, accomplishing the same result as the lower die in the Beach machine. The operation of the two is somewhat different. The Beach tucker moves on right lines while the defendants' tucker swings, for a time, in the arc of a circle, but when it does its work it moves in the same way, substantially, as the Beach tucker. The differences are immaterial. The defendants' mechanism performs the same labor and accomplishes the same result in substantially the same way as the complainant's mechanism. The former is the equivalent of the latter. Patents would be of little value if they can be avoided by such changes. *Machine Co. v. Murphy*, 97 U. S. 120, 125; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970; *Winans v. Denmead*, 15 How. 330; *Sargent v. Larned*, 2 Curt. 340, Fed. Cas. No. 12,364. The law does not intend that one who has taken the invention in its entirety, who has appropriated the inventor's idea and the broad principle on which the structure operates which embodies that idea, shall escape infringement because he practices the invention in a slightly different form from that shown in the patent. The law, in such cases, deals with substance and not with form; it tears the disguise from the infringer and exhibits him in his true light. To adopt the language of Mr. Justice Grier in *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103, Fed. Cas. No. 1,515:

"It is true that the complainant's specification describes a machine, which effects its result by a combination of lateral and rotary motion, to form a helical course or track in the operation of the machine. But is that of the essence or substance of the invention? or is it not merely an accident of that particular form of the machine described? * * * We cannot shut our eyes to the fact that the defendants have pirated the invention of the complainant in all its essential parts."

As there is no proof of infringement by the American Box-Machine Company the bill must be dismissed as to it. The other defendants are sued as copartners, trading under the name of the Inman Manufacturing Company, and as this copartnership is admitted in the answer and as a sale by one of the partners is established, it would seem that the proof as to them and the copartnership is sufficient. It follows that the complainant is entitled to the usual decree as to all the defendants, except the American Box-Machine Company. The question of costs can be determined upon the settlement of the decree.

BABCOCK et al. v. CLARKSON et al.¹

(Circuit Court of Appeals, First Circuit. June 23, 1894.)

No. 84.

1. PATENTS—ASSIGNMENT—ESTOPPEL OF ASSIGNOR.

The assignment of a patent by the patentee, for a valuable consideration, estops him, when sued for infringement thereof by one deriving title under the assignment, from raising questions of novelty, utility, patentable invention, anticipatory matter, and the state of the art, except so far as the state of the art, and anticipatory matter as a part thereof, may have a bearing on the construction of the patent.

2. SAME—LIMITATION BY PRIOR STATE OF ART—JUMP-SEAT CARRIAGES.

In the Clarkson patent, No. 300,847, for an improvement in jump seats, the invention, consisting of a combination of a falling tailboard and two seats, so connected by levers and hinges that the movement of the tailboard upward will drop the rear seat out of use, and move the front seat backward, so as to preserve the proper center of gravity, is not a pioneer invention, in view of the prior state of the art, and is not infringed by a combination producing a different set of movements, except that the rear seat moves upward and downward, that seat being left in use. 58 Fed. 581, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Frank A. Babcock and others against Joseph T. Clarkson and others for infringement of a patent. The patent was No. 300,847, issued June 24, 1884, to defendant Clarkson, for an improvement in jump seats. Complainants claimed title under assignments from Clarkson. The circuit court dismissed the bill, and a decree for defendants was entered thereon. 58 Fed. 583. Complainants appealed.

Edward P. Payson, for complainants.

Thomas W. Porter, for defendants.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. Joseph T. Clarkson, one of the respondents below, was the original patentee, and the title of complainants is derived under assignments from him for a pecuniary consideration, valuable in law, though said to be small. Consequently, an estoppel operates against him. The precise nature of this estoppel does not seem to have been always clearly apprehended. It is, in effect, that, when one has parted with a thing for a valuable consideration, he shall not, so long as he retains the consideration, set up his own fraud, falsehood, error, or mistake to impair the value of what he has thus parted with. As applied to the specifications of a patent, the vendor patentee is as much barred from setting up that his allegations therein were merely erroneous as that they were willfully false. This is as much in harmony with sound morals as with the fundamental rules of equity law. The estoppel is not technically by record; nor is it the usual estoppel

¹ Rehearing denied August 1, 1894.

in pais, arising from the representations or silence of the party against whom the estoppel is charged, as in *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, and *Brant v. Iron Co.*, 93 U. S. 326. Consequently, the estoppel which we apply to this case does not run against a patentee whose patent has been sold by his assignee in bankruptcy. These distinctions lay out of this case *Cropper v. Smith*, 26 Ch. Div. 700, affirmed on this point in *Smith v. Cropper*, L. R. 10 App. Cas. 249.

Hall v. Conder, 2 C. B. (N. S.) 22, was decided in 1857. It related solely to a question of implied warranty at common law, an essentially different matter from the principle of the equitable rule that one cannot avail himself of his own wrong, which includes error, to the detriment of his privy in title. Much was said in that case with reference to the proposition that the facts were equally within the knowledge of each party; but, in applying the equitable rule referred to, reliance, unless in exceptional cases, is put on the equitable obligations of the vendor, and the question of knowledge is unimportant. In *Hall v. Conder* an appeal was taken to the house of lords; but we do not find that it was perfected. At any rate, its principles could not have escaped so learned and experienced a lawyer as Lord Romilly, then master of the rolls, who decided *Chambers v. Crichtley*, 33 Beav. 374, in 1864. There the same estoppel was applied as is raised in this case, although the transaction was between partners, who must be presumed to have had equal sources of knowledge. His opinion summarizes the law so well that we give the whole of it on this point, as follows:

"I do not intend to express my opinion as to the validity of Wright's patent. I will assume, for the purpose of my judgment, that it is worth nothing at all. But this is certain: that the defendant sold and assigned that patent to the plaintiffs as a valid one, and, having done so, he cannot derogate from his own grant. It does not lie in his mouth to say that the patent is not good."

On the whole, the estoppel raised in this case is of the same class as that applied by the supreme court in *Brazee v. Schofield*, 124 U. S. 495, 8 Sup. Ct. 604, where the court said (page 503, 124 U. S., and page 604, 8 Sup. Ct.) as follows:

"There is another view of this case which would seem to conclude the appellant as to the sufficiency and legality of this notification by the widow. The patent of the United States was issued upon the supposed compliance of the patentees with the requirements of the donation act. That instrument is not in the record, but we must presume that it follows the usual form of such instruments, and recites the compliance of the patentees with the requirements of the act, and the production to the proper officers of satisfactory proof on that point. The appellant derives all the title he asserts through conveyances of the heirs of the deceased settler under the patent. As well observed by the supreme court of the territory, under these circumstances these heirs and their grantees are estopped from saying to the prejudice of any grantee of theirs, but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated for the prescribed period the donation land claim known as his, or that by virtue of a full compliance with the essential requirements of the donation act, his widow and children were, at the date of his death, in January, 1853, entitled under the act to that land claim."

The principle is recognized in *Brant v. Iron Co.*, 93 U. S. at pages 336, 337.

In *Ball & Socket Fastener Co. v. Ball Glove Fastening Co.*, 7 C. C. A. 498, 58 Fed. 818, we had occasion to consider the effect of an estoppel as against a licensee operating under the peculiar agreement existing in that case, and used the following language:

"So far as this suit is concerned, the various patents referred to in the agreement are to be held valid, and the claims in each to be fully sustained, according to their fair intent, as such claims are usually construed under the rules of the patent laws; and, so far as the validity and extent of the claims are concerned, neither is to be diminished by any prior patents or inventions, known or unknown, disclosed or undisclosed, although they may come in to some extent for the purpose which we will state. The record contains very much touching the state of the art and prior patents. From what we have already said, it is plain that they cannot be introduced here for the purpose of invalidating any of the patents covered by the contract, or any portion of any claim of any of such patents. Nevertheless they, as well as the file wrappers and their contents, are appropriate to be considered for ascertaining the true construction of the various patents involved, and especially for determining whether, according to such construction, the improvements were of a primary or secondary character, and how far the combinations admit of the doctrine of equivalents."

These expressions were special, and, when used, were limited to that case. They happen to define accurately the operation of the estoppel in the case at bar on the questions of novelty, utility, patentable invention, anticipatory matter, and the state of the art; and they leave for our consideration none of these, except the state of the art, and anticipatory matter as a part of the state of the art, and these only as bearing on the construction of the patent.

We do not understand that these propositions are contested by the respondents below, now the appellees; yet we have deemed it necessary to state them at length, in order that we may accurately consider the effect which the patent in question has as between the parties to this suit. We also refer, in this connection, to *Clark v. Adie*, L. R. 2 App. Cas. 423; *Trotman v. Wood*, 16 C. B. (N. S.) 479; *Crosthwaite v. Steel*, 6 R. P. C. 190; *Ashworth v. Roberts*, 9 R. P. C. 309.

Applying these principles, and construing the patent in suit in the light of the art, we concur in the conclusion of the circuit court, for the reasons stated in the opinion filed in that court.

Decree of the circuit court affirmed.

WOODWARD et al. v. BOSTON LASTING MACH. CO.

(Circuit Court of Appeals, First Circuit. June 23, 1894.)

No. 61.

1. PATENTS—ASSIGNMENT—ESTOPPEL OF ASSIGNOR—WAIVER.

The estoppel of a patentee, who has assigned his patent, to set up its invalidity as a defense to a suit against him by the assignee for infringement, is not waived by the assignee failing to anticipate such defense in his bill, or to except to the answer setting it up, and the court will give effect to the estoppel although the parties did not wish to raise it.

2. APPEAL—DECISION—RESERVING LEAVE TO FILE BILL OF REVIEW.

Where a decree is affirmed on an issue not anticipated by appellants, which the parties did not intend to raise, and which appellants suggest

can be met by further proofs, liberty may be reserved to them to apply to the court below for leave to file a bill of review, and to proceed thereon as that court may determine, with reference to the matter.

This was a petition by Erastus Woodward and others, appellants, for a rehearing of their appeal, after a decision affirming the decree of the circuit court. 8 C. C. A. 622, 60 Fed. 283. Leave to file briefs was granted to both parties.

Causten Browne and Geo. O. G. Coale, for appellants
J. E. Maynadier, for appellee.

Before COLT and PUTNAM. Circuit Judges, and NELSON, District Judge.

PER CURIAM. The court has given careful attention to the petition for a rehearing filed in this case, and the briefs thereon filed by each party by leave of court, which have fully argued the grounds on which the court decided this case in its opinion in 8 C. C. A. 622, 60 Fed. 283. The matter is so important that it is proper to explain why we deny the petition.

For all we need say touching the rule of estoppel applicable to this case, in addition to what appears in the opinion in 8 C. C. A. 622, 60 Fed. 283, we refer to the opinion passed down this day in *Babcock v. Clarkson*, 63 Fed. 607.

It is said that the right to set up estoppel was waived in various ways. There was no waiver by the pleadings. The estoppel would properly arise as a matter of rebuttal by complainant, on the proofs, and not on the pleadings. The complainant might have anticipated the defense of invalidity by inserting, in its bill, charges and an avoidance; but it was at its option to do so, and it lost no rights by not availing itself of this option. Story, Eq. Pl. § 33.

In *Underwood v. Warren*, 21 Fed. 573, the question of estoppel was raised by exceptions to the answer; but this was irregular, and was apparently permitted because no one objected to this method of proceeding. An answer is clearly not insufficient merely because it sets up a defense which may be rebutted, and parties cannot be compelled to try on exceptions an issue of this kind.

It is said, and is apparently true, that the parties did not wish to raise this question. But that, if successful, would, in effect, result in submitting to the court a moot patent cause, which, on account of the public interests involved, the court is ordinarily disinclined to permit. As a general rule, the court, before passing on the question of patentability, is entitled to require that it should be properly presented by parties legally competent and interested to do it.

The court sees no occasion to modify its conclusions touching the relations of defendant Barrett to defendant Woodward.

It is apparent that the result has turned on an issue which the appellants did not anticipate, either in this court or in the court below; and the surprise comes from the fact that the issue was raised by the court, while the parties intended not to raise it. The appellants suggest that the issue can be met by further proofs.

Therefore, a special mandate is requested, which we will grant, as the circumstances are so peculiar. *Smith v. Weeks*, 3 C. C. A. 644, 53 Fed. 758. It must be expressly understood that we are not committed to any phases of the law which the new proofs, if taken, may raise, nor barred from applying to them the rule of *Telegraph Co. v. Himmer*, 19 Fed. 322, if it meets our approval and comes in point.

Ordered: The petition for a rehearing is denied. The judgment already entered is amended to read as follows: "The decree of the circuit court is affirmed. This court reserves to the appellants liberty to file in the circuit court an application for leave to file a bill of review, or leave to adopt other appropriate methods, and to proceed thereon as that court may determine, with reference to the matter of estoppel appearing in the opinion of this court passed down March 5, 1894; the appellees to recover costs of appeal."

DE LORIEA et al. v. WHITNEY.

(Circuit Court of Appeals, First Circuit. June 22, 1894.)

No. 88.

1. PATENTS—ACTIONS FOR INFRINGEMENT—DIRECTING VERDICT.

When, in an action at law, the essence of an alleged infringing machine is not in dispute, so that the question of infringement by it turns plainly on the construction of the patent alleged to be infringed, and such construction is for the determination of the court, either on the face of the patent, or on its face in connection with facts of such nature that their existence and effect cannot be reasonably disputed, the entire issue of infringement is practically for the court. In regard to these particulars, the same rules of construction apply as apply to other instruments.

2. SAME.

Royer v. Belting Co., 10 Sup. Ct. 833, 135 U. S. 319, touching what issues are for the jury, explained.

3. SAME—EVIDENCE—CONSTRUCTION OF PATENT.

The facts that a patented machine was the first successful one, and that it had great commercial success, are limited in their application to questions of utility or patentable invention, and have no pertinency in cases turning on the construction of the patent.

4. SAME — LIMITATION OF CLAIMS — MACHINES FOR UNHAIRING AND SCOURING HIDES.

The McDonald patent, No. 210,797, for a machine for unhairing and scouring hides and skins, must be limited to a machine containing two feed rolls and a supporting roll and a scouring roll; is not entitled to a broad range of equivalents, but falls within *Fay v. Cordesman*, 3 Sup. Ct. 236, 109 U. S. 408, and cases of that class; and is not infringed by a machine which contains three rolls, the lower acting as a combined feed roll and supporting roll.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Joseph F. De Loriea and Griffin Place, executors of James W. McDonald, against Arthur E. Whitney, for damages for infringement of letters patent No. 210,797, issued December 10, 1878, for a machine for unhairing and scouring hides and skins. On trial in the circuit court the judge instructed the jury to find for defendant. Judgment for defendant was entered on the verdict. Plaintiffs brought error.

The ruling in the circuit court was as follows (COLT, Circuit Judge):

The evidence being closed in this case, and the requests for rulings having been presented by the counsel upon both sides, I am prepared now to state the conclusions that I have reached with respect to the construction of the McDonald patent in suit, which has an important bearing upon the case.

I am of opinion that the McDonald invention described in claims 1 and 2 of his patent of December 10, 1878, must be limited to a machine containing two feed rolls, a supporting roll, and a scouring roll, and that a machine which contains three rolls, the lower roll acting as a combined feed roll and a supporting roll, is not within the patent.

The specification refers to the prior Roberts patent, of November 7, 1876, which was for a four-roll machine, and the prior McDonald patent, which was also for a four-roll machine, and it declares that the invention is for an improvement on the last-named device. The patentee, after referring to three other prior patents in his specification, and pointing out why they do not contain his invention, describes what he says "constitutes the spirit of my invention" as follows: "Two feed rolls for feeding a hide or skin to a scouring roll, so arranged in relation to each other and to the scouring roll that one of said rolls may be lifted from the other and held apart while a hide which has been improperly fed is drawn back by the operator before it has passed the scouring roll to be properly fed to the said scouring roll." The spirit of the McDonald invention, and the substantial improvement which he believed he had accomplished by his invention, was the separation of the two feed rolls, whereby a hide which had been improperly fed could be drawn back by the operator. He was dealing with a four-roll machine of the Roberts type. He had already patented one improvement on that type of machine. He now saw still another defect in the machine, and the way to remedy it. The defect was that in both the Roberts machine and his prior machine the feed rolls could not be separated. Both these machines provided for the separation of the supporting roll and scouring roll by the movement of the treadle, but no means were provided for the separation of the feed rolls by the same movement. To McDonald's mind the separation of the supporting roll and scouring roll was old with Roberts and himself, while the separation of the feed rolls was a new conception originating with him; and he considered this an important improvement on the prior machines, because by this means the operator was enabled to withdraw the hide when improperly fed. This was the principal contribution to the art which McDonald believed he had made by the patent in suit. This is clearly shown by the file wrapper and contents, which was not before the court in either of the two prior cases where this patent was under consideration.

In the original application the first claim of the patent was as follows: "In machines for unhairing and scouring skins and hides, the feed roll, D, in combination with the treadle, F, and suitable connecting mechanism, whereby the rolls may be separated and held apart, substantially as described, and for the purposes set forth." The examiner held that this claim was anticipated by the Coogan patent, of October 10, 1871; the Roberts patent, of November 7, 1876; the Larrabee patent, of July 24, 1877. He also said: "It is proper to add that it is common, in leather-working machines, to provide vertical adjustment to rolls or cylinders by means of levers and their intermediate devices."

To this the applicant replied, October 22, 1878, through his authorized attorney, T. W. Clarke, that the Coogan patent did not describe feeding rolls which could operate to feed a hide; that, while Roberts describes a pressure roll which can be moved with respect to the scouring roll, the adjustment is not applied to the feed roll, and no adjustment is shown for the purpose of holding one roll from another in order that an improperly fed skin may be withdrawn for the purpose of again properly presenting it to the feeding rolls; that the Larrabee machine shows but one feed roll; that the drum described in the Larrabee patent as a work-supporting cylinder has a movement in relation to the scouring roll, but none in relation to the feed roll; that the movement in relation to the scouring roll, is for the purpose of feeding the pressure of the roll upon the hide; and that there is no provision by which the hide can be

withdrawn after it has once commenced to feed. The first claim was therefore withdrawn, and the following substituted: "(1) In machines for unhairing and scouring skins and hides, in which two feed rolls are employed in feeding the hide or skin to the scouring roll, D, provided with a vertical movement in relation to the feed roll, D', by means of the treadle, F, and suitable connecting mechanism with said feed roll, D, whereby the said rolls may be separated and held apart, substantially as described, and for the purposes set forth."

Mr. Clarke further says in this same communication: "The applicant is aware that it is common, in leather-working machines, to provide vertical adjustments to rolls or cylinders by means of levers and their intermediate connections; but he is not aware that these adjustments have been made in machines for unhairing, working out, and scouring skins and hides for the purpose of enabling a workman to withdraw a skin or hide that has become wrinkled or folded upon itself in the feeding, so that by supporting the feed roll, and by moving the supporting roll from the scouring roll, the skin may be drawn back by the operative, and again fed, without the necessity of feeding the same through the machine, stopping the machine, removing it from the pile on the other side to again feed it to the feed rolls, which it is necessary to do with the machines now in use." That is, the principal idea that lay in McDonald's mind was to have the two feed rolls separate in a four-roll machine, and you will observe that in these communications with the patent office that idea is pressed upon the examiner as the leading and principal improvement in his patent. In the prior Roberts machine there existed only the separation of the work roll and the supporting roll. In the prior McDonald patent that same feature is found. Now, McDonald said it is necessary to separate the feed rolls in order that the operator may be able to withdraw a hide which is improperly presented; to remedy, in other words, the defect of permitting the hide to pass entirely through the machine, fall upon the other side, and then to be taken up and presented to the machine again.

The applicant, through Mr. Clarke, still further follows up and enforces this view of his patent in his dealings or correspondence with the patent office. Under date of October 28, 1878, the examiner, in reply to the last communication from the applicant's attorney, uses this language: "It is not unusual to provide two feed rolls in a leather-working machine, and the employment of levers and springs as means for adjustment has been shown to be old." At that date, therefore, the amended claim—the first claim of the application—stood rejected.

To that communication from the examiner, Mr. Clarke replies, under date of November 14, 1878, in part, as follows: "In presenting a hide or skin to feeding rolls, the same is liable to become folded upon itself, if not properly fed; and, if a hide is so fed that it shall be presented in a folded or wrinkled state to the unhairing or scouring roll, it, of course, will be imperfectly dehaired or scoured. In all the inventions heretofore employed for unhairing and scouring, no provision has been made for withdrawing the hide or skin from between the feeding rolls before it is operated upon by the scouring roll; and consequently every hide or skin that was not fed in a perfectly flat condition, so that no wrinkles or folds could occur therein, had to pass entirely through the machine, imperfectly scoured or unhaired, and required to be again passed through the machine, in a perfectly flat condition, in order to perfectly free it from hair, or work it. Thus, in imperfectly unhairing and scouring one hide, there was consumed time enough for perfectly scouring two hides. If, however, the hide could have been withdrawn before it reached the scouring roll, by separating and holding apart the feed roll, the time would have been saved. Mr. McDonald has discovered that it is possible to save this time, and he effects it in a way which seems very simple after he had accomplished it, but nevertheless was entirely unknown and unpracticed before he conceived it; that idea being the separation of the feed rolls. The conception of the separation of the working roll and the scouring roll was old. He accomplishes it by so supporting and actuating one of the feed rolls that it can not only be lifted by the movement of the lever, but it can be held apart sufficiently long to withdraw the hide if improperly presented. Mr. McDonald was as well aware that rolls had been given movements or adjustments in relation to other rolls, in certain classes of machines, as he was that the feeding rolls of an unhairing machine had never been organized to accomplish

the result that he accomplishes. His invention consists, not in moving one roll from another,—for the same is very old, not only in leather-working machines, but in a great variety of devices where it is desirable to increase or lessen the space between rolls,—but it does consist in moving one roll for another at a certain time for a certain purpose, and in a certain machine; and there is as much invention in moving a roll at a certain time for a certain given purpose as there is in discovering that one roll may be separated from the other for the purposes of any desirable and new adjustment. Mr. McDonald's invention does not depend upon the means for separating the rolls alone, but it further depends upon the time when said separation is to be employed; and Mr. McDonald, so far as the references show, is the first man who has arranged two feed rolls so that one of them may be lifted and held at a certain specified time to accomplish a certain specified result."

The letter then considers more in detail the three references to which the patent office referred the applicant in the first communication which was made to him. The letter further says, "I am so firm in my conviction that neither of the three references cited meet the invention of Mr. McDonald that I will incorporate the following amendment in the specification."

He then proceeds to incorporate into the specification the amendment which remains now as a part of the patent. That amendment points out and describes the Coogan machine, the Roberts machine, and the Larrabee machine, and then follows this language: "But neither the boarding, pebbling, and glossing machine of Coogan, with its rolls revolving in the same direction to carry the end of a folded sheet of leather in an opposite direction, nor the device in the Roberts machine for pressing a hide against a pressure roll, nor the mechanism shown in the Harrington patent for pressing a hide against a knife cylinder without changing its relative position to the other feed roll, constitute the spirit of my invention; and neither of the three patents show or describe two feed rolls for feeding a hide or skin to a scouring roll, so arranged in relation to each other and to the scouring roll that one of said rolls may be lifted from the other and held apart while a hide which has been improperly fed is drawn back by the operator before it has passed the scouring roll, to be properly fed to the said scouring roll, which constitutes the spirit of my invention."

Then follows an amended first claim in the following language, to be substituted for the last amended first claim, which was rejected. "In a machine for unhairing, scouring, and working out skins and hides, in which two feed rolls are employed in feeding the hide or skin to the scouring roll, the combination with said scouring roll of the feed roll, one of which is provided with a vertical movement in relation to the other by any suitable means whereby the said rolls may be separated and held apart when desirable, for the purposes stated."

That further amended first claim was rejected in a communication from the examiner dated November 19, 1878. In a further communication from the examiner, dated November 27, 1878, we find the following language: "The last amendment and argument has been carefully considered. It has been shown by pertinent references that a combination of coating rolls and a lever-adjusting mechanism is not novel. In fact it is common, in most leather and hide working machines, to provide adjustment with relation to each other, where feed rolls are employed, before careful examination. It is obvious in this case that the novelty, so far as the lever mechanism is involved, consists in the peculiar arrangement of such mechanism, whereby, from a single movement of the lever, the feed rolls are separated, and the supporting roll is adjusted relative to the scouring roll." That is, the examiner says, in substance: "Mr. McDonald, you can have no patent for the separation of the two feed rolls by the lever mechanism, because that feature is old; but you may have a patent for the combination of that feature with the other feature of the separation of the work roll from the supporting roll, both sets of rolls being separated by a single movement of the lever. You admit that the separation of the work roll and the supporting roll is old. We hold against your urgent contention that the separation of the two feed rolls by a movement of the lever is old, but you may have a claim for the combination of those two elements operated by a single movement of the lever."

But the applicant still remained unsatisfied. He still presses upon the pat-

ent office that the spirit of his invention is the opening of the two feed rolls combined with a work roll, in an unhairing machine, by lever mechanism; and in a communication from Mr. Clarke, dated November 23, 1878, we find the following comments: "Office letter of Nov. 19, in relation to the above-named application, is at hand, and contents noted. From its contents, I perceive that the examiner does not fully comprehend the nature of the applicant's invention. I therefore desire once again to call his attention to the matter, and I will make such a comparison between the invention of Mr. McDonald and the cited references as will show that the subject-matter of the claim, as it was intended to word it, is not found in any of the references cited, and that such adjustment can only be of use in an unhairing machine, and that none of the references cited as analogous machines describe, or in any way show or hint at, any such combination. The claim also is erased, and a more specific one inserted in lieu thereof, to more clearly express Mr. McDonald's invention." You will observe that these changes in the claim represent an effort on the part of the applicant to make more specific what his invention is, and that it relates to the feed rolls alone, the capacity of separation, with a work roll in an unhairing machine.

This first claim now assumes this form: "In a machine for unhairing, scouring, and working out skins and hides, which contains a pair of feed rolls to feed the skin to the scouring roll, and a scouring roll to work the same, the combination with the scouring roll of a pair of feed rolls, one of which is provided with suitable means of adjustment to and from the other feed roll, without changing the relations of the feed apparatus to the scouring roll, substantially as described." This certainly does not claim anything set forth and shown in either of the references, and is not itself shown in either of the mechanisms referred to.

The boarding machine of Coogan has only two rollers, not three, and therefore is lacking in one element, and a very important one, of the combination. Both his rollers are working rollers, while only one of the applicant's three is, in the same sense, a working roller. The Roberts machine, patent No. 184,175, has, again, only two rolls in the described combination; or, if you add to the combination containing the adjustable roll, the feed rolls, it is a combination of four rolls, two of which are working rolls, and adjustable to and from each other, the other two of which are feed rolls, and are not adjustable to and from each other. In our case there are but two rolls, and the feed rolls contain the adjustability, and not the working rolls. In the Harrington machine, we come upon the machine which has three rolls, one of which has a working roll, as in our case. The other two are feed rolls, and one of the feed rolls is movable, and swings upon the axis of the other to and from the scouring roll, thus acting as a working roll or pressure roll, as in the case of the Roberts machine. But this machine does not embody the combination of feed rolls adjustable to various gauges, with a scouring roll set with relation to the feed rolls at an unvariable gauge, but it embodies the combination of a scouring roll set at a variable gauge with one of the feed rolls; that is, the scouring roll is set at a variable gauge with one of the feed rolls in the Larrabee of Harrington device. The feed roll may be moved towards the scouring roll.

It is not the time when the adjustment of the roll takes place that is important. It is the act that the machine is performing, and the error that it falls into, that has led to this improvement; and it is clear that if such an error should be committed by the Harrington machine as the one we are providing against,—that error being the wrong presentation of the hide, and the capacity to withdraw it by the workman,—it could not be corrected in the same way. It could not be corrected in the same way in the Larrabee or Harrington machine, because, according to the applicant's interpretation of that machine, the feed rolls had no motion with respect to each other. But it is also true that the Roberts machine presents no method analogous to this for correcting a similar error in the working machine; and inasmuch as the Coogan machine cannot do the work which this machine proposes to do, and has no scouring roll whatever, and no feed rolls, but simply a pair of kneading rolls or dragging rolls, it is useless to consider that reference any further. Then follows this significant language: "It is therefore obvious that the combination which the applicant claims, embodying the peculiar features of a pair

of adjustable gripping rolls in combination with a working roll, towards which the gripping rolls are not adjustable" (that being the peculiar feature of the Larrabee machine), "and with which neither of the gripping rolls performs the function of a pressure roll" (that is, neither of the feed rolls, according to the spirit of the McDonald patent, performs the function of a pressure roll), "has not been anticipated, so far as any reference yet given has shown. And it must also be obvious that the claim, as now presented, indicates"—what? "Fairly, the peculiarity of this invention, and is not broader than the invention itself." That ends the correspondence with the patent office.

What followed? The applicant accepted the position taken by the patent office, and the patent was issued as we now find it. The patent office said, in substance, to McDonald: "You cannot have a claim for what you consider as the spirit of your invention, namely, two feed rolls so arranged with reference to each other and to a scouring roll that one of said feed rolls may be lifted from the other and held apart while a hide which has been improperly fed is drawn back by the operator before it has passed the scouring roll; but you may have a claim for this feature, which is old, in combination with another feature which you admit is old. In other words, you may have a claim for that special arrangement or combination whereby, from a single movement of the lever, the feed rolls are separated, and the supporting roll is adjusted to the scouring roll." This position was accepted by McDonald, and the patent was issued.

I think the proceedings in the patent office, and the language of the specification, show that McDonald never contemplated, as included within his invention, a feed roll which performed the double function of a feed and pressure roll. Indeed, when he has referred to such a roll in the Larrabee machine, he denies that his feed roll has any such double function. He says, in substance, that his feed rolls do not perform the function of a pressure roll, and that his feed roll is not adjustable towards the scouring roll. It was natural for him to say this, for this was the type of the three-roll machines as represented by Larrabee, Weed, and Sheldon, and he was dealing with a four-roll machine of the Roberts class. I think it may be fairly said that McDonald has disclaimed the use in his machine of a single feed roll which has the additional function of a pressure roll.

If, however, we assume that no such limitation exists, we are met with a further difficulty, assuming that the patent is not thus limited.

If the first two claims in the patent are to be interpreted without regard to what took place in the patent office, or to the recital in the specification of the patent to which I have referred, we must then examine the scope of those claims. The first claim covers broadly the combination with feed rolls and a supporting roll of a lever and intermediate mechanism, whereby, by a single movement of the lever, the feed rolls are separated, and the supporting roll adjusted to the scouring roll; and the second claim is for the feed rolls which can be separated, and a scouring roll and a supporting roll which can be separated, the intermediate mechanism not being specifically made a part of this claim. These claims, as I interpret them, include only the four rolls, and the means for separating them by a single movement of the lever. Now, if we say that these claims are not limited to the use of four rolls, but that they cover a machine with three rolls, in which the lower feed roll acts both as a feed and pressure roll, then we are met by the Weed patent, where by a single movement of the lever the lower feed roll is separated from the upper feed roll and the work roll. This patent appears to have escaped the attention of the patent office. Whether Weed used the same or a different kind of work roll makes no difference, provided that the essential thing was present in his machine, of separating all the rolls by a single movement of the lever or treadle. Nor does the fact that the act of pressing the foot on the treadle in the Weed machine brings the rolls together, while the same act in the McDonald machine releases the rolls, seem to be regarded by McDonald as a part of his invention. I was at first inclined to attach importance to this distinction, but upon reflection, supplemented by the evidence, I am satisfied I was mistaken. The circumstance that the rolls are held together by spring pressure in the McDonald machine is not an element in these claims. The words "substantially as described" do not enlarge the terms of a claim beyond what is mentioned or referred to in the claim as the elements of the combina-

tion. If, therefore, these claims of the McDonald patent are to receive the broad construction which their language justifies, they are anticipated by Weed. In the old equity case of McDonald v. Whitney, 24 Fed. 600, the Weed patent was not before the court.

It being admitted in the present case that the defendant's machine is constructed with three rolls, the lower feed roll acting both as a feed and pressure roll, I must direct a verdict for the defendant, on the ground that there is no evidence to go to the jury to support the charge of infringement.

James Milton Hall, for plaintiffs in error.

Joshua H. Millett and Ralph W. Foster, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. When this case was before this court on a prior occasion, the exceptions were not framed to bring before us the issue which is now raised as to the construction of the plaintiffs' patent, but only the proper manner of submitting to the jury certain other issues, which, it was not disputed, were proper to be submitted to it in some form. We are now asked to consider the question raised by the following extract from the record:

"After the evidence was all in, and counsel had submitted requests for rulings, the presiding judge directed the jury to return a verdict for the defendant on the ground that there was no evidence to go to the jury to support the charge of infringement, and ruled as follows: The evidence being closed in this case, and the requests for rulings having been presented by the counsel upon both sides, I am prepared now to state the conclusions that I have reached with respect to the construction of the McDonald patent in suit, which has an important bearing upon the case. I am of opinion that the McDonald invention, described in claims 1 and 2 of his patent of December 10, 1878, must be limited to a machine containing two feed rolls, a supporting roll, and a scouring roll, and that a machine which contains three rolls—the lower roll acting as a combined feed roll and a supporting roll—is not within the patent."

What follows this need not be recited at this point, as it only gives the explanation by the presiding judge of the reasons governing his conclusion. As it does not appear that the defendant below asked that a verdict should be directed for him for any particular reason specified by him, or that he in any way limited himself, it follows that if the conclusion of the circuit court was right the reasons which led to that conclusion afford plaintiffs below no ground of question in this court.

In the extract we have made from the record the issue is first put as one of infringement, but subsequently it is stated as one of construction of the plaintiffs' patent. Either way of stating it may be said to be correct. When the essence of an alleged infringing machine is not in dispute, so that the question of infringement by it turns so plainly on the true construction of the patent alleged to be infringed that, such construction being ascertained or not in dispute, a verdict in one direction ought to be set aside as against the weight of evidence, then, under the rule as now understood, the court ought to direct a verdict in the other direction; and under such circumstances the issue of infringement is essentially the same as that of the construction of the patent in suit. In the case at bar there was no dispute as to the essence of defendant's

machine, and there can be no reasonable question of fact that, upon one construction of the plaintiffs' patent, defendant's machine infringed it, and upon another that it did not. And if, therefore, the construction of plaintiffs' patent was for the determination of the court, either on the face of the patent, or on the face of the patent in connection only with facts of such nature that their existence and effect could not be reasonably disputed, it follows that the entire issue of infringement was practically for the court, however it might have been with issues of novelty and patentability, or other issues which might have been raised if the issue of infringement could properly have been submitted to the jury, or determined for the plaintiffs.

So far as concerns what is for the court and what for the jury, there is no essential distinction between patents for inventions and other instruments. Primarily, the construction of all of them is for the court; and yet all such, even obligations under seal, and, under some circumstances, solemn records of judicial tribunals, have relation to disputed facts, which must be determined by the jury before the construction can be finally settled. In such instances the issue is often spoken of as one of mixed law and fact. Yet, the doubtful facts being determined, the construction remains for the court, though the form where verdicts are general and not special may have a different appearance. Where the facts are not in dispute, or, if in dispute, are so clearly proven and of so clear effect that they come within the rules for directing verdicts, the construction of the instrument remains throughout practically for the court, even though under the form of directing the jury what determination to make. This was the precise condition of this case in the circuit court. It is quite probable that, if the question of infringement could have been determined in favor of plaintiffs, other issues would have followed, which must have gone to the jury. Such issues have been discussed before us, but, if the issue of infringement was correctly determined in connection with the construction of the patent in suit, we have no occasion to refer to others, except to remark that it was not necessary to send the case to the jury on account of contingencies which might have made these important, but did not.

Holding these rules in view, the case becomes very simple. The progress of McDonald's application through the patent office was clearly and fully explained by the learned judge in the circuit court; but we need not refer to it, except briefly. The first claim, as originally offered, was as follows:

"In machines for unhairing and scouring skins and hides, the feed roll, D, in combination with the treadle, F, and suitable connecting mechanism, whereby the rolls may be separated and held apart, substantially as described, and for the purposes set forth."

There was also, originally, a second claim, as follows:

"In machines for scouring and unhairing and working hides and skins, the combination of the supporting roll, G, with the treadle, F, and suitable connecting mechanism, whereby the same may be moved and held from the scouring roll, substantially as and for the purposes set forth."

These were each rejected as having been anticipated by prior patents, and for the additional reason, given by the examiner, that "it is common, in leather-working machines, to provide vertical adjustment to rolls or cylinders by means of levers and their intermediate devices." McDonald acquiesced in the position of the examiner; and the final result was the first claim as it now stands, covering a combination which, according to its letter, contains, as elements, two feed rolls, a pressure roll, and a working roll,—in all, four distinct rolls, arranged in two sets, with levers for opening each set simultaneously. The second claim was originally drawn as the third claim, and was in essence the same as the first claim now is, and has always so remained. The proceedings therefore involve a clear and unquestionable disclaimer, by amendment, of a combination which adjusts merely one feed roll or one pressure roll with reference to another roll, even under all the limitations of the rule touching this form of disclaimer fully stated by this court in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 61 Fed. 958.¹ Neither is the effect of this amendment complicated by the proposition now made, that McDonald was the first to construct a machine in which the rolls were closed when the machine was in its normal condition, and that this was a distinguishing feature of his combination, to be protected by the doctrine of equivalents. This particular of his machine appeared in his first and second claims as first drawn, so that, if this was a feature of novelty or a function of his invention, these claims, as thus drawn, should have been allowed; and it follows that his disclaimer by amendment covers this feature or function also.

Now, with reference to the adjustment of the rolls, the record shows clearly the construction, operation, and principle of the alleged infringing machine, and in this connection there can be no dispute nor obscurity. Plaintiffs' declaration contains a continuing, covering the period from the 5th day of August, 1885, to the date of the writ, and we have no concern with the somewhat different machines built by the defendant between 1881 and 1885. The defendant's machines involved in this suit are clearly described in the record as having three rolls, held together by spring pressure and a treadle and lever mechanism, by which all the rolls are simultaneously separated by a single movement of the lever. It appears by the record that this machine has the feature, apparently common to all three-roll machines, by which one roll serves the purpose of both a feed roll and a pressure roll; and the separation in the defendant's machine in controversy, the record says, is brought about by this feed and pressure roll moving away from the upper feed roll and the work or scouring roll. In another place in the record the operation in this particular is described in the following language:

"The Whitney machine has an upper feed roll and a lower feed roll, so that it has two feeding points. The upper feed roll and the lower roll, working together, do nothing but feed the hide along, precisely the same as the

upper feed roll and the lower feed roll feed it along in the McDonald, and they have no other function. The lower feed or pressure and the work rolls in the Whitney are also feeders. The rubber or lower roll acts as a feed roll upon the surface next to the upper feed roll. It acts as a feed roll also upon the surface next to the work roll. At that last-mentioned point it also acts as a pressure roll to make this roll work; that is, unhair the hide."

Again, on page 20:

"Pressure on the treadle in the Whitney machine throws the lower roll out in a lateral direction, and releases it from the work roll, and also from the feed roll above, and it releases the hide from two points."

It thus appears that in the operation of the alleged infringing machine only one roll is adjusted or moved. The proceedings in the patent office disclaim, as old, the use of a treadle and levers by which a single roll can be operated and adjusted; and McDonald's invention was thus admittedly limited to the more complicated system of levers and connections required to operate simultaneously, easily, and for practical purposes, two rolls, each of them embraced in different sets of rolls in the same machine.

Whether, in any event, anything claimed by plaintiffs to have been accomplished by McDonald involved invention, within the requirements of the patent laws, or whether he was anticipated, except so far as admitted by the proceedings in the patent office, or whether the general principles of the defendant's machine are the same, or its mercantile qualities depend on the same general features, as the plaintiffs', we do not determine. If the case turned on any of these issues, the law might have compelled the court below to ask the aid of a jury touching it; but, as the case in fact stands, they can all be assumed to be as maintained by plaintiffs, or passed by entirely, because the case is disposed of before their consideration is reached. We refer to them again only to make sure that it is not misunderstood that we are dealing only with the face of the patent, and with undisputable facts of the character which we have described. To return, therefore, to our last proposition, we add that each of the two claims of plaintiffs' patent under consideration harmonize with that proposition by the use in this particular of clear and positive expressions. Each of them, in terms, includes two full sets of rolls as elements in the combination. The rule, *prima facie*, is that, while the use of equivalents for an element in a combination is not lawful, yet a combination which does not include all the elements does not infringe. There may be exceptions where the nature of the invention is of such a primary or broad character that it is plain some of the elements named are unessential; in other words, where the invention is so broad that the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 310. But there is no reasonable basis for maintaining, either as a matter of law or fact, that the case is outside of the rule applied to ordinary combinations in *Meter Co. v. Desper*, 101 U. S. 332; *Fay v. Cordesman*, 109 U. S. 408, 420, 421, 3 Sup. Ct. 236; *Knapp v. Morss*, 150 U. S. 221, 228, 229, 14 Sup. Ct. 81; and *Dunham v. Manufacturing Co.* 154 U. S. 103, 14 Sup. Ct. 986.

The appellants rely on *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, laying down the rule that the question of what is a primary or pioneer patent, and also the question of the differences between the patented machine and the alleged infringing machine, are for the jury; but even in this case the court (page 325, 135 U. S., and page 833, 10 Sup. Ct.) recognizes the exception that these questions are not to go to the jury when, if a verdict should be found on them for the plaintiff, it would be proper for the court to set it aside. That in the present case any finding of a jury that McDonald's invention, in whatever form it could reasonably be stated by the plaintiffs, was excepted from the practical application of the rule touching mere combinations stated in the cases cited, could not be accepted by the court, and that there are no facts in the case which, on any reasonable theory, could state the mechanical principles of McDonald's machine and of the alleged infringing machine, so far as they are now involved, other than as we have stated them, are plain propositions.

The reference to the Larrabee patent in McDonald's specifications, on which the appellants rely, instead of weighing against our propositions, adds to them. It is referred to, with other patents, for the purpose of stating that neither of them "show or describe two feed rolls for feeding a hide or skin to the scouring roll," etc. In the absence of qualifying matter, the fair interpretation of this expression is the literal one.

The appellants rely on the fact that the patented machine was the first successful one, and on the fact that it had great commercial success. The decisions touching the effect of these propositions are so numerous and modern that they need not be referred to specifically, but they limit the application of them to doubtful cases turning on questions of utility or patentable invention. They have no pertinency to cases which turn on the construction of the patent. We think no well-authenticated case can be found where they have been admitted with reference to such issues. On the whole the majority of the court are satisfied with the conclusion of the circuit court.

The decree of the circuit court is affirmed.

FRENCH v. KRELING et al.

(Circuit Court, N. D. California. August 13, 1894.)

UNPUBLISHED OPERA—UNAUTHORIZED PRODUCTION—ACCOUNTING FOR PROFITS.

One who produces an opera without authority from the author must account to him for the profits, where such opera has never been circulated or published, though copies had been printed for the private convenience of performers, in learning their parts.

Bill for an accounting by T. H. French against Joseph Kreling and others. There was a decree for plaintiff, as prayed.

Joseph D. Redding, for complainant.

HAWLEY, District Judge. This is a bill in equity to compel respondents to account for the receipts of the Tivoli Opera House, at which the operetta of Falka was performed, and for other and further equitable relief. From the testimony taken on behalf of complainant, it appears that he is the owner of said operetta; that one Henry Farnie, of London, England, was the author and composer of the dialogue and words of the songs of said operetta, and that it was by him adapted into the English from the French original, entitled "Le Droit d'Ainessi;" that this English adaptation is in many respects an entirely original work; that from the middle of the second act to the end of the third act the plot and situations are entirely original; that four of the characters, and all the situations and dialogue appertaining to the characters, were the creation of Farnie; that the entire English dialogue of Falka is original; that the title "Falka" is an original title affixed by Farnie; that prior to his composition of the dialogue, words, and songs, the said operetta had never been used in connection with any other composition or operetta; that the music was written by Francis Chas-saigne; that the operetta consists of a libretto in three acts, and a musical score; that the dialogue, words, songs, and spoken parts thereof have never been published; that the musical score has been published with the words of the songs so set to music; that the dialogue, libretto, and stage business, etc., have never been published; that, if any copy of said unpublished libretto ever came into the possession of respondents, such copy was obtained by illegal means; that the authorship of said operetta has been asserted in newspapers, and has been known and recognized throughout the United States; that royalties have been received from the licensed performances thereof; and that the property of said operetta is valuable, etc. Upon the part of the respondents, it was attempted to be shown by the testimony of Alfred Hays, of London, England (a musical publisher), that the comic opera Falka had been published in book form. The testimony of this witness, which is quite lengthy, fails to show any such publication. He testified that:

"The words were printed for the use of the artists to learn their respective parts. The book was printed in 1888; and was never in circulation. Such books were kept by myself at my private residence, under lock and key, and copies were handed to the stage manager by myself. As he required them, he would hand them to the artists, to be used by them only for the purpose of learning their respective parts. * * * They were never published and circulated. The book was only printed for the convenience of the artists, to enable them to learn their parts. * * * I say that said book, nor any counterpart thereof, has never been published. It was merely printed for the private use of the artists, as is the custom in this country, and is not now public property."

This book, upon its title page, contains the words, "Right of representation and reproduction reserved;" and on the inside page is written in ink the names of the original cast in America, and at the top of the next page, written in ink (evidently in the same handwriting): "Property of F. J. McCarthy. Presented to him by E. J. Steyne, Comedy Theatre, London, E." In the original cast of characters appears the name of F. J. McCarthy as "Tekeli."

The law protecting the rights of authors in their compositions, literary and musical, where they have not been dedicated to the public, or published with the author's consent, is well established. The principles announced by this court in *Goldmark v. Kreling*, 11 Sawy. 215, 25 Fed. 349; *Henderson v. Tompkins*, 60 Fed. 764; and in *Drone on Copyrights*, §§ 97, 121, 383, 526,—are conclusive in favor of complainant's right to a decree, with costs. Let a decree be so entered.

SNOW v. MAST et al.

(Circuit Court, S. D. Ohio, W. D. August 4, 1894.)

1. COPYRIGHT OF PHOTOGRAPH — EQUITY JURISDICTION — SUIT FOR PENALTIES AND FORFEITURES.

Complainant filed a bill to recover penalties and enforce forfeitures, under Rev. St. §§ 4963, 4965, for infringement of copyright on a photograph, and also prayed an injunction, and that defendants be required particularly to answer how many copies they had sold. *Held*, that there was an adequate remedy by action at law, and equity had no jurisdiction.

2. SAME—DISCOVERY.

Under Rev. St. § 860, an alleged infringer of a copyright on a photograph cannot be required, by answer or otherwise, to disclose any fact upon which a claim against him for penalties and forfeitures accruing under Rev. St. §§ 4963, 4965, may depend.

This was a bill in equity by Blanche L. Snow against Mast, Crowell & Kirkpatrick for infringement of copyrights of photographs.

Wood & Boyd, for complainant.

Keifer & Keifer, for respondents.

SAGE, District Judge (orally). The bill is for an injunction and account. It is founded upon the alleged infringement by defendants of three separate copyrights of photographs, with reference to each of which the complainant seeks to recover penalties for the violation of sections 4963, 4965, Rev. St. U. S. The complainant prays for an injunction, and that the defendants appear and answer all the averments of the bill,—particularly, how many copies of each of said copyrighted photographs they have sold, and the number they have on hand,—and that they may be ordered and decreed to render an account of the copies that they have sold, or in any wise disposed of, together with those on hand or under their control; also, that they may be ordered to surrender and deliver up the copies on hand or under their control, and the plates from which they were made, to an officer of the court, to be sold or destroyed, and that they may be ordered to pay into court, to be distributed according to law, the damages established by law as the penalty for their aforesaid unlawful acts and doings, and for other relief. The defendants demur to the bill generally for want of equity, and that the bill is multifarious, and for other reasons.

The demurrer will be sustained, and the bill dismissed. The complainant has a plain, adequate, and complete remedy at law, by an action. This consideration, of itself, disposes of the bill, under sec-

tion 723, Rev. St. U. S., and under the general rule as to equity jurisdiction. In addition to this, section 860, Id., provides that no pleading of a party, nor any discovery or evidence obtained from him, whether as a party or witness, by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. The defendants cannot be required to make disclosure, by answer or otherwise, of any fact upon which the claim against them may depend, nor can they be required to produce any books or papers which would subject them to a penalty. *Johnson v. Donaldson*, 3 Fed. 22. Even in a civil action for the recovery of a penalty, the defendant is exempt from answering specifically the allegations of the petition. The proper answer, in such a case, is that he is not guilty of the wrongs charged against him.

It is not necessary to consider any of the other grounds upon which the demurrer is based. There is no case in equity against the defendants. The bill will be dismissed at the complainant's cost.

THE RAVENSDALE.

ANDERSON v. THE RAVENSDALE et al.

(District Court, S. D. New York. March 2, 1894.)

SHIPPING—PERSONAL INJURY—HOISTING CARGO—NEGLIGENCE—FELLOW SERVANTS.

Where the libellant, a longshoreman, was injured by the fall of a draft of boards which were being hoisted aboard a steamer, and the evidence showed that the cause of the accident was the improper fastening of the draft, so that the draft did not tauten as it should have done when the draft went up, *held*, that it was immaterial by whose fault this occurred, since it was certainly done by one of the several workmen engaged in the same common employment, which would prevent any recovery by the libellant.

This was a libel to recover damages for personal injuries, filed by Saverin A. Anderson against the steamer Ravensdale and Roberts Bros., stevedores, who were loading said steamer.

Hyland & Zabriskie, for libellant.

Convers & Kirlin, for the Ravensdale.

Charles C. Nadal, for Roberts Bros.

BROWN, District Judge. On the 16th of February, 1891, while the lighter Georgia Pine was lying alongside the steamer Ravensdale, at the Atlantic basin, and delivering a cargo of boards to the steamer, the libellant, who was captain of the lighter, and was assisting a gang of men employed by Roberts Bros., stevedores, in hoisting the boards upon the steamer, was severely injured by the fall of a part of one of the drafts, just before it was hauled over the steamer's rail. One of the vertebrae of his back was dislocated, causing incurable paralysis of both the lower limbs. The above

libel was filed to recover for the damages against the Ravensdale, and the stevedores who were loading her.

The boards were hauled up in drafts of 25 or 30 boards. There is contradiction whether these were secured by a sling, passed around them with a double turn, or whether the fall rope itself was run twice round and then hooked to the same rope, without a sling. This fall ran to a block attached to a boom rigged to the steamer's mast, and from thence was operated by a winch on board the steamer. The boom was designed to swing out when the draft was to be taken up, so as to keep the draft free from contact with the side of the ship, and to swing in as soon as the draft was above the rail. The top of the steamer's rail was from 10 to 15 feet above the load of boards on the deck of the lighter. The boards were from 12 to 14 feet long, and were fastened by the rope or sling at about two-thirds of the length towards the upper end of the draft.

The libelant contends that the draft by which he was injured, as well as others before it, caught against the projecting parts of the steamer's side, or against the projection of the rail, which was from one to two inches; that this liability ought to have been guarded against by the use of a skid; and that the catching of the upper end of the draft loosened the hold of the rope around it, and caused the boards to fall.

The defendants contend that there was no projection on the ship's side, save the slight projection of the rail, which was rounded; that the ship had skids, but that they were not used, because it was not customary or necessary to use them with a smooth, iron-sided ship like the Ravensdale, but only with wooden ships, to protect the vessel's side; that this draft did not catch at all, and that the boards fell, because the sling, after being passed around the draft by the libelant himself, was improperly run through a loop made at the thick, stiff splice of the sling, instead of away from the splice, whereby the natural and proper tightening of the sling around the draft as it was hoisted up was prevented; and that the libelant was previously remonstrated with for making the loop of the sling at that splice. The libelant testified that no sling was used, and that, so far as he remembered, he had nothing to do with adjusting the rope around the boards.

Deeply as I sympathize with the libelant in the helpless condition in which this accident has plunged him, I cannot find that he is entitled to a decree against either of the defendants, without doing violence to the canons of legal decision. Except in the single particular as to whether the libelant himself adjusted the rope or sling, in which his young son sustains him, the libelant is not corroborated in his material statements by any other witness, but is contradicted by them all. Practically, his case rests wholly upon his own testimony. While this is not absolutely insurmountable as against five witnesses who contradict him in every material particular, it is at least necessary to his success that his account should be sustained by circumstances, and appear to be, on the whole, the more credible of the two accounts of the accident; and

such corroboration is here wanting. Had the fall rope broken in the ascent, such a circumstance would have been a strong corroboration of the witness' testimony that the draft caught; but here nothing broke. Had the upper end of the draft caught in going up, as the libelant avers it did, that would naturally have tightened the hold of the rope, as all the witnesses testify. But the libelant himself says that he watched the draft until the lower end of it was within about 2 feet of the top of the rail; so that at that time the upper end of the draft must have been hoisted up 10 or 12 feet above the highest place where it could have caught; and at that time, as the libelant testifies, he saw nothing out of order in the draft, but "it appeared all right;" and then he turned around to take up some other boards. Had the top of the draft caught against the rail, the highest possible point, and thereby caused the rope to become loosened, the lower end of the draft must have been at that time upon the deck of the lighter, or very near to it; and the effect of the loosening must have been visible when the upper end was swung off; yet nothing like this was seen then, or while the draft went some 10 or 12 feet higher up; and the loosening and sliding back of the boards would, moreover, have occurred when the lower end of the draft was on or near the lighter's deck, and where the slipping of the boards could not have produced this accident to the libelant. The libelant's testimony, therefore, does not, on the whole, make it probable that the absence of a skid caused the accident, or even contributed to it; while upon the defendant's testimony, it certainly did not.

The account given by the defendants, on the other hand, does furnish, apparently, a reasonable explanation as to how this happened, viz. through the insecure mode of fastening the draft, so that the rope did not tauten as it should have done when the draft went up. It is immaterial, as respects the libelant's right of recovery, by whose error or fault this happened, since it was certainly done by one of the several workmen engaged in the same common employment. The testimony is too strong against the libelant to permit a decree in his favor, and I am, therefore, constrained to dismiss the libel; but, under the circumstances, without costs.

VESSEL OWNERS' TOWING CO. et al. v. WILSON et al.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 151.

1. NEGLIGENCE—OBSTRUCTION IN NAVIGABLE STREAM.

The faces of the piers of a drawbridge were not perpendicular, but were built out under the surface of the water, in irregular projections of steps to the bottom of the river. Contractors, in repairing the bridge, took up piles which had been driven around the piers to ward off vessels. *Held*, that they were liable for injuries sustained by a vessel striking against the under-water projections of a pier.

2. TOWAGE—NEGLIGENCE.

A loaded vessel, while being towed down the Chicago river in broad day, struck against the abutments of a bridge pier extending below the

surface of the water. These abutments had existed for 25 years, but had been guarded by piles which had been lately removed. *Held*, that the tug was guilty of negligence.

On Appeal from the District Court of the United States for the Northern District of Illinois.

Libel by Thomas Wilson, R. McLaughlin, Mary P. Wilson, D. Morris, Wilson D. Morris, Thomas E. Quayle, William H. Quayle, George L. Quayle, Alvira Scott, Luther T. Lyman, William Wilson, the Maritime Insurance Company, and the Insurance Company of Philadelphia against the city of Chicago, the North Chicago Street-Railroad Company, the Vessel Owners' Towing Company, and the Fitz Simons & Connell Company. Libelants obtained a decree against the Vessel Owners' Towing Company and the Fitz Simons & Connell Company, and the latter appeal.

This was a libel by the owners of the steamship Wallula and by the owners and insurers of her cargo for injuries sustained by the vessel and cargo in collision with the south abutment of the Wells street bridge over the Chicago river in the city of Chicago during an attempt to pass down the river and through the south draw of the bridge, under the following circumstances: The piers of the Wells street bridge were constructed some 25 years ago. Above the surface of the water they presented a smooth face of masonry; below the surface they were built in footing courses extending from a point five feet below the surface some six feet into the river, in irregular projections of steps, to the bottom of the river. A row of spiles was maintained by the city of Chicago in the river along the face of the abutment, driven close to the abutment at its base, and standing some six feet from its face above the water, serving to ward off vessels from contact with the abutment. The other and more modern abutments of other bridges over the river were not so constructed, but present a smooth batter face to the bottom of the river, and, while not perpendicular, were constructed at a very slight incline, the projecting spiles being only some two feet from the face of the abutment above the water. A street-railway company, under an arrangement with the city, undertook to construct new abutments and a new bridge at Wells street. The appellant Fitz Simons & Connell Company became the contractor for the erection of the substructure. The piers or abutments were to be taken out and removed some 10 feet nearer the shore, increasing the width of the draws of the bridge, then some 16 feet. By its contract it agreed to erect and maintain such guards, and during the nighttime such lights, as would prevent the happening of accidents or harm to life or property in consequence of the digging up, use, or occupancy of any highway, and covenanted for liability for all damages occasioned by the digging up or use or occupancy of any highway, or which might result therefrom, or from the carelessness of any servant of the company. Work was first begun in the north draw, and was completed early in the month of April, 1888, so that it was free for the passage of vessels before the commencement of work in the south draw, except that several schooners were lying at their winter berth, about 150 feet east of the draw, rendering it impassable for large vessels. The company thereupon, and a day or two prior to the collision in question, removed all the protecting piles in the south draw by means of block and fall purchase operated in a pile driver mounted on a scow. Just prior to the time of the accident its servants were engaged upon the scow in removing a group of spring piles at the northeast corner of the pier. At the time of the collision, opposite the south draw and from 150 to 300 feet west of the west end of the central projecting piling supporting the bridge, the Palmer, a large steam barge, lay aground, her bow pointing eastwardly to the lake, and had so been lying for 24 hours before the collision. About noon of the 9th of April, 1888, the steamship Wallula, laden with a cargo of 66,000 bushels of oats consigned to Buffalo, was proceeding down the river in tow of two tugs, owned and operated by the appellant the Vessel Owners' Towing Company,

the Carpenter ahead and the Van Schaick astern. The Wallula had no steam up, and had no control of her own movements, her tiller being lashed amidships by direction of the tugs. She passed to the north of the Palmer, stopping when opposite to that vessel,—in the opinion of some of the witnesses, because she grounded alongside of the Palmer. Whether that were so or not, the head tug started up suddenly and “wide open,” giving the Wallula a headway of from two to three miles an hour, not in a direct line through the draw, but swinging to starboard towards the abutment. As the Wallula bore down upon the abutment, and when from 20 to 60 feet distant therefrom, the tug Carpenter swung off to port, working with full steam to check the steamer on her course, and endeavored to pull the stem of the Wallula around, to avoid collision with the abutment. The maneuver was too late, and the Wallula crashed into the abutment at an angle of about three points, coming in contact with the salient of one of the footing courses of the abutment, about five feet below the surface of the water. Under the guidance of the tugs she proceeded down the river to the Central elevator. Upon examination of her bow and side above the water no fractures were found, and it was supposed that no injury had been received. Upon sounding the next morning, four feet of water were found to be in her hold, and upon removing the hatches the water could be heard running in. Pumps were then applied, the uninjured grain removed, and the injured grain taken out and sold. The vessel was placed in dry dock, where it was discovered that an irregular hole had been made in the bluff of her bow below the water line on her starboard side from 10 to 15 feet from the stem. It was of the character of a heavy gouge, breaking and shredding a plank 5 inches thick. The district judge held that the injury was sustained by the joint negligence of the appellants, and decreed that each should pay one-half the damages sustained. The opinion of the court is reported under the title of *Wilson v. City of Chicago*, 42 Fed. 506.

C. E. Kremer, for the Vessel Owners' Towing Co.

Ball, Wood & Oakley, for the Fitz Simons-Connell Co.

Harvey D. Goulder and C. W. Greenfield, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge (after stating the facts as above). That portion of the abutment below the surface of the water was, by reason of its position and peculiar construction, a concealed and imminently dangerous obstruction to the navigation of the river. As it was placed there by the city of Chicago, so it became the duty of the city, so long as the obstruction was maintained, to so guard it that injury therefrom should not result to vessels navigating the river. *Philadelphia R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209. That duty was sought to be discharged by maintaining spiles along the face of the obstruction, which were effectual to prevent vessels passing the draw of the bridge from coming in collision with the projecting footing courses of the abutment. The maintaining in place of these spiles, in the absence of other safeguards, was an imperative duty. Their removal was an act of negligence contributing to produce the injury here complained of. Acting under authority of the city, the contractor, as well by its contract as by the law, was liable for damages arising from the removal of the protection. The duty is the same whether an obstruction to navigation be created or a protected obstruction be uncovered. The contractor undertook to perform the work of removing the

stonework, and to "keep free and unobstructed the channel of the river, so as not to interfere with or obstruct the movement of vessels or other craft," and to "maintain suitable signals and lights to be approved by the commissioner of public works as a warning to vessel men." This, however, merely emphasized an imperative duty imposed by law. The contractor is not absolved by his ignorance of the character of the construction below the surface of the water. Undertaking the work, he is chargeable with knowledge of the character of the work he undertook to perform. Removing protection work, whose obvious function was to protect vessels from contact with the abutment, the contractor is chargeable with knowledge of the fact of the obstruction and of its nature. The law cannot permit one to uncover a concealed and dangerous obstruction to navigation, and to plead in excuse ignorance of the character of the obstruction. He must act at his peril. Acting under the authority of the city that created the obstruction, and bound by the contract to protect the city, and bound by law to keep free and unobstructed the channel of the river, if, in the prosecution of the work, it became necessary to remove protection works that had been maintained by the city, and that guarded the navigation of the river, the contractor could not shut his eyes to the character of the obstruction that had so been covered, or negligently remain ignorant of its character. The protection work itself was notification of a danger that it guarded. Removing the protection, the actor was bound to know the character of the danger that he uncovered. The contractor knew of the submerged abutment, knew that it was dangerous, because protection work had been maintained to guard against that danger. Removing the protection and exposing the obstruction, the contractor is chargeable with knowledge of its character, and with the result of his negligent act in failing to substitute other and effectual safeguards and warnings. *Casement v. Brown*, 148 U. S. 615, 623, 13 Sup. Ct. 672. As matter of fact, the contractor had sufficient notice of the character of the submerged obstruction to put one upon inquiry as to its character. In a narrow draw, only 16 feet wide, the protection spiles were placed 6 feet away from the face of the abutment above the water, whereas at the other bridges in the city the protecting spiles are placed but two feet distant. Naturally there was a motive for this, when it is matter of common knowledge that such protecting spiles are driven close to the base of the abutment. The fact was sufficient to put the contractor upon inquiry, and failure to inquire, when inquiry would have disclosed the fact, was negligence.

We do not conceive that the contractor is excused upon the plea that the work in the north draw of the bridge had been finished. While the work was there progressing, the draw had been closed to navigation, and certain vessels had anchored for winter quarters at the east entrance of the draw. We think it was the duty of the contractor, under such circumstances, before proceeding with the work in the south draw, and before uncover-

ing so dangerous an obstruction, to see to it that the north draw was free to navigation. The contractor commenced the work and uncovered the obstruction in the south draw while the north draw was as effectually closed to navigation as though it had been blocked with the derricks and pile-drivers of the contractor.

Nor do we think the contractor excused by reason of the alleged negligence of the tug. The injury resulted from the combined negligence of the contractor and the tug. Concurring negligence is not a defense, and does not relieve from responsibility, where a plain duty was owing, and there was neglect in its performance. In such case the admiralty apportions the damages between the tort feasers. It enforces contribution from both parties in fault to liquidate the injury done to a third party.

The Wallula cannot be charged with the negligence of the tug. The latter was not her agent, but an independent contractor, and wholly controlled her movements. The Doris Eckhoff, 1 U. S. App. 129, 1 C. C. A. 494, 50 Fed. 134; The Niagara, 1 U. S. App. 658, 663, 3 C. C. A. 342, 52 Fed. 890; The T. J. Schuyler, 41 Fed. 477.

By the decree complained of the contractor is charged with a moiety of the damages only, unless the appellees should be unable to collect from the owners of the tug the one-half part of their damages awarded against the tug company. This is in accord with the settled principle of the admiralty, and is not subject to criticism. The Alabama, 92 U. S. 697; The Atlas, 93 U. S. 302; The Juniata, Id. 340; The Sterling and The Equator, 106 U. S. 647, 1 Sup. Ct. 89; The Max Morris, 137 U. S. 1, 10, 11 Sup. Ct. 29.

With respect to the claim of the contractor the Fitz Simons & Connell Company, in which the towing company does not join, that the Wallula is chargeable with gross negligence on the part of its officers subsequent to the collision, whereby the damage to the cargo was aggravated, we need only say that we have carefully examined the testimony, and do not think that the evidence bears out the contention of counsel. A review of the evidence convinces us that all proper efforts were taken in ascertainment of the injury and in protection of the cargo.

We think it equally clear that the tug was at fault. The Wallula was wholly under the control of the tug, and unable to help herself. The tug was "the dominant mind or will of the adventure" (The Fannie Tuthill, 12 Fed. 446), and took the whole responsibility of her navigation (The Express, 3 Cliff. 462, Fed. Cas. No. 4,209). The collision occurred in broad daylight, and under such circumstances the fact of the collision creates a presumption of negligence on the part of the tug. The Delaware, 20 Fed. 797. Engaging in the service of towing up and down the Chicago river, the tug was bound to know the channel, and whether, under the circumstances, it was safe to make the venture of passing the draw. The Margaret, 94 U. S. 494. And that obligation imposes upon the master of the tug, before undertaking the towing, a knowledge of the condition of the bottom and of the depth of water in the river, and of the exist-

ence and location of any well-known obstruction. The *Lady Pike*, 21 Wall. 1; *Pettie v. Towboat Co.*, 1 U. S. App. 57, 1 C. C. A. 314, 49 Fed. 464; The *Robert H. Burnett*, 30 Fed. 214. This is not a case coming within the principle of the cases cited by counsel. The *Angelina Corning*, 1 Ben. 109, Fed. Cas. No. 384; The *Willie*, 2 Fed. 95, 8 Fed. 768; The *James A. Garfield*, 21 Fed. 474; The *Mary N. Hogan*, 30 Fed. 927; The *Pierrepoint*, 42 Fed. 687. In those cases the tugs were absolved of responsibility for collision of the tow with unknown obstructions. Here this sunken obstruction had existed for some 25 years, and had been guarded, to the knowledge of the master of the tug, by these protection spiles. Prior to undertaking this towage, he knew those spiles had been removed. He knew those spiles stood out six feet from, and indicated that it would be dangerous to go nearer, the face of the abutment. He had seen these abutments in process of construction. The master of the tug sought to excuse himself by asserting that he supposed everything had been torn out when the piling was taken down, and yet the abutment stood there facing him with the protection gone. He confesses that his idea in towing the *Wallula* through the draw was simply to "keep her away from the visible thing." He assumed that the abutment proceeded on the same angle to the bottom of the river, notwithstanding he knew that the spiles stood out six feet from the face of the abutment, while at other bridges they stood out but two feet. With this knowledge, and this imperfect comprehension of his duty, and in view of the fact that the *Van Schaick* could give but little assistance in steering the *Wallula* by reason of the position of the *Palmer* in the channel, it was the duty of the captain of the *Carpenter* to have had the *Wallula* under control, and he should not have permitted her to enter the draw at such a speed and upon such an angle that collision with the abutment was inevitable. The decree will be affirmed.

THE VICTORY.

THE PLYMOTHIAN.

ELCOATE v. THE PLYMOTHIAN.

OWNERS OF THE PLYMOTHIAN'S CARGO v. THE VICTORY and THE PLYMOTHIAN.

(District Court, E. D. Virginia. September 18, 1894.)

1. COLLISION—RULES AS TO PASSING—COAST WATERS.

Tide waters, navigable from the ocean, by ocean craft, are "coast waters," within Act March 3, 1885 (23 Stat. 438 et. seq.), adopting the revised international rules and regulations for preventing collisions at sea (article 21 of which embodies the rule "Keep to the right"), and declaring that they shall be the rules for navigation on the high seas and in all coast waters, except as are otherwise provided for; the exception being defined by the further provision that "nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbor, river, or inland navigation."

2. SAME—RIVERS—HARBOR RULES.

Part of a river not within the territorial limits of a city, though part of its harbor is not affected by a rule of navigation for the harbor ordained by the city, under provision of Act March 3, 1885, that a special rule, duly made by local authority, relative to the navigation of any harbor, shall not be interfered with by the international rules of navigation.

3. SAME—KEEPING TO THE RIGHT.

When the steamers P. and V., the former going 4 miles and the latter 6 miles an hour, were at a distance of $1\frac{1}{2}$ miles, approaching each other, in clear daylight, along a narrow channel, which was in full sight, and governed by international rule 21 ("Keep to the right"), the P., which was obeying the rule, signaled the V., which was not obeying it, that they should pass port to port. When over 1,000 yards distant, the V. answered with a cross signal, that they should pass starboard to starboard, without there being any cause therefor, and without giving any signal to indicate that there was such cause. The P. thereupon repeated its signal, which the V. promptly answered with its cross signal, whereupon both gave alarm signals and backed, without, however, preventing a collision. *Held*, that the V. was liable therefor, and the fact that, shortly before the collision, she had a schooner under her starboard side, and that this and two other schooners, which she had met shortly before, passed on her starboard, was no excuse.

4. SAME—ABSENCE OF LOOKOUT IN BOWS.

The fact that a steamer had no lookout forward at the time of a collision will not render her liable for the cargo, as having contributed to the collision, she being navigated at the time by a pilot, with her master on the main bridge acting as lookout, and she having omitted nothing which she ought to have done, or which she would have done had there been a lookout in her bows.

In Admiralty. Libels by S. Elcoate, master of the steamship Victory, against the steamship Plymothian, and by the owners of the Plymothian's cargo against both steamers, and petitions by the owners of both vessels for limitation of liability.

On the 12th day of November, 1891, the steamers Victory and Plymothian came in collision in the Elizabeth river, between Lambert's Point and Craney Island light. It was in broad daylight, at 4:14 p. m. of a clear day. At the time of collision, the Victory was bound in ballast from Hampton Roads to Norfolk. The Plymothian was bound to sea, having left Galveston November 1st, with a cargo of cotton, bound to Liverpool, and having, in the prosecution of that voyage, come in through Hampton Roads, and taken coals at Lambert's Point, Norfolk. By the collision, the port side of the Plymothian was cut below the water's edge near amidships, and, to save her from sinking, she was run ashore. Some of her compartments filled with water, and her cargo was much damaged. Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability. The value of the Victory has been appraised at \$67,500, and her owners have given stipulation for that amount. The value of the Plymothian has been appraised at \$33,350, and the value of her freight at \$11,871, making a total of \$45,221, which is to be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. The amount of her owner's liability will therefore be about \$40,000. In response to citations issuing in these proceedings, the damages arising out of said collision have been assessed. Those sustained by the owners of the Victory have been assessed at about \$14,500; those sustained by the owners of the Plymothian have been assessed at about \$42,000; and the damages sustained by the owners of the Plymothian's cargo have been assessed at about \$72,000.

In stating what I conceive to be the facts of this case, derived from a huge mass of conflicting testimony, I shall be in frequent conflict with evi-

dence given on one side or the other in the case. Owing to the unusual volume of this evidence, it will be impracticable for me to analyze the statements of witnesses as to each fact, and to show why any fact which I have stated has been adopted. The task would be great, and its execution tedious, and it has been rendered unnecessary by the unusually elaborate and able discussions of the evidence which have been submitted by counsel on either side in their briefs.

The Victory (Elcoate, master) was an iron ship, of 1,774 net tonnage, 338 feet in length, 38½ in breadth, with 17 feet aft and 13 feet forward of draft. She had on 400 tons of water ballast, and 550 tons of coal. Her number of officers and crew was 31. The Plymothian (Mardon, master) was 260 feet long, 1,016 tonnage, net, had a crew all told of 21 men, and had a cargo of 3,682 bales of cotton. She responded with exceptional facility and promptness to her helm. The two vessels were actually navigated by their respective pilots, Nelson on the Victory, and Henley on the Plymothian. The masters of the two vessels were each on the bridge with the pilot, each acting as lookout, and seeing that the orders of the respective pilots were executed. Neither ship had a special lookout forward of the bridge in her bows. Several members of each crew were examined as witnesses in the case. All were respectively offered and ready to be examined. The collision occurred close upon what is now black buoy 7, which marked the eastern side of the 18-foot channel between Craney Island light and Lambert's Point light, in Elizabeth river. The course of the channel up the river from Craney Island light to black buoy 9 is nearly south; and the channel at buoy 9 turns southeastward towards Norfolk, at an angle of about 65°; but the course coming out from the coal pier at Lambert's Point into the channel, around buoy 9, turns an angle of about 45°. According to a chart of this channel (Exhibit X), filed by counsel for the Victory, the distance from Craney Island light to buoy 7 is 1,200 yards, or about two-thirds of a mile, and to buoy 9 is 1,967 yards, or 1½ miles; the distance between the two buoys being 735 yards, or three-eighths of a mile. The channel here is easily navigable for ships drawing 25 feet of water. Its breadth at Craney Island is 250 yards; and at buoy 9, a mile and an eighth south, is 400 yards, broadening as it extends. Below Craney Island light, as the river Elizabeth flows, the channel stretches three miles and a half, in a straight course, due north, into Hampton Roads, opposite Sewall's Point. There is no obstruction to the view over the entire length of the channel between Sewall's and Lambert's Points, except by such vessels as may happen to be lying near or passing along the channel. On the western side of the channel, south of Craney Island, as far as buoy 9, very spacious waters expand to the shore, which are navigable for a distance of twice the width of the channel for vessels of eight or nine feet draft. East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however; and, owing to the eastward bend of the channel around buoy 9 to Lambert's pier, navigators coming up from Craney Island are apt to head directly for Lambert's Point light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, and are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel. It was in the channel and waters thus described that the collision which has been mentioned occurred. Each ship had on board, as required by law, a licensed pilot, taken up at the Virginia Capes. The Victory was coming in to Norfolk in ballast. The Plymothian, having come in for coal, was going out on her voyage to Liverpool. Just as the Plymothian, having left Lambert's pier, had rounded buoy 9, and had straightened out on her course down the channel, the Victory, in coming up from Hampton Roads, had got just abreast of Craney Island light. It was at about 4 p. m. that the two ships were thus in motion, and began to approach each other at a distance apart at the start of a mile and an eighth. The Victory had been moving at the rate of ten miles an hour; but at Craney Island she slackened her speed and proceeded up the channel at the rate of six or seven miles an hour, with a two-mile flood tide assisting her. The Plymothian, on straightening out

at buoy 9, had begun to move against the tide at the rate of about four miles an hour. The Plymouthian moved on a ported helm, and kept well to the eastern side of the channel. The Victory, which, at Craney Island light, was at mid-channel according to most of the evidence, but on the eastern side according to her own testimony, moved, after or from the time of passing Craney Island light, on or to the eastern side of the channel, under a starboard helm. Each vessel moved so long on these courses under the helms respectively mentioned that when the collision which was threatened became imminent, and each reversed engines and backed with all speed, they did so ineffectually. The Plymouthian's headway was checked, but she had little backward movement, if any, at the time of collision. The Victory's headway was not stayed, and she was still moving forward at the moment of collision. The stem of the Victory, at about 4:14 p. m., came into the port side of the Plymouthian at her main bridge, inflicting so deep a wound that she was immediately beached on the bank of the channel east of buoy 7. Shortly before sounding three whistles and reversing her engines, the Victory had a schooner close under her starboard side, which prevented her from porting her helm. She had previously met two other schooners on her starboard side. All three of these schooners were on the east of mid-channel, bound out to Hampton Roads.

It would seem to be useless to consider how either vessel had moved before the time when, one of them being at Craney Island light, and the other off buoy 9, they began, at the hour of 4 p. m., to approach each other in the open channel. But it may as well be premised that the Plymouthian had not before then, in coming out from Lambert's pier, gone over to the west of the channel near to red buoy 22; and had not, after doing so, recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect. Nor was the west side of the channel, as seen on that afternoon from Craney Island light, to red buoy 22, lined with numerous vessels at anchor to a degree obstructing that side of the channel, as claimed by the same counsel. There were barges and other craft anchored near the red buoy, but not as many as usual. The weight of testimony is that the western part of the channel, as far at least as abreast of buoy 7, was free from obstruction. The Victory's own witnesses place such schooners as that steamer met after passing Craney Island east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rule, to take the eastern side. Moreover, the claim of the Victory's crew that each of three steamers which she met in coming from Hampton Roads up Elizabeth river gave her two whistles, and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers, and by all the witnesses in the case who testified that, when she had reached Craney Island, she was in mid-channel. The preponderance of testimony in favor of her being in this last-named position is so great as to be conclusive of the fact. The only steamer whose crew was not examined on this point was a foreign tramp; and her testimony could not be obtained. But that vessel was met in Hampton Roads three miles from where the next steamer was met, and there was space and time abundant for the Victory to pass to the proper side of the channel after meeting the tramp. Even if the two other steamers had passed on her starboard side, which they deny that they did, their distance apart was ample for allowing the Victory to pass between them to the western side of the channel, if she had desired to do so. Nor, indeed, did the Victory (if, in fact, she had been pressed by the three steamers to the eastern side of the channel, and was held there when she reached Craney Island by a sort of marine duress), at any time after sighting the Plymouthian, give her alarm signals, or any sort of notice that she was on the east side of the channel by a compulsion which she could not throw off. I consider it proved beyond reasonable doubt that the Victory and Plymouthian, at 4 p. m. on the afternoon under consideration,—one of them in mid-channel abreast of Craney Island light, and the other in mid-channel abreast of

buoy 9,—were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction or let or hindrance of any kind.

Much evidence was taken pro and con on each side upon the question of the seaworthiness of the whistles of the two steamers. The result of the elaborate testimony taken on this question is to show that the whistles of both steamers were as good as those of English steamers usually are, and were in good working order. After rounding buoy 9, and straightening out on her course down the channel, the Plymothian gave a long whistle, indicating that she would pass the Victory port to port. It was some time before the Victory answered, which she at length did with a cross signal of two whistles. Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was halfway between Craney Island light and buoy 7. The Plymothian thereupon blew one signal whistle a second time, and was then promptly answered by a cross signal of two whistles by the Victory. The two steamers thereupon, and at the same time, blew alarm signals, and at once backed their engines at full speed; and this backing of engines continued until the collision occurred. The headway of the Plymothian was overcome, and it is possible she attained a slight backward movement. The headway of the Victory was not overcome, and she ran into the Plymothian's broadside, with such force as to drive 15 inches into her side, and to render immediate beaching necessary. She penetrated 15 inches into the Plymothian, notwithstanding the fact that the angle of incidence with that ship was 60 or 70 degrees.

Sharp & Hughes, for the Victory.

Whitehurst & Hughes, for the Plymothian.

Butler, Stillman & Hubbard, by Mr. Mynders, for the Plymothian's cargo.

HUGHES, District Judge (after stating the facts). It is obvious from the foregoing statement that the question in the case under consideration is whether or not it is governed by the great rule of the road, "Keep to the right." That rule is embodied as article 21 in the "Revised International Rules and Regulations for Preventing Collisions at Sea," adopted and made the law of the United States by the act of congress of March 3, 1885 (23 Stat. 438 et seq.). The act declares that they shall constitute the rules for the navigation of vessels "upon the high seas and in all coast waters of the United States, except such as are otherwise provided for." The exceptions alluded to are defined by the act itself, in the section declaring that "nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation." The rule only is excepted, not the coast water itself. The act of congress prescribing these rules is a law, of which all the world must take cognizance. Special rules of local ordination are not laws, but rules only, and, in order to be binding, must be brought home to the knowledge of navigators, and proved affirmatively in the courts. I know, however, of no provision of such local rules, so far as they affect our eastern waters navigable from the ocean, which conflicts with the international rules adopted by congress, and prevailing, by general adoption, the world over. These general rules of the world at large, adopted and made laws of the United States by congress, are in force in the oceans and seas off

our coasts, and in all the coast waters of the country; that is to say, in the rivers, bays, and roadsteads opening into the ocean, and "allied to ocean navigation, from being used and necessarily used by all ocean-bound vessels" and vessels coming in from the outer waters. These rules would be paralyzed if they ceased to operate in favor of ocean ships as soon as they passed within lines drawn between points of land projecting into the ocean. That they are intended to be in force and operation within such lines is proved by their very terms. Article 21, which has been mentioned, would be a meaningless nullity under a contrary contention. Its language is: "In narrow channels every steamer shall, when it is safe and practicable, keep to that side of the fairway, or mid channel, which lies on the starboard of such ship." Except in the instances of two or three great straits, in different parts of the world,—so few in number and each so wide that no rule is necessary in regard to them,—no such narrow channels as article 21 contemplates are to be found beyond lines drawn between the great fauces terrae of our seaboard. The contention that this important article applies only to the outer seas would exclude Chesapeake bay, Hampton Roads, and Elizabeth river from the category of "coast waters." That bay has been called the "Mediterranean of America," from the vast and varied commerce that floats upon it, carried largely in ships of the ocean. Hampton Roads, from the depth of its waters, its spacious area, and its land-locked conditions of safety, is a favorite resort in storms for all vessels that navigate our Atlantic seaboard. Elizabeth river carries a channel of 25 feet in depth, and from 250 to 500 yards in width, all the way from Hampton Roads to the national navy yard at Gosport. It would be imposing hard lines upon foreign steamers and sailing ships coming up to Norfolk, with and for heavy cargoes, for the courts to repeal article 21 as to a river traversed so constantly by sea-going ships of the largest size and capacity as the Elizabeth river is,—an article known to all navigators from every part of the earth,—and to dwarf the river into a local harbor, subject to the provincial domination of a town council, and to the crude regulations of ever changing town officials. It may not be practicable to define with precision the meaning of the phrase "ocean waters;" but, so far as this court is concerned, I hold that it embraces all waters opening directly or indirectly into the ocean, and navigable by ships, foreign or domestic, coming in from the ocean, of draft as great as is drawn by the larger ships which traverse the open seas. I hold that all tide waters, navigable from the ocean, with navigable depth for ocean craft, are "coast waters," in the meaning of article 21. The Elizabeth river, between Norfolk and Hampton Roads, is one of the ocean waters, and the international rules of navigation are therefore in full force and operation in that river.

Elizabeth river is not embraced within the meaning of the clause of the act of congress providing that "a special rule duly made by local authority relative to the navigation of any harbor" shall not be interfered with by the international rules of naviga-

tion. If the river is a harbor at all, it is only as a part of the harbor of Norfolk. But it is not within the territorial limits of Norfolk, and is not subject to any municipal regulation in force within that corporation. It is competent for Norfolk to ordain rules of navigation for her own harbor; but these rules lose their authority when the territorial boundaries of the city, either on land or water, are passed. But, even if this were not so, it has not been shown that any rule of navigation ordained by Norfolk for the government of shipping within her own harbor is in conflict with article 21, or with any other law of navigation embodied in the international rules. If so, if there be no municipal rule of navigation in force in Norfolk harbor with which article 21 or any other international rule interferes, then Norfolk harbor is itself subject to those international rules, and is in the category of "coast waters" contemplated by the maritime act of congress of March 3, 1885. Those rules are in force in Elizabeth river, independently of any rules ordained by Norfolk; and they are in force in Norfolk harbor itself, as long as they shall not interfere with any rule of navigation which may be enacted by the local municipality. It is fortunate for Norfolk that this is so; it would be a subject of serious public regret if it were not so.

International article 21 was the law of the road on the occasion when the Plymothian, off buoy 9, and the Victory, abreast of Craney Island light, one mile and an eighth apart, began at the same time to approach each other along the narrow channel of Elizabeth river, between those two points. The Plymothian obeyed article 21; the Victory disregarded it. The collision, which happened in direct consequence of the Victory's disloyalty to the rule, was caused by the Victory, and through her fault alone. The fact that she had had a schooner close under her starboard side shortly before the collision did not excuse, but condemned, her. The fact that this and two other schooners were moving on her starboard on the eastern side of the channel were three additional reasons why she should have come up on the western side from Craney Island. These three insignificant vessels were teaching her a lesson, which she rejected. International article 15 did not apply in this case. At a distance of a mile apart, these two steamers, in full sight of the channel between them, by clear daylight, were not approaching each other "in such a manner as to involve risk of collision." The liability of the Victory for this collision does not depend upon the question whether the statement of facts drawn up by the court, and prefixed to this opinion, is strictly and in every respect in conformity with the weight of evidence taken in this cause. If there were no other evidence in the record but that given by the master and crew of the Victory, that ship would be shown to be liable. She had no right, seeing the Plymothian coming up the narrow channel, to persist in running on the eastern side of it. The thoroughly disproved testimony given by her master and the deck witnesses of her crew, intended to show that she was driven to the extreme eastern side of the

channel by other steamers and by sailing vessels, has no other value in the case than to show that these witnesses felt the pinch of article 21, and made desperate efforts to excuse the obstinate and fatuous perseverance of her navigators in keeping on the eastern, and to them, as they well knew, the contraband, side of the channel. The Victory is liable for the collision; and I will decree in all respects to that effect.

It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting, and I think both steamers were at fault in not having had each a special lookout on duty; but in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the main bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stern. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine room would hardly have differed from those actually given if a lookout had been calling out to them what they both clearly saw and knew. But it is only with reference to the Pymothian that the question of lookout is of any importance. The contention of counsel for the cargo that the absence of a lookout on that steamer contributed to the collision is not supported by the evidence in the case. Inasmuch as this evidence shows that the officers on the bridge did not hear the first cross signals of the Victory, this counsel contends that if there had been a lookout forward, and the pilot Henley and the master Mardon had been notified of this cross signal, there would have been time for the Pymothian, by hard starboarding, to have passed the Victory on her starboard side. But the proof is that the Victory blew her first cross signal of two whistles as far off as halfway between buoy 7 and Craney Island light, or more than 1,000 yards from the Pymothian, before any stress of circumstances arose to require of her a violation of the rule of navigation which she was faithfully adhering to. It was not competent for the Victory, at that distance, to require from the Pymothian a violation of article 21, unless there was some cause forcing her to do so. That there was no such cause is shown by the evidence, and was virtually confessed by the Victory herself when she failed to follow up her cross signal by additional three sharp alarm whistles, giving notice of such a cause. Failing in this, the Pymothian was not, at a distance of 1,000 yards, and running against a flood tide at the rate of only 4 miles, either under obligation or at liberty to disregard a cardinal rule of navigation at the mere cross signal of the Victory. She would not and should not have done so even if a lookout properly posted in her bows had notified her navigators of the cross signal. Her officers on the bridge would and should have pursued precisely the course if they had known of the first cross signal which they did pursue on not hearing it; and the absence of a lookout contributed naught towards the collision. I therefore consider that

the contention of the counsel for the cargo on this point must be overruled.

Although it is wholly unnecessary in this decision to do so, I will notice some references of counsel for the Victory to the decision of this court in the case of *The Laurence* (rendered in August, 1892), and affirmed on appeal by the United States circuit court of appeals for the fourth circuit, at its February term, 1893. 54 Fed. 542. Counsel for the Victory contends that in that case this court held that a steamer coming up in the channel of Elizabeth river from Craney Island to Norfolk was at liberty to take either the western or eastern side of the channel at pleasure. The decision was a very different one, and was rendered in a case having no relation to the question involved in the present litigation. In that case the steamer *New York*, plying twice a day between Norfolk and Cape Charles City, had, in a foggy morning, while moving at an unlawful speed in a fog, run into the barge *Lawrence*, which was a very large vessel, loaded with coal, and lying at anchor on the western side of the channel of Elizabeth river, halfway between buoy 7 and Craney Island light. It was shown in evidence that the channel where the *Lawrence* lay was 450 yards wide; that the *Lawrence* was anchored on its western side as near to the bank as could be to allow of her swinging clear of it; and that at least half of the 225 feet west of mid-channel was clear. The *Lawrence* was swinging, when run into, due north on an ebb tide, and was not only on the western side of mid-channel, but was well off on the western side of that 225 yards of western channel. The steamer *New York* came up from Craney Island close upon the western side of the channel, in a thick fog, and struck the *Lawrence* on her starboard quarter, although there was abundant room between the *Lawrence* and mid-channel for the *New York* to pass to the port or east side of her. Nothing is said in the opinion of the court to indicate that the *New York*, in passing on the port side of the *Lawrence*, would have passed to the east of mid-channel. Between the *Lawrence* and mid-channel there was clear space of more than 100 yards, and the water east of mid-channel was not in the case at all. The evidence showed that there was not room between the *Lawrence* and the western bank of the channel for the *New York* to pass; and the court held that the *New York* was in fault in not passing on the eastern side of the barge, where there was abundant room. The court used the following language in its decision:

"All the testimony shows, and the pleadings admit, that they [meaning the *Lawrence* and a companion barge that was lashed to her port side] were then on the western side of the channel. The evidence shows, moreover, that the *New York* struck, from the west, the barge which was the western one of the two. Certainly, there was room in a channel, half of it as wide as 225 yards, for a steamer to pass vessels lying in the other half of the channel, which was another 225 yards in width."

That case has therefore no analogy with the one at bar.

Equally erroneous is the contention of counsel for the Victory that in that same case of *The Lawrence-New York* this court held

that the Elizabeth river, north of buoy 9, was a part of the harbor of Norfolk, and subject to her jurisdiction in respect to a harbor master. The facts were that by a stretch of authority, growing out of a public necessity, Norfolk had appointed a nominal harbor master at Lambert's Point, who assumed and exercised the authority of designating places of anchorage for the great number of vessels constantly coming in there for the Pocahontas coal. This "harbor master," so called, had for some time been in the habit of anchoring these vessels on the western side of the channel near to red buoy 22, and up and down on that side as far as necessity required. He so acted by general sufferance and from public necessity, and not by conceded authority. This quasi official action of his was known to all the masters of steamers which navigated that channel, all of whom acquiesced in and none of whom resisted his authority. Contrary to this self-adopted rule of acquiescence, the master of the New York, in the suit of *The Lawrence*, among other things, contended that the *Lawrence*, when she was struck by the New York, was unlawfully where she was, and that she had been illegally anchored there by a person who was not a harbor master, in the eye of the law. This court held that she had a right to be where she was when she was struck by the New York. Its language was as follows:

"In a technical point of view, the authority exercised [by the acting harbor master] is probably questionable. But the public interests required that there should be some authority to control and regulate the anchoring of those loaded vessels; and, until the law provides some other means of regulating this important business, custom and general acquiescence must be held competent temporarily to supply the omission of the law. These barges were passive in the matter of being placed in the anchorage in which they lay. They had not gone there of their own volition, in a spirit of caprice and indifference to consequences. The presumption is that, objectionable as the practice is of placing vessels along that channel in such numbers as the evidence shows, yet the placing of these particular barges was as judicious as the evil practice admitted of; and I do not feel that it would be competent or just for this court to undertake a reform of this evil by imposing penalties. The reform needed is a subject for municipal legislation; and it is hardly admissible for the court to assume the role of legislation by means of penal decrees and judgments."

There is nothing in this decision that gives countenance to the proposition that the channel of Elizabeth river, between Lambert's Point and Craney Island, is part of the harbor of Norfolk, subject to her jurisdiction, and excepted from the operation of article 21 of the international rules of navigation.

As to the question whether the clause contained in the bills of lading of many British ships, and sanctioned by British law, exempting the ship from liability for damages to her cargo, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariner, or other servants of the shipowner, and some of them containing a clause providing that the contract shall be governed by the laws of the flag of the vessel carrying the goods, it has been settled in this country that such clauses are contrary to public policy, and therefore null. I should feel constrained to rule accordingly if the question could arise in the case at bar.

HOME INS. CO. OF NEW YORK v. NOBLES et al.

(Circuit Court, E. D. Pennsylvania. September 14, 1894.)

No. 4.

1. FEDERAL COURTS—FAILURE TO AVER AMOUNT IN CONTROVERSY.

A bill for an injunction restraining defendants from further issuing a certain circular alleged to be detrimental to complainant's business, and from in any way interfering with that business by threats, etc., which does not contain any statement of the amount of damages sustained or apprehended, or of the value of the matter in controversy, or of the object sought to be obtained, is not sufficient to give the court jurisdiction.

2. SAME—LEAVE TO AMEND.

A bill, defective for want of an averment of the amount in controversy, will not be dismissed where it does not affirmatively appear that the court is without jurisdiction, but complainant will be given leave to move to amend.

This was a motion for a preliminary injunction. The bill was filed by the Home Insurance Company of New York against Milton A. Nobles, Edward F. McMenemin, Phineas Tolman, and Gustav E. Kress for an injunction restraining them from further issuing a certain circular, and from in any way interfering with complainant's business by threatening complainant's policy holders, or those intending to become such, with prosecution for an infringement of alleged copyrights, or from in any way interfering with complainant's business, either by threats or false representations, whether verbal or written, or by any other means whatsoever. The circular in question was issued by defendant Nobles as district manager of the Agricultural Insurance Company, and reads as follows:

"All persons insured under the weekly or industrial fire insurance plan are hereby notified that this plan, and all books and papers used therein, are copyrighted by the undersigned. The authority by me heretofore granted to the Home Insurance Company of New York has been annulled, and the said company has been notified to cease using said plan. The Agricultural Insurance Company of New York has been licensed to issue policies under said plan of weekly or industrial fire insurance, and alone has the right to issue such policies. On presenting your present policy in the Home Insurance Company, together with your book, at the office of the Agricultural Insurance Company, 216 South Fourth street, Philadelphia, or to any agent of the Agricultural Insurance Company bearing certificate of authority signed by me, a new book and policy will be issued to you, and the liability assumed by the Agricultural Insurance Company, without cost or loss to you. The agents of the Agricultural Insurance Company bearing certificate of authority signed by me are the only persons authorized to make collections. All persons representing other companies, as well as policy holders, are liable to involve themselves in lawsuits instituted to protect the copyrights, by attempting to use said plan."

G. Heide Norris and Francis T. Chambers, for plaintiff.

Harry & Beck, Hector T. Fenton, and F. Pierce Buckley, for defendants.

DALLAS, Circuit Judge. The only specific prayer of this bill is for an injunction restraining the defendants from further issuing a certain circular which is alleged to be detrimental to the com-

plainant's business, and from in any way interfering with that business by threats, etc. It is alleged that this circular and the action of the defendants, which are complained of, "have already caused great damage to it [the complainant], which will increase daily;" but there is no statement of the amount of damages sustained or apprehended, nor of the value of the matter in controversy,—of the object sought to be attained, which is the prevention of "any further issuing of the circular," etc. The bill is therefore defective for want of averment that the amount in controversy is sufficient, under the act of congress, to give this court jurisdiction. Consequently, the present motion for a preliminary injunction cannot be entertained; but, as it does not affirmatively appear that the court is without jurisdiction of the cause, the bill will not now be dismissed, and the complainant has leave to move as it may be advised in view of this suggestion, upon due notice to defendant's counsel. The attention of counsel is directed to *Railroad Co. v. Ward*, 2 Black, 485; *Symonds v. Greene*, 28 Fed. 834; *Whitman v. Hubbell*, 30 Fed. 81; *Market Co. v. Hoffman*, 101 U. S. 112; *Gorman v. Havird*, 141 U. S. 206, 11 Sup. Ct. 943; and *Rainey v. Herbert*, 3 U. S. App. 592, 5 C. C. A. 183, 55 Fed. 443. The motion for preliminary injunction is dismissed without prejudice.

HOME INS. CO. v. NOBLES et al.

(Circuit Court, E. D. Pennsylvania. September 27, 1894.)

No. 4.

1. PRELIMINARY INJUNCTION—DENIAL WHERE RIGHT DOUBTFUL.

A preliminary injunction will be denied where, upon conflicting affidavits, and under the law, complainant's right to the relief asked is doubtful.

2. SAME—DENIED WHERE WRONG VOLUNTARILY DISCONTINUED.

A preliminary injunction will not be granted to restrain the further issue of a circular alleged to be detrimental to complainant's business, which contains a statement that the policy holders of complainant company are liable to involve themselves in suits instituted to protect alleged copyrights, there referred to, where it appears by oath of defendant that the issuing of such circulars was entirely discontinued before suit brought, on being advised that the policy holders could not be held liable for infringement.

In Equity. On motion for preliminary injunction. The facts appear in the preceding case, 63 Fed. 641.

G. Heide Norris and Francis T. Chambers, for plaintiff.

Harry & Beck, Hector T. Fenton, and F. Pierce Buckley, for defendants.

DALLAS, Circuit Judge. When application for a preliminary injunction was first made, I declined to entertain it because the bill was, in my opinion, defective for want of a necessary jurisdictional averment. That defect has since been cured by an amendment, filed with notice and without objection, and thereupon the motion for preliminary injunction has been renewed. I have care-

fully considered all that the respective counsel have urged upon my attention, but deem it proper to abstain from any premature and unnecessary expression of opinion, and it must be understood that, in disposing of the present matter, nothing is indicated with reference to the conclusion which may be reached upon final hearing. It is sufficient now to say that I am not satisfied that a clear case for granting the relief sought at this stage has been made out. Upon the conflicting affidavits which have been submitted, and under the law as I understand it, the complainant's right to a decree in this proceeding, restraining the defendants "from in any way interfering" with complainant's business, "either by threats or false representations, whether verbal or written, or by any other means whatsoever," is at best very doubtful; and this is enough to require a denial of a preliminary injunction in pursuance of that portion of the prayer of the bill which I have quoted. I would, however, presently order an injunction to restrain any further issuing of the circular annexed to the bill, but for the fact that its use was, voluntarily, wholly discontinued before suit was brought. The statement which it contains, that the policy holders of the complainant company are liable to involve themselves in lawsuits instituted to protect the alleged copyrights there referred to, is wholly unwarranted, and was manifestly injurious to the plaintiff. It greatly exceeds the latitude which is legally permissible in the methods which may be pursued in the strife of business competition. *Steamship Co. v. McGregor*, [1892] App. Cas. 25. But this wrong, as appears from the affidavits and sworn answer, is not now being committed, and is not threatened. There is no reason to suppose that it will be repeated, and therefore, whatever other remedy the complainant may be entitled to, it cannot be awarded a preliminary injunction. If, as in *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. 324, there was merely "a naked and unsupported promise" not to further violate the plaintiff's rights, I would hold, as was held in that case, that such unsupported promise could be of no avail to avert an injunction. But here we have something more. It is alleged under oath, and without contradiction, "that defendant Nobles issued the circular (Exhibit C) dated August 17, 1894, in good faith, and under a claim of right which he believed, and still believes, is good and valid in law; that he issued very few of said circulars, and discontinued the same entirely before this suit was brought, on being advised that policy holders or users of the copyrighted matter could not be held liable for infringement in merely being in possession of such matter." This statement is not incredible. I am not at liberty to assume that it is false, and if it is true how can it be said that it is reasonably to be apprehended that the circular complained of will be further issued? At this time there is no foundation whatsoever for such apprehension, and therefore, in my opinion, nothing to call for the immediate exercise of the restraining power of the court. *Williams v. McNeely*, 56 Fed. 265; *Pott v. Altemus*, 60 Fed. 339. Complainant's motion for a preliminary injunction is denied.

STUART et al. v. CITY OF ST. PAUL et al.

(Circuit Court, D. Minnesota, Third Division. January 27, 1894.)

1. EQUITY PRACTICE—VACATING PRO CONFESSO DECREE.

A final decree against defendant upon a bill taken pro confesso charging infringement of a patent will not be vacated and defendant permitted to answer, though defendant's neglect is sufficiently excused, where the patent has been sustained in other circuits, and the answer submitted does not refer to or plead any patent claimed to anticipate that in suit, nor specify any time or place where, or any party by whom, the invention described was ever used before application made for the patent.

2. SAME.

A final decree on a bill taken pro confesso cannot be vacated at a subsequent term where no application was made at the term at which it was rendered.

In Equity. This was a motion by the city of St. Paul to vacate a final decree rendered against it upon a bill by Peter Stuart and others, charging infringement of a patent, and to permit the defendant to answer.

Paul & Merwin, for complainants.

Leon T. Chamberlain, for defendant the city of St. Paul.

SANBORN, Circuit Judge. This is a motion to vacate a final decree rendered June 5, 1893, during the January, 1893, term of this court, against the defendant the city of St. Paul upon a bill charging the infringement of a patent, and to permit the defendant to answer. The motion is denied for the following reasons:

First. The patent on which the bill is based has been sustained after a contest in the circuit court for the eastern district of Pennsylvania in *Vulcanite Co. v. American Co.*, 34 Fed. 320, and in the circuit court for the district of Maryland in *Stuart v. Thorman*, 37 Fed. 90. Conceding, for the purposes of this decision, that the neglect of the corporation attorney is sufficiently excused by the affidavits filed, it must be presumed that the proposed answer of the city states every substantial defense it could interpose in this action. The answer has been carefully examined, and it does not refer to or plead any patent which is claimed to anticipate that in suit, nor does it specify any time or place where, or any party by whom, the invention described in the patent was ever used before application was made for the patent. Under this answer the only substantial defense is that the invention was not patentable. That question is so far foreclosed by the decision of the circuit courts already rendered that this court ought not to come to a different conclusion until all controversy is put at rest by a decree of the supreme court of the United States. *Manufacturing Co. v. Bancroft*, 32 Fed. 590; *Manufacturing Co. v. Spalding*, 35 Fed. 67; *Reed v. Railway Co.*, 21 Fed. 284; *Celluloid Manuf'g Co. v. Zylonite Brush & Comb Co.*, 27 Fed. 295. As it does not appear that the city of St. Paul ever had any substantial defense to this suit, there is no reason why the decree should be vacated.

Second. It is not in the power of this court to vacate this final decree in any event. It was rendered at the January term, 1893. No application to vacate or modify it was made at that term. The nineteenth equity rule provides that:

"When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso and such decree rendered shall be deemed absolute unless the court shall at the same term set aside the same or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant."

The bill in this case was taken pro confesso, and the final decree entered in strict accordance with the rules and practice of this court. No rule of practice is better settled than that the United States circuit courts have no jurisdiction to vacate or modify final decrees in equity subsequent to the term at which they are rendered, except to correct formal or clerical errors. *Bronson v. Schulten*, 104 U. S. 415; *Allen v. Wilson*, 21 Fed. 881, and cases cited.

YORE et al. v. YORE.

(Circuit Court, E. D. Missouri, E. D. July 14, 1894.)

1. DEED—CONSTRUCTION.

Where land is conveyed to a trustee for the sole and separate use of a married woman, giving her full power to sell and convey the property, and it is provided that, in case she dies without disposing of the property by deed or will, the trust shall cease and determine, and the property shall revert to and vest in her husband, *held* that, on the death of the wife, the property being undisposed of, an equitable fee-simple title to the land vested in the husband.

2. SAME—STATUTE OF LIMITATIONS.

Where land is conveyed to trustee for the sole and separate use of a married woman, in trust to pay over to her the rents during her natural life, and no longer, with power on her part to dispose of the property, and it is provided therein that, in case of her death without disposing of the property, then that the same shall be held by the trustee for the use and benefit of her children, *held* that, upon her death, the title to the property vested in the children; and the husband having entered into possession of the premises, claiming them as his own, and having held them continuously for a period of more than 10 years after the death of the wife, the right of entry of the children as remaindermen was barred.

This was an action of ejectment by the plaintiffs, as the sole heirs of their father, William A. Yore, for the recovery of a one-sixth interest in the premises in controversy.

William A. Yore, plaintiffs' father, was one of six children born of the marriage of Patrick Yore and Barbara Ann Yore. Barbara Ann Yore died intestate, April 21, 1876, leaving the property undisposed of. William A. Yore was born in 1847, and died November 9, 1886, so that, at the time of his mother's death, he was 29 years old. Patrick Yore died July 14, 1889, and by his will left nothing to the children of William A. Yore. Patrick Yore married defendant, May 24, 1879. By marriage settlement dated May 22, 1879, he conveyed the premises in controversy to defendant for life. On the death of Barbara Ann Yore, Patrick Yore entered into the possession of the premises, claiming them as his own, and so continuously held possession

to the time of his death. The property is on the southwest corner of Eighth and St. Charles streets in the city of St. Louis, and has a front of 70 feet on the west line of Eighth street. Plaintiffs claimed title under two deeds: (1) Deed from Michael Kelly to John E. Yore, trustee of Barbara Ann Yore, dated January 12, 1857. This deed conveyed 37 feet to the trustee, beginning at the corner, to the use of Barbara Ann Yore, in trust—First, to receive and pay the rents to Barbara Ann Yore, as her separate property; second, to sell and convey the property in fee simple in such manner as said Barbara Ann Yore might designate. Said deed provided that, if said Barbara Ann Yore should die without having disposed of the property by deed or last will, the property should revert absolutely to Patrick Yore, his heirs and assigns. As to this deed the plaintiffs contended that the absolute fee vested in Barbara Ann Yore, and that the remainder to Patrick Yore was of no force and effect, and relied principally on the case of *Green v. Sutton*, 50 Mo. 186. As to the remainder of the lot, plaintiffs relied upon a deed from Thomas O'Flaherty to James Meegan, trustee of Barbara Ann Yore, which conveyed the property in trust for the sole and separate use of Barbara Ann Yore during her life, and no longer, to receive the rents, with power to sell, mortgage, etc. In case of her death without having disposed of the property, then said property was to be held by the testator for the sole use and benefit of the children of Patrick and Barbara Ann Yore.

C. P. Johnson, J. D. Johnson, D. P. Dyer, and M. F. Hunley, for plaintiffs.

H. D. Wood and A. J. P. Gareshee, for defendant.

Upon the proposition that the construction of deeds must be upon the entire instrument, with a view to give effect to the whole instrument, and that, by the first deed above referred to, an equitable fee-simple title vested in Patrick Yore on the death of Barbara Ann Yore, counsel cited *Long v. Timms*, 107 Mo. 519, 17 S. W. 898; *Bean v. Kenmuir*, 86 Mo. 666; *Pollard v. Bank*, 4 Mo. App. 408; *Carr v. Dings*, 58 Mo. 400; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Munro v. Collins*, 95 Mo. 33, 7 S. W. 461; *Straat v. Uhrig*, 56 Mo. 482; *Jecko v. Taussig*, 45 Mo. 167; *Smith v. Bell*, 6 Pet. 68; *Greffet v. Willman*, 114 Mo. 107, 21 S. W. 459; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Gaven v. Allen*, 100 Mo. 293, 13 S. W. 501; *Wood v. Kice*, 103 Mo. 329, 15 S. W. 623; *Bassett v. Budlong* (Mich.) 43 N. W. 984; *Prior v. Quackenbush*, 29 Ind. 475; *Baxter v. Bowyer*, 19 Ohio St. 490; *Chew v. Keller*, 100 Mo. 368, 13 S. W. 395; and other cases; and upon the proposition that, by the statute of uses, a fee may be mounted upon a fee, counsel cited *Bean v. Kenmuir*, 86 Mo. 666; *Straat v. Uhrig*, 56 Mo. 482; *Wood v. Kice*, 103 Mo. 329, 15 S. W. 623; *Chew v. Keller*, 100 Mo. 368, 13 S. W. 395; 2 Washb. Real Prop. (2d Ed.) *251, *252; *Dunwoodie v. Reed*, 3 Serg. & R. 452; *Saund. Uses & Trusts*, *149, *150; *Carver v. Jackson*, 4 Pet. 1. As to the second deed, upon the proposition that Barbara Ann Yore took a life estate, and that upon her death the trustee held the property in trust for the children of Barbara Ann and Patrick Yore, counsel cited *Rubey v. Barnett*, 12 Mo. 3; *Reinders v. Kopplemann*, 68 Mo. 482. That the statute of uses did not execute the use in Barbara Ann, see *Pugh v. Hayes*, 113 Mo. 432, 21 S. W. 23. That Patrick Yore had no right to the possession as tenant by the curtesy, see *Spencer v. O'Neill*, 100 Mo. 49, 12 S. W. 1054. That the adverse possession of Patrick Yore barred the right of entry of the children as remainder men, see *Jackson v. Harsen*, 7 Cow. 323; *Jones v. Johnson*, 81 Ga. 293, 6 S. E. 181; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174; *Pattison v. Dryer* (Mich.) 57 N. W. 814; *Busw. Lim. par. 401*; *Probst v. Trustees*, 129 U. S. 182, 9 Sup. Ct. 263; *Houx v. Batteen*, 68 Mo. 84; *Bank v. Evans*, 51 Mo. 335; *Farris v. Coleman*, 103 Mo. 353, 15 S. W. 767; *Ewing v. Shanahan*, 113 Mo. 188, 20 S. W. 1065.

THAYER, District Judge. It will be sufficient, to advise counsel of the grounds on which the decision in this case rests, to say that the court holds:

First. That it is a well-settled doctrine in Missouri that a deed should receive such construction as to give effect to the obvious intentions of the parties thereto. Technical rules of construction will be ignored, especially in deeds designed as family settlements, when they do violence to the evident intent of the grantor. *Bean v. Kenmuir*, 86 Mo. 666, 671; *Cook v. Couch*, 100 Mo. 29-34, 13 S. W. 80; *Lewis v. Pitman*, 101 Mo. 281-292, 14 S. W. 52; *Long v. Timms*, 107 Mo. 512, 519, 17 S. W. 898. There can be no doubt, in view of the proviso contained in the habendum clause of the deed from Michael Kelly to John E. Yore, trustee of Mrs. Barbara Ann Yore, of date January 12, 1857, that the grantor intended that the title to the lot therein described should vest in Patrick Yore in fee simple in the event that his wife, Barbara Ann, died without having disposed of the property either by deed or will. The deed must be construed as having vested in Barbara Ann a life estate, with power of disposal either by deed or will. Hence the plaintiffs cannot recover as to any of the property included in the Kelly deed.

Second. The court holds that the action is barred by the statute of limitations, as to the property included in the deed from O'Flaherty to Meegan, trustee of Ann Yore, of date April 26, 1852.

Judgment for defendant on these grounds.

WESTERN MORTG. & INV. CO., Limited, v. GANZER et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 231.

1. HOMESTEAD—ATTEMPT TO INCUMBER—SIMULATED SALE TO RAISE VENDOR'S LIEN—NOTICE—PRINCIPAL AND AGENT.

Knowledge by the agent of a loan company that an ostensible sale and conveyance of a homestead is merely colorable, and for the purpose of enabling the owners to raise money thereon by discounting the notes for the deferred payments with the loan company on the faith and security of the resulting vendor's lien, is not imputable to the company itself when the whole transaction is arranged by collusion between the agent and the owners for the purpose of perpetrating a fraud upon the company; and in such case the company is entitled to rely upon the vendor's lien. McCormick, Circuit Judge, dissenting, on the ground that in the particular case there was no fraudulent intent, at least upon the part of the wife; that it was doubtful on the evidence whether the supposed agent was not acting for himself alone, as principal; and that, under such circumstances, it was opposed to the historical and constitutional policy of the state of Texas (in which the homestead was situated) to deprive the debtors of their homestead, even if they had intended to incumber it.

2. SAME—VENDOR'S LIEN—SUBROGATION.

It is the settled rule in Texas that, where one advances money to pay off a vendor's lien upon a homestead, and the money is so applied, the creditor becomes subrogated to the vendor's lien. *Hicks v. Morris*, 57 Tex. 658, and *Pridgen v. Warn*, 15 S. W. 559, 79 Tex. 588, followed.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

The Western Mortgage & Investment Company, Limited, instituted this suit in the court below, praying for judgment against the appellee Ferdinand Ganzer on the latter's notes for \$4,200, interest thereon, attorney's fees, and costs, and for foreclosure of deed of trust lien on certain lots in the city of Dallas, Tex., alleging that, on the written application of Ferdinand Ganzer, complainant had loaned him \$4,200 on April 17, 1889, payable April 17, 1892, which loan was secured by a trust deed executed and delivered by Ganzer and wife to J. B. Simpson, as trustee, at the time of the execution of the note. Complainant specially alleged and relied upon a subrogation clause in said trust deed, which recited the payment by complainant, at the express instance and request of grantors, of two vendor's lien notes on said lots, one for \$1,200, and one for \$1,000, not yet mature. The complainant made the other defendants parties to the suit as claimants under Ganzer. The appellees Ganzer and wife filed separate answers, substantially to the same effect,—that they had no knowledge of the character of the application made for the loan of \$4,200; that it was prepared by complainant's agent, Simpson, and that it was signed by Ganzer, relying implicitly upon Simpson's representations; that the lots in question were, at the time of the making of the deed of trust and said loan, a part of the homestead of defendants, and were so occupied for several years prior thereto, as was well known to complainant; consequently no lien attached. They pleaded in avoidance of the subrogation clause, subrogating to complainant the vendor's lien securing the \$1,200 and \$1,000 notes, that they were induced by the said Simpson, as the agent of complainant, to sell and execute their warranty deed to the premises in question, and deliver same to one John H. Eberhart, which falsely recited a consideration of \$3,000 cash paid, and two vendor's lien notes of \$1,200 and \$1,000, which said vendor's lien notes were delivered by J. H. Eberhart to J. B. Simpson, who advanced to them (Ganzer and wife) only about \$1,900 therefor; that, as between Simpson, Eberhart, and the Ganzers, the whole transaction was simulated to enable the Ganzers to borrow money on their homestead, and to enable the said Simpson and his son-in-law to realize handsome commissions thereby. Ferdinand Ganzer admitted his personal liability on the note, but on pleas of the fraud perpetrated by himself, his wife, and Simpson in the execution of a warranty deed, and execution and delivery of the notes recited, suggested that no lien existed against the lots in question, which were at the time and intended to remain a part of the Ganzer homestead. To the pleas of defendants, complainant answered with a replication, denying the allegations of defendants. The court below rendered a decree allowing complainant a personal judgment against Ferdinand Ganzer for \$5,873.58, amount sued for, but denied the lien asserted by complainant, either as to the \$4,200 note, or as to the \$1,200 and \$1,000 vendor's lien notes. Complainant excepted to the findings and conclusions of the court, and urged its motion for rehearing, which was overruled; and the appellant then appealed to this court.

W. M. Alexander, W. H. Clark, and W. L. Hall, for appellant.

Thomas & Turney and J. L. Harris, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The assignments of error relied upon by the appellant present in different forms practically the same question; i. e. whether the court below erred in not allowing the plaintiff in error (appellant here) a lien on the lands in controversy for the amount of \$2,200, represented by the vendor's lien notes, with interest thereon from April 17, 1891, for the reason that the complainant, at the express instance and request of the defendant Ganzer, and while innocent of any fraudulent taint affecting the notes, advanced the value thereof to pay the same before maturity, and became by contract expressly sub-

rogated to the lien securing the same. It is conceded that, notwithstanding the representations and declarations of the defendant Ganzer and his wife made in the application for a loan and in the recorded declaration of a homestead, the lots in controversy formed no part of Ganzer's homestead; yet the fact being established that said lots, at the time and up to the institution of this suit, were actually used as a homestead, renders the mortgage sought to be foreclosed in this case, so far as it grants a mortgage lien on the lots in controversy, not enforceable.

The evidence establishes that on the 16th day of November, 1888, the defendant Ferdinand Ganzer, having applied to J. B. Simpson, who was agent for the Scottish-American Mortgage Company, for a loan of money, offered as security the lots involved in this suit, which were then, and continued to be, a part of the homestead of said Ganzer and his wife, until the loan on which this suit was brought was made. Said Simpson suggested that, as the security formed part of the homestead of the Ganzers, the form of the security offered should be changed; that the Ganzers could convey the property to some trusted friend, who would give vendor's lien notes, and, after the loan was made, the property could be conveyed back. He further suggested that a plat of the homestead as an addition to the city of Dallas be made, evidently that a proper showing would appear of record. Ganzer and his wife, being fully informed of the purposes thereof, executed a conveyance of said lands to one John H. Eberhart, reciting a consideration of \$5,200,—\$3,000 cash, and two notes for deferred payments, one for \$1,200, due at three years, and the other for \$1,000, due at five years, with interest at 10 per cent. per annum, with vendor's lien retained. Said Eberhart made said notes, and at the same time made a trust deed to Simpson to secure the payment of the same. Simpson recorded both of said instruments, and, taking Ganzer's indorsement upon the alleged notes, discounted them for the Scottish-American Mortgage Company, and said company advanced the money therefor. Ganzer and his wife and Eberhart all knew, as well as Simpson, that the colorable sale to Eberhart was for the purpose of perpetrating a fraud upon the company discounting the notes, as well as upon the homestead law of the state of Texas; and in making said conveyance, and executing the deed of trust and the vendor's lien notes and the plat of Ganzer's addition to the city of Dallas, the said Ganzer and wife knowingly colluded with the agent of the Scottish-American Mortgage Company for the fraudulent purposes aforesaid.

In the case of *Heidenheimer v. Stewart*, 65 Tex. 323, it is said:

"The equities between the original parties to a mortgage cannot avail the mortgagor in a suit on the secured negotiable note to foreclose the mortgage (*Jones Mortg.* § 834; *Hil. Mortg.* 572), even if it results in the incumbrance of the homestead, if those entitled to the exemption have caused the result by their own deliberate fraud (*Hurt v. Cooper*, 63 Tex. 362). If the owners of the homestead simulate a transaction in which a negotiable note would be secured by a valid and meritorious lien on the exempt estate, and their artifice succeeds in imposing upon an innocent party, they are stopped from denying the truth of their solemn statements, and cannot be permitted

to prove that a lien their acts declared to be valid is void because their acts were false. The constitution prohibits liens on the homestead, except for purchase money or improvements. The lien asserted by appellant was for purchase money, if the transaction was genuine, and appellees are estopped, as against appellant, from proving that it was otherwise."

In the case of *Cunningham v. Holcomb* (Tex. Civ. App.) 21 S. W. 125, the court of civil appeals of Texas said:

"It seems to be held that where a third person conspires with an agent to perpetrate a fraud upon the principal, and the rights of innocent third parties have not intervened, the principal is entitled to have a rescission of the contract made between his agent and such third party; or, if he elects not to have it rescinded, to have such other adequate relief as a court of equity may deem proper under the circumstances,"—citing *Mechem*, Ag. § 797.

In the case of *Hurt v. Cooper*, 63 Tex. 362, referred to in *Heidenheimer v. Stewart*, *supra*, which was a case where it was claimed that the sale and conveyance of a homestead was not real, but colorable, being resorted to as an expedient to raise money by negotiating the notes for the deferred payment, it was held that if the purchaser of the vendor's notes had notice that the conveyance was made to the apparent vendee by the owners of the homestead, not on a real consideration, but was accepted by him for their accommodation, and as a means of enabling the owners to procure money, then the deed to the apparent purchaser vested as to him no homestead rights of the original owners; but, if the purchaser had no such notice, he could rely upon the deed from those claiming the homestead as having been sufficient to divest them of all interest to the property; and this, even though the vendors had remained in possession of the property after executing the deed.

From these authorities, it is clear that the validity of the notes purporting to be for the purchase money in the sale from Ganzer to Eberhart, in the hands of the Scottish-American Mortgage Company, who discounted them for Ganzer, depends upon whether such company had notice of the colorable character of the transaction. The agent Simpson had full notice, in fact seems to have concocted the arrangement, and probably for the reason assigned by Ganzer, to wit, "on account of the large commissions allowed him by the company and other considerations of value to him;" but there is no pretense or suggestion that the Scottish-American Mortgage Company had actual notice. In this matter of notice the appellant contends, and the circuit court so held, that the general rule that a principal is bound by the knowledge of his agent is applicable to and controls this case.

The supreme court of the United States says:

"The general rule that a principal is bound by the knowledge of his agent is based upon the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for another client in a prior transaction, the reason of the rule ceases; and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information." *Distilled Spirits Case*, 11 Wall. 367.

In 1 Am. & Eng. Enc. Law, p. 423, we find:

"If an agent should collude with a third party to defraud the principal, the latter will not be responsible for knowledge of the agent in relation to such fraud. While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

From some of the cases cited in the Encyclopedia, supra, we quote as follows:

"The doctrine of constructive notice depends upon two considerations: First, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not. * * * Bostock was acting as Mr. Kirby's solicitor in the transaction; and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if obtained while so employed, and on the same business,—for I do not at all differ from Mountford v. Scott (a), Hiern v. Mill (b), and the other cases,—yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew; for the fraud practiced by Bostock upon Mr. Kirby himself was, of course, concealed from him; and so we may say would certainly be that other fraud which he had practiced on Mrs. Kennedy. Indeed, that was only another part of the same fraud,—another act of the same plot; and therefore I think we cannot, on this account alone, fix his client, Mr. Kirby, any more than his employer, Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge, he had of his own fraud, and are not to hold Mr. Kirby as cognizant (I mean, of course, cognizant in law and constructively) of that, merely because his solicitor himself—the contriver, the actor, and the gainer of the transaction—knew it all well." Kennedy v. Green, 10 Eng. Ch. 697, 718-724.

(a) 3 Madd. 34.

(b) 13 Ves. 114.

"A., to whom B. was indebted, advised C. to lend money to B., on the security of a mortgage of personal property, and acted as C.'s agent in completing the transaction. With the money thus obtained, B. paid A. the debt which he owed him. Both A. and B. acted in fraud of Gen. St. c. 118, §§ 89, 91; but C. had no knowledge of the fraud. Held, that the knowledge of A. was not in law imputable to C." Dillaway v. Butler, 135 Mass. 479.

"Where the same person is an officer of two corporations, and he transfers securities issued by one to the other, with knowledge that the securities are subject to an infirmity which renders them invalid in any hands but those of a bona fide holder for value, his knowledge is not the knowledge of the transferee." De Kay v. Water Co., 38 N. J. Eq. 158.

In the light of these authorities, and considering the fact, well established by the evidence, that Simpson and Ganzer and wife and Eberhart colluded in the execution of the alleged vendor's lien notes, we are constrained to hold that the knowledge of the agent Simpson as to the colorable character of the transaction cannot be imputed to the principal, the Scottish-American Mortgage Company, and the case is thus brought directly within the rule declared in Heidenheimer v. Stewart, supra, and Hurt v. Cooper, supra; and that the vendor's lien notes in the hands of the Scottish-American Mortgage Company should be treated as against Ganzer and wife as representing a valid, subsisting vendor's lien upon the property in controversy. This being the state of the case, the right of the complainant, the Western Mortgage & Investment Company, which

advanced the money to pay off and extinguish such vendor's lien under express subrogation thereto, must be recognized. If it be conceded that notice would affect the Western Mortgage & Investment Company, which is doubtful if the Scottish-American Mortgage Company was a holder of the vendor's lien notes without notice of their taint, then it is to be said that there is no more reason for charging the Western Mortgage & Investment Company with knowledge of the simulated sale by Ganzer to Eberhart, by reason of the knowledge of agent Simpson, than there is to charge the Scottish-American Mortgage Company.

We understand it is settled in Texas that, generally, where one advances money to pay off and discharge a vendor's lien upon a homestead, and the money is so applied, the creditor becomes subrogated to the vendor's lien so paid off and discharged. *Hicks v. Morris*, 57 Tex. 658; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559. In this case there was express subrogation by deed. For these reasons, we are compelled to disagree with the conclusions of the circuit court, and hold that it erred in refusing to recognize the complainant's lien for the amount of the alleged vendor's lien notes executed by Eberhart, acquired by the Scottish-American Mortgage Company, and paid off with the moneys obtained from the complainant.

The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree in favor of the Western Mortgage & Investment Company, Limited, for the amount of the vendor's lien notes, principal and interest, executed by J. H. Eberhart, and recognizing the same as a vendor's lien upon the property described in the complainant's bill, directing the foreclosure of such lien, and the sale of the property to pay the same.

(October 2, 1894.)

McCORMICK, Circuit Judge (dissenting). At the last term of this court, I had to dissent from the judgment and opinion of the court in a homestead case coming before us from Texas. I have now to again dissent from the judgment and opinion in this case, which is a homestead case coming to us from the same state. I dissent from the views expressed and implied in the statement of the case made by the court in the opening of the opinion, and emphasized as premises for the reasoning of the opinion. As I said in *Ivory v. Kennedy*, 6 C. C. A. 371, 57 Fed. 340, in this case there is no question of high equities before us, but a very plain matter of intensely Texas law. From the nature of the case, all homestead questions are local, and domestic to the state where the suit originates. In this case, as in every such case arising in Texas, the issues present mixed questions of law and fact. In considering these, perspective is of vital essence. Our view of the force and right application of the written law, of the credibility of the witnesses, and of the weight of the evidence will take its hue from the medium through which we look. The general principles of the law of evidence, of natural equity, of approved procedure, and the settled canons of construction are to be observed; but it is the Texas law, and not

another, that we are called to construe in this case, and from the standpoint and through the medium of that law we should look into the issues joined by these parties appellant and appellees. Whatever may be our individual views as to the concrete wisdom, justice, and force of hoary maxims, we may not struggle to render remedial organic laws nugatory, because such laws may appear to us to be in conflict with the principles embalmed in these time-honored maxims.

Judge Bynum said in *Duvall v. Rollins*, 71 N. C. 221:

"Our laws have long been so framed as to make fraudulent conveyances void as to creditors, and our habits of thinking run in the same direction; so that it is difficult to realize that another and a new right has been interposed between the creditor and debtor which secures certain of his property, even from his own frauds, upon creditors. It is confirmed by the constitution, and is inviolable."

Mr. Thompson, in his work on Homestead and Exemption Laws, says these laws "have never been supposed to be founded in principles of equity and justice, but are supported by reasons of humanity, expediency, and sound policy, and these reasons have secured for them on the part of courts a liberal interpretation." Section 339. They are not against equity and justice, but above these, as the substance of saving faith is not against reason, but above it. The genesis of these laws, the every-day life and thought of the people who live under them, the expression of the popular construction of them in the successive and progressive steps in organic and statutory legislation which mark the trend of the public policy of the state, the whole line of adjudged cases, the general voice of the legal profession in the state, the very air of the inns of court, and the utterances from the trial bench, furnish efficient helps to a sound construction and right, practical application of the provisions of the written constitution on this subject.

In construing a statute of Massachusetts on the subject of homestead exemption, Mr. Justice Gray, then chief justice of the supreme court of that state, declined to consider the cases in some of the western states cited by the learned counsel in the case of *Searle v. Chafman* further than to note that they were supported by no reasons, and did not disclose how far they may have been influenced by local statutes. 121 Mass. 19. In construing her statutes, the courts of Massachusetts did not need to look to some of the western states, or any of the new states, but naturally and wisely looked to the common law, and to the principles and practice of the settled jurisprudence in their own state. In the sense in which those terms are used by Judge Gray, Texas is not a "western state," nor is she, as to her history and jurisprudence, a "new state." San Antonio is as old as Philadelphia; and considered, in relation to homestead exemption laws, Texas is the senior state,—the pioneer. In this light, Virginia and Massachusetts are the new states. When the Anglo-American colonists were admitted into Texas, they found in force there a system of laws as ancient as the English common law, as rich in immemorial tradition, in ethical philosophy, and in fitness for the practical administration of substantial justice as the

common law of England, aided by the jurisdiction and practice in equity. It had not attained or retained that refinement in technical pleading which, with its much-lauded erudition, holds a dense mystic veil between the suitor and the shrine; nor did it denounce a penalty against poverty or insolvency. It recognized in the creditor and in the debtor alike, first of all and above all, his inferior properties, the husband and father, if he were such, and the citizen, whether or not he was husband or father. If he was a debtor, it exempted his person from seizure on that account, at the creditor's suit; and, in aid of this exemption and the discharge of his higher duties, it exempted from such seizure the farmer's implements and beasts of husbandry, the bread of bakers, tools of artificers, books of advocates and students, beds, wearing apparel, and other things necessary for daily use. *Cobb v. Coleman*, 14 Tex. 598. When these colonists had, by successful revolution, crowned themselves sovereign of the soil of Texas, they blended this system into which they had been admitted, and to which they had become attached, with that system of the common law and chancery of England into which most of them had been born and become more or less instructed, and formed that union of principles and procedure which the first judges of the Texas state supreme court were wont to regard and call "Our Peculiar System." Sovereign, independent Texas put in her first constitution, "No person shall be imprisoned for debt in consequence of inability to pay." Constitution adopted March 17, 1836. On the 26th January, 1839, she provided by statute:

"There shall be reserved to every citizen or head of a family in this republic, free and independent of the power of a writ of fieri facias or other execution issuing from any court of competent jurisdiction whatever, fifty acres of land, or one town lot, including his or her homestead and improvements, not exceeding five hundred dollars in value, all household and kitchen furniture (provided it does not exceed in value two hundred dollars), all implements of husbandry (provided they shall not exceed fifty dollars in value), all tools, apparatus and books belonging to the trade or profession of any citizen, five milch cows, one yoke of work oxen or one horse, twenty hogs and one year's provisions." 3 Gen. Laws Tex. p. 113.

By a statute which took effect February 25, 1843, it was provided that, on the death of a citizen, such of his property as had been exempted from execution should be set aside by the ordinary for the sole use and benefit of the widow and children of the deceased. 7 Gen. Laws, p. 12.

The first constitution of the state of Texas provided:

"The legislature shall have power to protect by law from forced sale, a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land (not included in a town or city) or any town or city lot or lots in value not to exceed two thousand dollars shall not be subject to forced sale, for any debts hereafter contracted; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the legislature may hereafter point out." Const. 1845, art. 7, § 22.

The act of May 11, 1846, provided, in reference to the administration of the estates of deceased persons, that all exempt property should be set aside for the sole use and benefit of the widow and

children; and, in case there were not among the effects of the estate all or any of the specific articles which by the constitution and laws would have been exempt, they should be procured by a sale of other effects. 10 Gen. Laws, p. 308.

By the act of March 20, 1848, it was provided that the ordinary should make an allowance in money adequate for the support of the widow and children for one year, and that all exempt property, except a year's provision, should be set aside for their sole use and benefit; and, in case there were not all or any of such property belonging to the estate, an allowance in money in lieu thereof should be made; both of these allowances to be a charge on the assets of the estate superior to judgment or mortgage creditors. Hartley, Dig. arts. 1153, 1154; 11 Gen. Laws, p. 235.

The act of February, 1860, provided:

"The homestead in a town or city exempt from forced sale is hereby declared to be the lot or lots occupied or destined as a family residence, not to exceed in value two thousand dollars at the time of their destination as a homestead; nor shall the subsequent increase in the value of the homestead by reason of improvements or otherwise, subject the homestead to forced sale." Pasch. Dig. art. 3928; 17 Gen. Laws, pt. 1, p. 34.

The act of November 10, 1866, provided:

"There shall be reserved to every citizen, head of a family or householder being a citizen in this state, free and independent of the power of a writ of fieri facias, or other execution, issued from any court of competent jurisdiction whatever, two hundred acres of land, including his or her homestead (not included in a town or city), or any town or city lot or lots in value not to exceed two thousand dollars at the time of their designation as a homestead; nor shall the subsequent increase in the value of the homestead, by reason of improvements or otherwise, subject the same to forced sale; household and kitchen furniture not to exceed five hundred dollars in value; all implements of husbandry; all tools, apparatus and books belonging to any trade or profession; five milch cows; two yoke of work oxen and two horses; one wagon; twenty hogs; twenty head of sheep and one year's provision; all saddles, bridles and harness necessary for the use of the family. There shall in like manner be reserved to every citizen not a head of a family * * * one horse, bridle and saddle; all wearing apparel; all tools, books and apparatus belonging to his trade or profession." 20 Gen. Laws, p. 160.

The constitution of 1869 provided:

"The legislature shall have power and it shall be their duty to protect by law from forced sale, a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land (not included in a city, town or village) or any city, town or village lot or lots not to exceed five thousand dollars in value at the time of their destination as a homestead and without reference to the value of any improvements thereon shall not be subject to forced sale for debts, except they be for the purchase money thereof, for the taxes assessed thereon, or for labor and material expended thereon; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, and in such manner as may be prescribed by law." Const. 1869, art. 12, § 15.

The constitution now in force provides:

"Sec. 49. The legislature shall have power, and it shall be its duty to protect by law from forced sale, a certain portion of the personal property of all heads of families, and also of unmarried adults male and female.

"Sec. 50. The homestead of a family shall be, and is hereby protected from forced sale for the payment of all debts, except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for

work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife given in such manner as may be prescribed by law. No mortgage, trust deed or other lien on the homestead shall ever be valid, except for the purchase money thereof or improvements thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void.

"Sec. 51. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a town, city or village shall consist of lot or lots not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

"Sec. 52. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the life time of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."

Const. 1876, art. 16, §§ 49-52.

Excepting the period from 1866 to 1876, the supreme court of the state of Texas has been composed of a chief justice and two associate justices. The first chief justice, Judge John Hemphill, had been reared and received a university training, including his preparation for the bar, in a common-law state. He had acquired an ample knowledge of the Spanish language and of the laws of Spain and Mexico. He was four years chief justice in the republic of Texas. He was a member of the convention that framed the constitution of 1845. He remained chief justice 13 years, at the expiration of which time he resigned, to accept the position of United States senator. Judge Abner S. Lipscomb, one of the first associate justices, had adorned the supreme bench of Alabama before he became a citizen of Texas. He, too, was a member of the convention that framed the constitution of 1845. He was a man of force in all the elements of manhood. He was a bold and sound thinker, whose gift and habit it was "to detect and watch that gleam of light which flashed across his mind from within, more than the luster of the firmament of sages." He continued on the bench till his death, which occurred in December, 1856. The other one of the first associate justices, Judge Royall T. Wheeler, was bred to the law in a common-law state. He was a man of profound learning and wisdom. He had a genius for judicial work. He was richly endowed with the virtues and graces which support and give a charm to high rank in public and in private life. He became chief justice on the retirement of Judge Hemphill. He continued on the bench till his death, in 1863. To fill the vacancy occasioned

by the death of Judge Lipscomb, Judge Oran M. Roberts was elected. He had received a university training and had served in the legislature of a common-law state before becoming a citizen of Texas, after which he grew and ripened through a full general practice at the bar and service as attorney for the state and as *nisi prius* judge before his elevation to the supreme bench. For more than 40 years he has done service to the state in places of the highest trust and honor, to the equal credit of the state and himself, and now, venerable and venerated, is enjoying in a green old age the respect and affectionate esteem of all worthy men who know him. To fill the vacancy occasioned by the retirement of Judge Hemphill and the promotion of Judge Wheeler, a native Texan, Judge James H. Bell, was elected, of whom, as he was a near kinsman of mine, I may not further speak. In 1861, Judge Roberts withdrew from the bench to take military service in the war then flagrant, and remained off till after the death of Chief Justice Wheeler. To fill the vacancy thus caused, Judge George F. Moore was elected. During his long service on that bench, he so impressed himself on and endeared himself to the legal profession and the people of Texas that when his sight had so far failed as to impede his wonted dispatch of work, and he expressed a wish, on that account, to retire, with one consent he was pressed to remain as long as his general health could support the labor of sitting in consultation with his brethren. Not to make further specific mention, it is safe and meet to say that, excluding the period of reconstruction when conditions were abnormal, the constituents of the supreme court of Texas have ever been men and lawyers of the first rank, worthy and fit to sit in any court, and faithful to their trust.

Running through 40 years, and through 80 volumes of its official reports, that court has published written opinions in 385 distinctly homestead cases. Beginning with the earliest case, it has profoundly considered, and has often, and sometimes warmly, stated the object and purpose of, the homestead exemption; so much so that 10 years ago the court, speaking through the late chief justice (over whose death the state now mourns), then associate justice, said:

"The object and purpose of the homestead exemption has been so often stated that there is no need to repeat now."

And later, through the present chief justice, then associate justice, the court said:

"The beneficent provisions of our homestead laws have been the occasion of much enthusiastic comment and of not a few rhetorical flourishes in the opinions of this court."

In one of the later, if not the last, of the opinions delivered by Chief Justice Moore in a homestead case, this language occurs:

"Whether the policy of our legislation regarding the homestead exemption has been wise or unwise is not for us to say. It is, however, unquestionable that from its first introduction there has been a uniform and steady tendency in the popular mind in favor of its liberalization and enlargement; and, if the courts have not at all times responded to the popular sentiment upon the subject, they have been constrained to give way to it by more explicit legis-

lation or constitutional enactments. For example, no sooner was it manifest, that the courts were inclined to construe the exemption in the constitution of 1845 as referable both to the lot and its improvements than it was declared the improvements should not be considered in estimating the value of the exempted lots; and, as we think, when it became apparent that this court did not regard the place of business of the head of the family, if entirely distinct and separate from their home, as within the exemption, by reason of its use, there was an enlargement of the homestead exemption, as we find it in the present constitution." *Miller v. Menke*, 56 Tex. 550.

From a careful consideration of the whole line of Texas decisions on this subject, it appears obvious to me that the provisions of the constitution now in force in Texas are not, in substance, an enlargement of the homestead exemption, but only a more explicit expression of that exemption,—a conclusive organic construction by the people of Texas of the exemption as fixed in the first constitution of the state government. An exhaustive analysis of the respective constitutional provisions and review of the numerous decisions would lead too far, but a few suggestions may be indulged, and will suffice. The first sentence of section 22, art. 7, in the constitution of 1845, as a mere grant of power, was unnecessary. The legislature had exercised that power, in the absence of such a grant, by the act of 1839, the validity of which has never been questioned. Subject to be withdrawn or modified by the constitution, it was inherent in the legislature. The intent of this sentence, therefore, must have been to charge the legislature with a duty. The specific and exhaustive provision in the next sentence left personal property only on which the legislative power could act. Both of these necessary implications are now expressed in section 49, art. 16. The self-acting, exclusive character of the homestead provision in the second sentence of section 22, so clearly implied therein, and authoritatively announced by the supreme court in *Darst v. Walker*, 31 Tex. 681, is literally expressed in the words "and is hereby," in section 50. The exceptions embraced in this section are clearly constructions of the existing exemption, for the law had and has ever been in Texas that, to the extent of the unpaid purchase money, the vendor of land retains the superior title. The homestead exemption can only attach or rest on what the claimant owns, be it fee simple, equity of redemption, as tenant in common, leasehold, or other right. The homestead, therefore, had never been protected from forced sale for the payment of the purchase money thereof. Where the vendor's lien covered more than the exempt homestead, it had, in case of sale, to seek satisfaction first out of the excess. It was never supposed or held that the homestead was not liable for the taxes assessed thereon. The supreme court accept the last sentence of section 50 "as a legislative construction of the general policy of our state in this regard." *Black v. Rockmore*, 50 Tex. 96. It must have been in Judge Moore's mind, when he wrote the language above quoted from *Miller v. Menke*, that section 51 was, as touching the particulars he was considering, rather a reversal of *Williams v. Jenkins*, 25 Tex. 279, and of *Iken v. Olenick*, 42 Tex. 195, than an extension of the exemption. Even the change in the numerical figures used to express the limit of value put on the urban home-

stead is not, in fact, an enlargement of that exemption as fixed in the constitution of 1845. It is only a restoration of it. In 1845 the purchasing power of the precious metals had not been lowered by the output of the mines in Australia and in our Pacific states. The value of the bare land of the average rural homestead did not exceed, probably rarely equaled, \$2,000. It is evident that the intention was, as it certainly should have been, to make equal provision, as nearly as could be, for each of the two classes of inhabitants into which all civilized people are divided,—the rural and the urban. In 1869 and in 1876 the conditions of the currency and of the country were so changed that, in order to preserve the spirit of the provision, it was necessary to change the letter. The spirit giveth life; the letter killeth. He that sticks in the letter stops in the bark, and fails to reach or know the rich sap and stout heart of this tree of life, of Texas origin, which for 50 years has cast forth its good seed into the fields of other states, where some have fallen by the wayside, and some on stony places, and some among thorns, but much other has been received into good ground, and brought forth fruit in due season and measure, while in its native soil the parent tree maintains perennial life and growth, majestic in its strength, a joy forever in its beauty. Its roots take deep hold on and fill all the land. Its trunk and limbs and leaves and bloom and fruit shelter, heal, delight, and nourish the families that uphold the pillars of the state. And whosoever will, let him come.

This policy of homestead exemption is not a provision by the public for the poor. It has no element of pauperism in it; neither has it any element of bounty in it. It does not collect from the provident and affluent, and bestow its exactions to foster fraud or sloth. It bestows on all alike. It takes from all alike. It takes from all heads of families the right to make so much of their land as they use as a home the basis of credit, and from the married man who owns a homestead the right to sell it, except with the consent of his wife, and in the manner prescribed by law. It is not the debtor who is protected from his creditor; it is the homestead of the family that is protected against both. As to the homestead, the owner is not and cannot become a debtor. The land is bound for the charges fixed on it before the homestead designation. These charges may be enforced. They are the debts of the homestead. They underlie its right, and are not ousted or rendered dormant by the homestead use. But no act of the owners or of others can put a charge over the homestead use not within the named exceptions. Homestead in Texas is not an estate that can be sold and conveyed, or a right that can be waived by deed, or estoppel arising out of recitations in a deed. Where, in fact, the property is actually in use for homestead purposes, neither the declarations of the husband or of the wife, nor of both, can change its character. *Jacobs v. Hawkins*, 63 Tex. 1. The husband and wife cannot by any character of solemn writing, executed and acknowledged, or even sworn to before a public officer, authorized to take acknowledgments of married women and of other parties, and to administer oaths generally, and placing that paper in the

custody of the register of deeds to land for the county, and having it inscribed in the order of its date on the book for the record of deeds, and accurately indexed, restrict the limits of their homestead defined by actual use. There is no law authorizing such a restriction, nor can the legislature of Texas so provide. *Radford v. Lyon*, 65 Tex. 471. The convention that framed the constitution now in force did, with great deliberation, after full and earnest debate, most wisely refuse to require or authorize the designation of the homestead to be made on the record. The act for subjecting the excess in a rural homestead to execution has no application to this case, even if all of its provisions are valid, which as yet has not been tested. The constitutional method of designation is "that the same shall be used for the purposes of a home or as a place to exercise the calling or business of the head of a family." The right of trial by jury remains inviolate. There are now in Texas, approximately, 2,500,000 people, which will give, allowing five persons to a family, 500,000 families. If one-half of these live in a city, town, or village, and own homesteads to the limit in value of the exemption, these homesteads will embrace improved real estate the bare ground of which was at the time of designation of the value of \$1,250,000,000. If the other half of these families own homesteads not in a town or city, to the limit in area of the exemption, they will aggregate 78,125 square miles of improved country lands. It is sadly true that many families do not own their homes. Many others are not able to own to the extent of the exemption. It is happily true that very many who own homesteads have no desire to borrow money on them, and could not be tempted. The strictly legal possibilities only are given in the above figures, and, though far beyond the moral and practical possibilities, show the gravity of the subject; and the number and character of current suits, as shown by official records and reports, show the interest, the zeal, the cunning, and the skill which mortgage companies and other money lenders have, and have often successfully exerted, to evade this exemption, and reach with their investments the homes which it is the policy of the state to protect from their benevolence.

As already stated, the homestead in Texas has always been held to be subject to forced sale for the payment of the purchase money thereof, but not for the payment of the purchase money of five times as much more, or of any more, of a tract of which it formed a part in the purchase. In *Harrison v. Oberthier*, 40 Tex. 385, it appears that John Harrison had bought 307 acres of land from T. J. Walling. John Harrison died. His widow resided on the land. On the application of the administrator, 200 acres of the tract were set apart for her as homestead. There still remained due to Walling of the unpaid purchase money of the 307 acres about \$600. He asked for and obtained an order of the county court for a sale of all the land for cash, to satisfy his unpaid purchase money. Oberthier was in possession of the land, as the tenant of the plaintiff (the widow), at the time the sale under the order of the probate court was made. He bought at the sale. It was confirmed. The administrator con-

veyed the land to the purchaser on his payment of the purchase money, with which Walling's claim was paid. The widow brought trespass for the whole tract. The trial court gave judgment against her, and she appealed. In the supreme court the case was reversed, on a question of procedure. The purchaser at the probate sale was held to have acquired no title to the land by his purchase, but to have become subrogated to the right of Walling, by the payment to him of the purchase money. The court pointed out the correct procedure to have his rights enforced, and said:

"If this course should be taken, and it should be found necessary to sell the land to pay the balance of the purchase money, the surplus of one hundred and seven acres in excess of the homestead should be sold first, and the deficit, if any, should be made up by a sale of a sufficient quantity, or the whole, if necessary, of the two hundred acres, if it is not otherwise paid."

The case of *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559, I have studied with care. To give an adequate analysis of it would involve irksome detail. I insist that it is not authority for the decision of the court in *Ivory v. Kennedy*. "All pretended sales of the homestead involving any condition of defeasance shall be void," and "no mortgage, trust deed, or other lien on the homestead shall ever be valid, * * * whether such mortgage or trust deed or other lien shall have been created by the husband alone or together with his wife,"—is the mandate of the constitution. Real sales of the homestead, made in the manner prescribed by law, will, like mortgages on the separate property of the wife to secure the debts of the husband, be closely scrutinized; and they must be free from symptoms of fraud, coercion, or undue influence, but within the conditions of good faith they are not discouraged. Where a fraud is practiced on the wife by others whom she trusted, and the purchaser is willfully blind, in order that he may profit by it, he is as guilty as those who perpetrated the fraud. If, before signing and acknowledging the deed, she was made to believe that these acts were a mere matter of form, and not binding on her or on her home, of which the creditor had knowledge or should have taken notice, the wife will not be bound. *Shelby v. Burtis*, 18 Tex. 645; *Pierce v. Fort*, 60 Tex. 464.

In the case of *Hurt v. Cooper*, 63 Tex. 362, it was claimed in the answers that the lots on which the trust deed was given by Cooper were conveyed by Catherine and Thomas D. Gilbert and his wife to Cooper for the sole purpose of procuring a note in the form of a purchase-money note, on which appellant was willing to lend money, and that in fact Cooper made the note and accepted the deed solely for the accommodation of the Gilberts, who, as between themselves and Cooper, were the real debtors and also the owners of the lots, which, in accordance with the original understanding between them, he soon afterwards reconveyed. The evidence showed that, as between the Gilberts and Cooper, such was the real nature of the transaction. The answer further alleged that Hurt had timely notice. The court says:

"If he had such notice, then he could not rely upon the deed from the Gilberts to Cooper for the divestiture of such homestead rights as the former had in lot 11, block 143, for he would stand charged with notice that Cooper

held the legal title to the lot in trust for the Gilberts; and the trust deed by him, apparently made to secure the purchase money for the lot, could not have any further effect towards the divestiture of the homestead right than would such a deed had it been executed by the Gilberts directly. If, however, Hurt had no notice of the nature or purpose of the conveyance from the Gilberts to Cooper, then he might rely upon that deed for the divestiture of the title to the lot, and the consequent divestiture of any homestead right the Gilberts may have had therein, and it would be subject to sale to satisfy his debt contracted in good faith on what appeared to be the real title of Cooper, which would pass through a sale made under the trust deed."

In the case of *Mortgage Co. v. Norton*, 71 Tex. 683, 10 S. W. 301, in which the wife had signed the application for the loan, a written designation of homestead, and two mortgages or deeds of trust, and acknowledged them before the proper officer, the supreme court, after reciting the evidence, says:

"It is difficult to attach the term 'fraudulent' to her passive submission to the series of acts dictated and required to perfect the loan for the husband by the agent of the company."

And, again, in the same case, the court says:

"As the constitution denounces as invalid all liens upon the homestead save for purchase money or for improvements made thereon, whether created by the husband alone or together with his wife (article 16, § 50), the holder cannot rely upon such mortgage or trust deed attempting to give a lien. The privy acknowledgment of the wife does not cure the invalidity of a trust deed for a loan upon the homestead. The estoppel, therefore, must be made out by proof of facts outside the instrument itself. It cannot directly or by its recitals bind the homestead."

The case of *Heidenheimer v. Stewart*, 65 Tex. 321, is this: The appellants, as indorsees of one Alexander, brought suit against Stewart to recover the amount due on a negotiable promissory note executed by Stewart, and to foreclose a lien on a certain tract of land retained as security for the note in a deed from Alexander to Stewart for the land. At the time of and for some time before the execution of this note, the land in question was the homestead of Stewart, who was a married man. He was indebted to Alexander on open account. To secure this debt, Stewart and wife conveyed the land by proper deed, with full warranty, to Alexander, who, on the same day, by like deed, reconveyed the land to Stewart, taking the note sued on, and retaining vendor's lien to secure the note. All this was done in pursuance of a distinct understanding between the parties, and in order to conceal the true character of the transaction which was to secure the pre-existing debt. The court says:

"If the owners of the homestead simulate a transaction in which a negotiable note would be secured by a valid and meritorious lien on the exempt estate, and their artifice succeeds in imposing upon an innocent party, they are estopped from denying the truth of their solemn statements, and cannot be permitted to prove that a lien their acts declared to be valid is void because their acts were false. The constitution prohibits liens on the homestead except for purchase money and improvements. The lien asserted by appellant was for purchase money, if the transaction was genuine, and appellees are estopped as against appellant from proving that it was otherwise. Appellant had no constructive notice of the fact that the deeds were intended to evade the law, for, if the transactions had been as recited, the note would have been secured by a valid lien. That there was no actual no-

tice, which might have arisen from the date of the deeds, the consideration, and registration (*Gaston v. Dashield*, 55 Tex. 508), was stipulated between the parties in the court below."

In this connection it may be noticed that in Texas the husband not only has control and exclusive power of disposition of his separate estate, but, pending the marriage, has like control and power of disposition of the community property and exclusive management of the wife's separate estate, and, with exceptions not necessary to notice, is a necessary party to all litigation for or against her, which, as a rule, is prosecuted or defended on her behalf under his direction; hence, doubtless, the stipulation as to notice which controlled this *Heidenheimer Case*.

What is the case before us? On February 24, 1893, the appellant exhibited its bill in the circuit court of the United States against Ferdinand Ganzer, his wife, Helene Ganzer, and others, not now material to mention. The bill showed that appellant is a corporation organized under the laws of England, and that the defendants just named are husband and wife, citizens of Texas, and inhabitants of the district where the suit was brought. It charges that Ferdinand Ganzer had on the 9th day of April, 1889, prepared his written application, addressed to the complainant, in which he solicited a loan of \$4,200 for the term of three years, proffering as security lots 1, 2, 3, 4, 5, 6, and 7, in block 847 of Ganzer's addition to the city of Dallas, which he represented to be free from incumbrance, except \$2,200, which was to be paid out of this loan. That he occupied no part of the same as his homestead, but occupied lot 8 in said block as his homestead, which lot 8, with its improvements, was worth \$8,000. That on 17th of April, 1889, Ganzer and wife executed and filed for record their designation of their homestead, designating the lot number 8, which was then and there actually occupied by them as their homestead. That on the faith of the recitals in the application, and on the faith of this designation of homestead and of their actual occupancy, and of the recitals in a deed of trust that day given by defendants, complainant made the loan asked, taking the deed of trust and a note for \$4,200, at three years, with six interest coupons to cover semiannual interest. That the principal note and the three last maturing of the interest coupons are overdue and unpaid. It then declared on this provision in the deed of trust:

"That the herein-described property is not our homestead. That the principal note secured by this deed of trust is given partly for and in lieu of two certain notes executed by J. H. Eberhart to F. Ganzer, both dated the 16th day of November, 1888, one for the sum of \$1,200, due 3 years after date, and the other for the sum of \$1,000, due 5 years after date, both notes bearing interest at the rate of ten per centum per annum. Said notes were given for part of the purchase price of the lands herein conveyed, to secure which notes the vendor's lien was specially retained. The note secured by this deed of trust is intended in part as an extension of said vendor's lien notes, which, with interest accrued thereon, have been paid off for me, the said Ferdinand Ganzer, and at my special instance and request, by the Western Mortgage and Investment Company, Limited, with the express understanding and agreement that said Co. is thereby subrogated to all the rights of the said Ferdinand Ganzer under said vendor's lien to the extent of the sum so paid by the said Co. for principal and interest of said vendor's lien

notes. That we will pay the said notes and interest thereon as the same becomes due and payable. That we have a good and perfect title in fee simple to the said lands, and have the right to convey the same to the said James B. Simpson, trustee."

—That the note for \$4,200 was intended in part as an extension of said vendor's lien notes, which were fully paid off, with the express understanding and agreement that complainant was thereby subrogated to all the rights, legal and equitable, of said Ganzer. The bill prays subpoena to defendants requiring them to answer (without waiving oath to the same), for judgment for principal and interest, for foreclosure of the lien and decree of sale of the premises described in the deed of trust, to satisfy its debt and costs. The defendant Ferdinand Ganzer answered that he was indebted on the \$4,200 note, principal and interest. That he is, and was at and long before the time of making said note and deed of trust, a married man. That, at the time and long before the execution of the same, he and his wife owned, occupied, and used the whole of the premises as their homestead, which the agent of complainant, who negotiated the loan, well knew. That about the 14th of November, 1888, he applied to James B. Simpson for a loan of money; and that Simpson, as agent of complainant, stated that he would make the loan for complainant, but requested respondent to comply with certain forms in relation to his homestead property, which he distinctly stated could not be held as security for the loan, but that as a form only he wished it. He advised that a plat of respondent's homestead, then actually occupied and used for homestead purposes, be made and recorded as an addition to East Dallas. That this was made on the 14th of November, and filed for record on the 15th November, 1888, dividing the homestead into eight lots, numbered from 1 to 8. The lots from 1 to 7 included respondent's stable, cow house, chicken house, laundry, and garden, then and ever since in actual use as the homestead of respondent. That Simpson named this "Ganzer's Addition to the City of East Dallas." That it was not made with a view to a sale of any part of the property, but a part of the transaction upon which Simpson proposed to proceed as follows: He directed respondent to select some friend to whom a simulated conveyance of lots from 1 to 7 might be made, to be canceled or the lots to be reconveyed to respondent's wife, if desired, as soon as the loan should be obtained. Respondent suggested a laborer boarding with him, named J. H. Eberhart, who had no means to purchase the property, as Simpson well knew. That Simpson prepared a deed to Eberhart for lots from 1 to 7, reciting a consideration of \$5,200,—\$3,000 cash, and the two notes, one for \$1,200, and one for \$1,000, referred to in the bill. That in fact nothing was paid or intended to be paid, and Simpson advised that nothing need ever be paid on account of these formalities. He was willing, as the representative of complainant, to loan the money, and did loan it, on the personal responsibility of respondent; but, to preserve uniformity in his mode of proceeding, desired, as he stated and led respondent to believe, only the form of a conveyance, which should

in no way bind the lots. These papers were executed—the notes by Eberhart and the deed by respondent and wife—on November 16, 1888, and were duly recorded. At the same time Simpson took a deed of trust to himself, as trustee, with power of sale from Eberhart on the same lots, ostensibly to secure the payment of the \$1,200 and the \$1,000 notes. These notes he retained, and, although they were afterwards settled, they have never been delivered to respondent. That on the 17th of April, 1889, Simpson, for complainant, devised a method of payment of the two notes for \$1,200 and \$1,000, and for that purpose he agreed to make for complainant a further loan to respondent, to secure which he prepared the mortgage and trust deed and note with coupons declared on in this case, all of which were executed,—the notes by respondent, and the deed of trust by him and wife. About this time, Simpson procured respondent and wife to sign a statement that lot 8, on the plat, was their homestead. The respondent Helene Ganzer adopts her husband's answer, and further says that she signed the trust deed upon the express understanding and agreement that it should not affect the title to her homestead, and that complainant, through its agent, had full knowledge of her homestead rights at and before any and all the transactions detailed in the bill and in the answer of Ferdinand Ganzer. The complainant put in evidence the application, in print and in writing, for the \$4,200 loan. This application is not signed by the wife, Helene Ganzer. It is not sworn to by Ferdinand Ganzer. It is made on a printed blank form, twin to the latest improved edition of such corporation literature, with which the legal profession and the courts have become so familiar that they may take notice, as matter of common knowledge, of the labyrinthine intricacies of marginal directions, alternative statements, mostly printed in small type, in crowded lines, and the confusion of short and narrow blank spaces, which any one who has had the benefit of actual experience in filling out in his own behalf knows are apt to mislead and deceive even the elect. This one, like the whole brood, has those statements in reference to homestead which provoked the Texas supreme court to indulge in this sarcasm:

"The wonder is that the borrower was not required to make, and did not make, a further statement that no agent or officer of appellant had capacity to know that land owned and occupied by a husband with his wife as their sole place of residence was their homestead." *Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12.

Some of its features may help us further on. It values lot No. 8, with its improvements, designated as the homestead, at \$8,000. It values lots 1 to 7, proposed for security, with improvements thereon, at \$11,000. The appellant's witness Hodge was employed by appellant and paid by appellant to inspect and appraise this proposed security. He did inspect it, for he so testifies, and this application was filled out, he says, "by my partner, Mr. Hoya, under my direction, and Mr. Ganzer. Mr. Ganzer furnished the data for the application, and signed it, and I signed the appraisal attached to the application. This was sent to the complainant at

Kansas City, and the application was approved and the loan made." This witness was 51 years old, and the proprietor of the leading hotel in the city of Dallas, and engaged also in real estate and loan business, at the time he testified, and was so engaged at the time these transactions were had. In his report of appraisement, he values lots 1 to 7, with improvements, at \$11,000, and says that, in his best judgment, they would sell at forced sale, at that time, for \$8,000 cash; that he had acquired the following information respecting the proposed security and borrower:

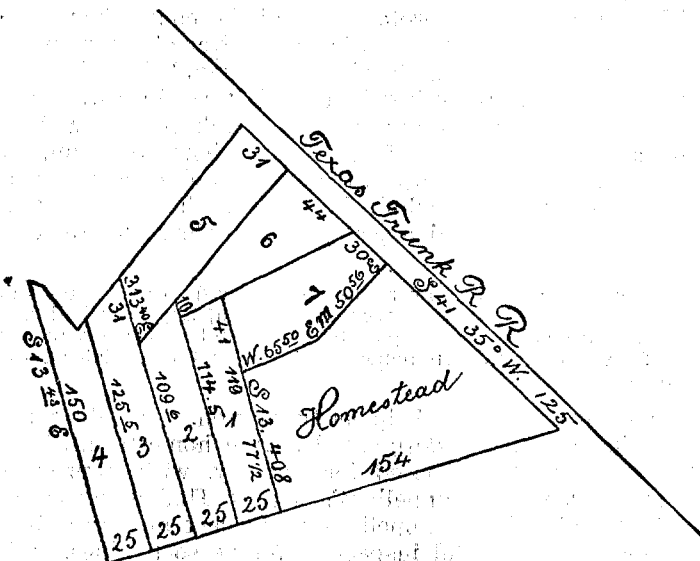
"Borrower is O. K. and enjoys a very good reputation. Consider security A No. 1. The statements made in the foregoing report are made on my honor, and embody my opinions on said property as an expert judge of real property values in the city of Dallas.

"Dated this 12th day of April, 1889.

"[Signed]

A. L. Hodge, Appraiser."

Both Ganzer and wife had known Simpson for a number of years; had bought a part of their homestead from him. Ganzer had had several business transactions with Simpson, and alleges in his answer and testifies that Simpson thoroughly knew the property, its continuous use by Ganzer and his wife as their homestead, his business relations and financial condition, and that he had no occasion to make, and did not make, any representations or give any data to Simpson, or to Hodge, who acted in connection with Simpson, in the matter of this loan. Appellant also put in evidence the recorded plat of Ganzer's addition to the city of East Dallas, as follows:



—Also the recorded designation by Ganzer and wife of their homestead; the principal note, with three interest coupons attached, for the \$4,200 loan; the deed of trust to secure them, the deed

of trust and note all bearing date April 17, 1889; the two Eberhart notes, of date November 16, 1888; and the depositions of Simpson and Hodge. The respondents made such ample proof in support of their plea that the whole property was in fact homestead, and was at the time of its designation as such of less value than \$5,000, that in this court the appellant does not claim that the property is bound beyond the amount of the simulated purchase money notes.

There is not a syllable of proof that the wife, Helene Ganzer, did or said anything in connection with this Eberhart transaction further than the signing and acknowledging her execution of the deed to Eberhart. This she claims to have done under the express understanding that it was not to affect her title to her home, and her claim in this respect seems to be conceded, and appears to be abundantly proved. "If the husband or any really free agent had stated that his signature was merely a matter of form, not intended to be binding, it would have had the effect to give, if possible, additional force to his acts. His statement would be regarded as a confession of fraudulent design. Such imputation cannot, however, be made against the wife, who is supposed to be not well informed of her rights or the effect of her acts." *Shelby v. Burtis*, supra. It is clear that she is not bound by the act itself (Simpson knowing all the facts), and cannot become bound unless she, and not another, her husband, Eberhart or Simpson, or all three, perpetrated a fraud. Where such an issue is to be found by the jury, the charges should limit the inquiry to the acts of the wife (*Mortgage Co. v. Norton*, supra); and the chancellor, sitting in equity, must observe the rule which as a judge, sitting at law, he would give to the jury. It may be permitted to repeat from the case last cited:

"It is difficult to attach the term 'fraudulent' to her passive submission [even if it had been] to a series of acts dictated and required to perfect the loan for the husband by the agent of the company."

Moreover, in this case it is not the declaration of the wife that she makes the deed as a matter of form, and is not bound by it, nor is it the declaration of the husband, with whom she joins in making the deed, but it is the statement and express agreement of Simpson, the man for whom the deed to Eberhart is being executed and delivered, and to whom Eberhart's deed of trust is being delivered, and from whom Ganzer is getting the money. May she not plead and testify to and prove this without being charged with conspiracy to commit fraud, with the actual perpetration of fraud, and when fully proved, as it is, will she be bound? And the subject-matter being homestead, if she is not bound, will the husband be bound? *Inge v. Cain*, 65 Tex. 79. There is on the Eberhart notes not even a pencil memorandum to show that these notes were ever the property of the Scottish-American Mortgage Company. On their face they are payable to the order of Ferdinand Ganzer, at the office of Simpson & Huffman, Dallas, Tex. On the back they are indorsed in blank, "Ferd. Ganzer;" only this, and nothing more. That company is not mentioned in connection with this simulated

unpaid purchase money in Ganzer's application to the appellant for the \$4,200 loan. The Scottish-American Mortgage Company is not named in the deed of trust in connection with the paying off of these Eberhart notes; and it is to be remarked that Ganzer, in giving a deed of trust on his own property, does not covenant that his creditor, who has paid off a debt which is held against Ganzer and his land, shall be subrogated to all the rights of the holder of said notes and lien, but the stipulation is that it shall be subrogated to all the rights of the debtor himself, the said Ferdinand Ganzer.

The name of the Scottish-American Mortgage Company is not mentioned in any of the pleadings of the complainant or of the respondents. It is not mentioned in any of the direct or cross interrogatories propounded to the respondents' witnesses, or in any of the answers in their depositions, which were filed in the court below on October 31, 1893. It is not mentioned in any of the interrogatories or cross interrogatories propounded to the appellant's witnesses after the respondents' answers and their depositions and the depositions of their witnesses were all filed in the court below. It is as clear as the sun that up to this time the connection of the Scottish-American Mortgage Company with these Eberhart notes was utterly unknown to the veteran solicitors of the appellant. In the answer of James B. Simpson, taken 7th December, 1893, to one of the interrogatories propounded by the appellant, appear these words: "I bought them [the Eberhart notes] for the Scottish-American Mortgage Company, Limited, of Edinburgh, Scotland." In all the pleadings and in all the evidence there is no other mention of or reference to that company. There is no other proof that such a company exists, or where it has a local habitation, or what relation Simpson then or ever sustained to it, or that it had in Texas or elsewhere any representative, employé, agent, officer, or constituent other than James B. Simpson. Not only so. It is fully proved that Simpson was connected with the appellant from 1884 till 1891; that the money for the \$4,200 loan made Ganzer was forwarded to Simpson through the bank of Flippen, Adoue, and Lobit; that Simpson let Ganzer have about \$1,800 of that money, and retained the balance, to meet his commissions and charges (for the loan was net to the appellant company), and to pay the Eberhart notes; but there is no whisper of evidence or testimony by or from Simpson, or any other source, that any money on this account—the Eberhart notes—was ever paid to the Scottish-American Mortgage Company, or to any one else, except to James B. Simpson, who knew their simulated character. Ganzer's written application for the \$4,200 is dated and was made April 9, was approved April 15, and the loan was to date from April 17, 1889. The notes and deed of trust given to secure it bear date April 17, 1889. The deed of trust was not acknowledged and delivered till May 6, 1889. The date of its filing for record does not appear. The deed from Eberhart and wife conveying the premises to Helene Ganzer, though dated April 28, was not completed by the taking of the wife's acknowledgment till May 7, 1889, on which day it was

filed for record. All of these instruments were doubtless of record before any of the money of this \$4,200 loan passed. The instruments ordinarily might be considered contemporaneous, notwithstanding the order of their dates, or of their actual execution and record. But is the order of their dates, actual execution, and record not pregnant with notice to the appellant? Soon after the execution and record of Eberhart's deed, he applied to Simpson for the surrender of the \$1,200 and \$1,000 notes. Simpson said the notes had not returned from Scotland, which was literally true, for the notes had never gone to Scotland, and hence had not returned. Eberhart demanded a writing showing that the notes had been paid, and Simpson gave Eberhart this certificate:

"Dallas, Texas, May 13th, 1889.

"This is to certify that the two J. H. Eberhart notes—one for \$1,000, dated Nov. 16th, 1888, and due 5 years after date, and the other for \$1,200, of same date, and due 3 years after date—have been paid off and fully satisfied of this date. These notes are in Europe at present, but, when they are returned, I agree to hand them over to Mr. Eberhart.

"For James B. Simpson,
"Dick Ritchie."

This certificate was made, executed, and delivered to Eberhart, in Simpson's presence, by his direction and dictation. Does it not deserve especial notice that this certificate does not name the Scottish-American Mortgage Company as the holder, to whom payment of these notes had been made, or as the party thereby agreeing and bound to hand them over to Mr. Eberhart? It does not even mention Scotland. It does not purport to be given by Simpson for or on behalf of any other person, natural or incorporated, who had been the innocent holder and owner of these notes. It is given by James B. Simpson, purporting on its face to be only for him and on his own behalf. The fact that Eberhart was willing to receive it, and did receive it, in this shape, shows convincingly that he had no suspicion, as he had no reason to suspect, that Simpson was acting in this matter for an undisclosed principal.

Is the appellant not chargeable with knowledge that the dealing with Eberhart was only a simulated sale? The deed to him stood on the record. His deed of trust to Simpson stood with it. No deed from him to Ganzer, or to Ganzer's wife, or to any other person, appeared there or had been made when Ganzer, in possession of the premises, using all of the same as his homestead, did, in a writing dated and duly signed by him April 9, 1889, with the attached report of A. L. Hodge, dated April 12th, forwarded to Paul Philips, the general manager at Kansas City, by James B. Simpson, and examined and approved by the general manager, April 15, 1889, give the express notice in these plainly-printed words: "The title to the above property is vested in fee simple in the undersigned." If this does not charge the appellant with knowledge, it might be very interesting to learn how notice can be got to the mind of Simpson's principal. The appellant nowhere, in its pleadings or in the proof it offers, seeks to charge Simpson with fraud. It is clear that he committed no fraud on the appellant. He fell into an error of law,—an error persisted in by the appellant until the final action

of the court below was had on this case. Simpson believed and Hodge believed that the platting and recording of the Ganzer addition to the town of East Dallas, and the recording of the written designation of homestead made by Ganzer and wife, were a conclusive abandonment of lots 1 to 7 as part of their homestead, and that, therefore and thereafter, the husband and wife could bind it by their deed of trust to him for the appellant. This appears from Hodge's testimony. He says: "The lots in question adjoin the homestead of Ganzer, which, as designated in their instrument in writing, adjoined the lots in question, but constituted no part of same." Assuming that Simpson bought the Eberhart notes for the Scottish-American Mortgage Company, and waiving the question as to his relation to that company being such as to charge it with his knowledge, it is not so clear that he intended to perpetrate a fraud on it. Ganzer was in good business and credit; was, as Hodge declares on his honor, O. K. as a borrower; and had improved real estate of the value (April 9, 1889) of \$19,000, the part of which then valued at \$11,000 would have sold at forced sale for \$8,000 cash, or nearly three-fourths of its real value, showing that such real estate was then in active demand. May not Simpson, without fraud, have loaned this man \$2,200 on his personal responsibility? Assuming (for there is no proof) that Simpson's instructions forbade his purchasing negotiable promissory notes not secured on sufficient real estate, and that, by doing so, he may have made himself liable to his principal, there is not only no proof that Simpson was not amply solvent, but all the fair implications from the proof tend to show that he was good for that amount. Before the first installment of semiannual interest had matured on these notes, Ganzer's half acre being too valuable for a man in his circumstances to hold the whole of it as a homestead, Simpson induced him to do, with the concurrence of his wife, what Simpson believed effected and conclusively evidenced an abandonment as homestead of that part of the premises embraced in lots 1 to 7, and to borrow on the part so abandoned, on mortgage, to the extent of less than 40 per cent. of its value. Simpson still had the Eberhart notes. He never parted with them from the day of their execution till about the time of the institution of this suit, when he delivered them to the solicitors of the appellant. They were to be paid out of this new loan, and this new loan was secured by a valid mortgage, if Simpson was not in error as to these acts of Ganzer and wife conclusively showing an abandonment of that part of their homestead.

From the pleadings and proof in this case, it is clear that Ferdinand Ganzer did not know, and had not the least ground to suspect, that Simpson was representing two different mortgage companies in the making of the two loans. It is true that Ganzer knew that Simpson was representing the appellant in loaning money in Dallas, and he avers and testified that Simpson expressed himself willing, as such representative, to let Ganzer have the first loan on his personal credit, and wished the Eberhart papers for the sake of form; but it is manifest that Ganzer considered that

Simpson was the real party. Ganzer and his wife are plain Germans, born in the fatherland, taught to read and write in their native language. On reaching adult years, they intermarry, and begin life in Dallas county, Tex., not in the city. They have no children. The husband has learned to read and write English; the wife learned to read English, but not to write it. By 1883, having lived then in Dallas county 10 years, they were able to buy a part of the half acre that now constitutes their homestead. It had no house on it, and they had not then the means to pay for erecting a dwelling house on it; but it was purchased for a home place, and, as soon as practicable, they commenced improving it for that purpose, erecting first stables and cowhouse and an out-house used as a washhouse; and in 1886 they were able to build, and did erect, a house thereon for their dwelling, which they then commenced and still continue to use as their dwelling. The first part of this half-acre lot was acquired October 2, 1883; the last part, March 8, 1888; and at the cost for the whole of about \$1,200. They had both known James B. Simpson for a number of years. A part of their home lot was purchased from Simpson. He was a practicing attorney, of experience and skill, engaged also and largely in the business of loaning money. To them he was the great lawyer, with untold wealth to lend; and he was held by them in that honor which, in their native land, honest yeomen accord to worthy eminent men. The rest of this picture presented by the record has already been drawn.

In this investigation the effort has been to soak the mind with the record, eliminating color. In the opening of this opinion, reference was made to the office and effect of perspective. It may now be permitted to suggest that the view of this case taken by the majority of this court illustrates the power and value of perspective. It is respectfully submitted that the distinction drawn in the opinion of the court by which the corporation claimed to be the principal in the purchase of the Eberhart notes by Simpson is to escape from being charged with his knowledge finds no support in the opinion of the supreme court in the Distilled Spirits Case, 11 Wall. 367. The citations from the American & English Encyclopedia of Law are not accessible at this writing, but do not seem to require notice. The distinction drawn by the majority of the court in this case may rest on a refinement in casuistry fit to have exercised the fancy of the schoolmen, but one which the judgment of a superior court, charged to administer the Texas homestead exemption law, should reject. Much of the money-seeking investment on mortgage security in Texas is owned by aliens or by citizens of other states. It is now the vogue there, as elsewhere, to effect such investments through mortgage companies. Citizens of that state desiring to invest money there on such security will have easy opportunity, of which they will not be slow to avail themselves, to make their investments through incorporated mortgage companies, created by or under the laws of some foreign country or of some other state of this Union. If the views expressed in the opinion of the court in this case are to become its settled doctrine, the United

States courts in Texas will enjoy a monopoly of all similar suits in which the matter involved is of value sufficient to support their jurisdiction. Cases like *Ivory v. Kennedy*, 6 C. C. A. 371, 57 Fed. 340, may not occur so often, but cases like this will abound. The evil intended to be excluded is the object of the tempter's arts, and subjects not proof against his beguiling wiles will be charmed into the snare. The barrier of the constitution will be withdrawn, for the doctrine of notice, as held and applied in this case, will practically exempt incorporated mortgage companies from the operation of that organic law.

UNITED STATES v. DURLACHER.

(Circuit Court, S. D. New York. October 1, 1894.)

CLERK OF CIRCUIT COURT—RIGHT TO HOLD OFFICE OF COMMISSIONER.

Section 2, under subdivision "Judicial," of the appropriation act of July 30, 1894, which provides that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of \$2,500, shall be appointed to or hold any other office to which compensation is attached," etc., applies only to offices to which a fixed annual compensation of at least \$2,500 is attached, and does not prevent a clerk of the circuit court from holding the office of commissioner of such court.

This was a petition to test the question whether under section 2, subdivision "Judicial," of the appropriation act of 1894, the clerk of the circuit court for the southern district of New York could hold the office of commissioner of the circuit court in such district.

Abram J. Rose, for petitioner.

Wallace McFarlane, U. S. Dist. Atty.

LACOMBE, Circuit Judge. The section presented for construction upon this motion is numbered 2, under the subdivision "Judicial" in the appropriation act approved July 31, 1894. The clause whose meaning is in dispute is as follows:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."

John A. Shields, before whom this proceeding is pending, has held the office of "commissioner of the circuit court" (section 627, Rev. St. U. S.) in this district for many years. He has also, since May 1, 1888, been the clerk of this court. That it is eminently desirable for lawyers, litigants, and all persons interested, including the local representatives of the administrative branches of the government, that the clerk of this circuit court should also be a commissioner thereof, is a self-evident proposition to any one who is familiar with the character, extent, and conditions of the business transacted here. That prior to the passage of the act there was no legal objection to the same person holding both offices and receiving the fees earned by discharging the functions of both is settled by authority, *U. S. v. McCandless*, 147 U. S. 692, 13 Sup. Ct. 465. To

neither office is a salary attached. The compensation received is by a separate fee for each separate official act. The only question here presented is, "Has this section of the appropriation act changed the law?" In my opinion, it has not. The phrase, "an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars," plainly imports a fixed compensation of at least that amount. The annual compensation must be determinate, and not merely matter of speculation. It will not do to say that because on one particular day the fees received amounted to \$10 over and above all expenses, and because there are some 300 working days in the year, therefore the annual compensation for the current year is \$3,000. Nor does the act contemplate a shifting compensation, which might at one time be \$2,490 and at another \$2,510, thus making the clerk competent to hold the office of commissioner on Monday, incompetent on Wednesday, and competent again the ensuing week. That there have been years when the compensation of the clerk aggregated more than \$2,500, and that there may hereafter be such years, does not establish the fact that the compensation for the current year amounts to that sum. No one can know what is to be the annual compensation of the clerk for any given fiscal year until the year has closed, his accounts have been passed at Washington, and his personal compensation taxed and allowed by the attorney general. Day by day, as his functions are discharged, he collects the separate fees allowed for them by law. For all of these he renders an account to the government. From the fees thus received he retains the amount of "his necessary office expenses, including necessary clerk hire," transmitting vouchers for the same to be audited by the proper accounting officers of the treasury. Rev. St. U. S. § 839. Out of the surplus, and out of that only, is he to receive his personal compensation; and it is manifest that if for any reason the volume of business done decreases, the fees will, in like manner, decrease, and the surplus may be reduced to less than \$2,500, or may disappear entirely. Moreover, even if the surplus be over \$2,500, the statute does not insure it to him. Its phraseology is, "No clerk * * * of the circuit court shall be allowed by the attorney general * * * to retain of the fees and emoluments of his office * * * for his personal compensation * * * a sum exceeding \$3,500 a year." Rev. St. U. S. § 839. This limits the power of the attorney general in one direction, but not in the other. He must not allow the clerk more than \$3,500 a year; he may allow him less. Apparently it is within the power of that officer to reduce the salaries of all clerks of circuit courts to \$2,000 at any time; a reduction which may be made at the beginning of a fiscal year, or during its course, or at its close. The "annual compensation" of a clerk of the circuit court is therefore unknown and unknowable until after the expiration of the year, the auditing of his accounts and allowance of his compensation by the attorney general. When, therefore, the question arises whether the incumbent of such office shall be appointed to or hold some other office, it is impossible to discover that he is dis-

qualified because he then "holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars."

It is further contended that the section of the appropriation act is prospective only, and does not affect persons in office when it was passed,—a proposition which finds support in *People v. Green*, 58 N. Y. 295; but that point need not be here discussed. Mr. Shields should proceed as commissioner in the case at bar.

FISHER et al. v. ADAMS et al.

(Circuit Court of Appeals, Third Circuit. October 12, 1894.)

No. 10.

INSOLVENT BANKS—LIABILITIES.—ORGANIZATION OF TRUST AND DEPOSIT COMPANY TO AID BANK—FRAUD ON PUBLIC.

The officers of an embarrassed bank organized a trust and deposit company to "aid the bank in its struggle for existence." The two institutions had the same officers, and did business in the same building. The bank owned all the trust company's stock, and the deposits and securities of the latter were treated as belonging to the bank, and were abstracted from time to time to meet its necessities. *Held*, that the organization and use made of the trust company was a plain fraud on the public, and, on the failure of both institutions, the trust company was to be treated as a creditor of the bank to the amount of the funds so used.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by Josiah R. Adams, receiver of the Penn Safe Deposit & Trust Company, and others, against Benjamin F. Fisher, as receiver of the Spring Garden National Bank, and against the bank itself, to establish a liability on the part of the bank for certain funds of the trust and deposit company, which were used for its benefit. The circuit court entered a decree for complainants, and respondents appealed.

John R. Read, Silas W. Pettit, and H. B. Gill, for appellants.

M. Hampton Todd, Samuel B. Huey, and Thomas R. Elcock, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The Spring Garden National Bank and the Penn Safe Deposit & Trust Company were substantially one concern. The latter was organized as an adjunct to the former. Its stock was owned by the bank, held in the names of the bank's directors, its business was conducted in the same building as the bank's, and the officers of each were the same. F. W. Kennedy the president of both, after describing the manner of organizing the trust company and the purpose it was intended to serve, says it

"Had one purpose, and that was to aid the bank in its struggle for existence. There was no other motive. I made use of the trust company as

an instrument to that end. If it had not been for the stringency and the carrying out of this plan of mine to receive deposits in the trust company, these deposits would have been made by the different individuals in the bank, and would now be among the liabilities of the bank, and the loans transferred would now be the assets of the bank. * * *

"I looked upon it as one and the same institution, and also I looked upon these transfers as a temporary matter, which would be undone as soon as business resumed its normal condition. It was a temporary matter to bridge over the financial stringency and panic, but the Keystone Bank failure and Bardsley trouble coming increased the panic, and there was nothing for me to do but to let the bank go down. * * *

"Q. Then, if I understand you correctly, in dealing with the assets of the bank and the assets of the trust company in borrowing money and receiving deposits, you dealt with them as if they belonged to one and the same institution?

"A. Yes; I clearly did.

"Q. And that one institution was the national bank?

"A. Yes.

"Q. The other being merely an adjunct or instrument?

"A. Yes."

From time to time, as the bank's necessities required, the funds and securities of the trust company were transferred to the bank, so that when the receiver took possession he found little in its vaults. He therefore brought this suit to have the bank declared responsible for the property so transferred. After testimony had been heard the defendant admitted liability for the principal part of the claim; whereupon the following decree was entered:

"And now, November 21, 1893, this cause having been heard on bill answer and proofs, but upon agreement of counsel as to all matters hereby decreed, except as to so much of this decree as relates to 'note of Francis W. Kennedy, dated November 18, 1889, for the sum of \$15,000,' and as to this latter matter the cause having been now fully considered, it is

"Ordered and decreed that Josiah R. Adams, as receiver of the Penn Safe Deposit and Trust Company is a creditor of the Spring Garden National Bank of the City of Philadelphia in the sum of one hundred and seventy-eight thousand dollars, represented by the following obligations, namely:

"Note of Nelson F. Evans, dated December 10, 1889, for the sum of \$25,000.

"Note of Van Gunden & Young, dated August 13, 1886, for the sum of \$37,500.

"Note of Van Gunden & Young, dated January 2, 1891, for the sum of \$25,000.

"Note of Francis W. Kennedy, dated April 9, 1891, for the sum of \$37,500.

"Note of Alfred C. Rex, dated October 23, 1890, for the sum of \$37,500.

"Note of Francis W. Kennedy, dated November 18, 1889, for the sum of \$15,000; amounting in all to the sum of one hundred and seventy-eight thousand dollars; and it is further

"Ordered that the plaintiffs shall deliver to the defendant B. F. Fisher, as receiver of the Spring Garden National Bank, the above set forth obligations together with the following collateral securities, namely; 465 shares of the capital stock of the Delaware and New England Company, which is collateral to the note of Nelson F. Evans, for \$25,000, and 130 shares of the capital stock of the same company which is collateral security to the note of Francis W. Kennedy, for \$15,000; and it is further

"Ordered that the following collateral security, namely; 312 shares of the capital stock of the Hero Fruit Jar Company, as collateral security to the note of Van Gunden & Young, for \$37,500; 312 shares of the capital stock of the same company as collateral security to the note of Francis W. Kennedy, for \$37,500, 312 shares of the capital stock of the same company, which is collateral security to the note of Alfred C. Rex, for \$37,500, and 280 shares of the capital stock of the Delaware and New England Company which is collateral security to the note of Van Gunden & Young, for \$25,000, which

is now in the hands of B. F. Fisher, as receiver of the Spring Garden National Bank, be retained and applied by him, as such receiver.

"And it is further ordered that the said J. R. Adams, as receiver as aforesaid is entitled to participate in a pro rata distribution of the assets of the said Spring Garden National Bank of the City of Philadelphia, and the receiver of said national bank, will pay and distribute accordingly the amount ascertained to be due the Penn Safe Deposit and Trust Company by this decree, in addition to the sum of thirty-four thousand nine hundred and three and seventy-four one-hundredths dollars, which appeared as a deposit to the credit of the Penn Safe Deposit and Trust Company on the books of the Spring Garden National Bank, which has been already proved and dividends paid thereon.

"And it is further ordered and decreed that there is due and owing from the Spring Garden National Bank of the City of Philadelphia the sum of two hundred and twelve thousand nine hundred and three dollars and seventy-four cents, being the total of the aforesaid sums of one hundred and seventy-eight thousand dollars for notes and thirty-four thousand nine hundred and three dollars and seventy-four cents for amount of debt proved, together with interest from April 9, 1891, amounting in all to the sum of two hundred and forty-four thousand nine hundred and three dollars and seventy-four cents, unto Josiah R. Adams, as receiver of the Penn Safe Deposit and Trust Company, plaintiff."

From this decree an appeal was taken on behalf of the bank, and numerous errors were assigned. The only one pressed however, is that which relates to so much of the decree as renders the bank responsible for the abstraction of \$15,000 worth of stock deposited as security for Kennedy's worthless note, in that sum.

The facts respecting this transaction do not differ materially from those respecting the other transactions covered by the decree; and the bank was justly held responsible for it. The responsibility arises not only out of the fact that the stock was abstracted by its president for its benefit, and the proceeds applied to its use, but especially out of the circumstance that it was done in pursuance of the bank's scheme in organizing the trust company and its practice in dealing with its funds, and that it must therefore be treated as having been done with its knowledge and approbation. It is unimportant that Kennedy owed the bank money and that the amount raised from the stock was credited to him. The bank was in trouble and the stock was taken for and applied to its relief, in pursuance of its design in organizing the trust company and its practice in dealing with it. The organization of the company and the use made of it was a plain fraud on the public and depositors, for the consequence of which the decree justly makes the bank responsible. It is therefore affirmed.

AMERICAN WOODEN-WARE CO. v. STEM et al.

(Circuit Court, S. D. New York. July 14, 1894.)

WRITS—SERVICE ON FOREIGN CORPORATION.

Service on foreign corporation by serving its secretary while temporarily in the state in attendance on a federal court to testify as a witness in a cause to which such corporation was a party, held invalid, it appearing that such corporation did no business in the state except selling goods through a traveling salesman, and in one instance buying a

stock of goods and selling them through an agent specially appointed for that purpose. *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635, and *Golden v. Morning News*, 42 Fed. 112, followed.

This was an action by the American Wooden-Ware Company against Arthur Stem and the Oval Wood-Dish Company. Motion to vacate service of summons. The papers on this motion disclosed substantially the following state of facts:

The action was originally commenced in the supreme court for the city and county of New York by the service of a summons upon defendant company's treasurer while temporarily within the state in attendance on United States court in charge of one of the company's causes, and in expectation of testifying as a witness. Defendant company appeared on motion to vacate said service on the circumstances stated, but said motion was denied. Thereafter defendant company removed the cause to the United States circuit court, and there renewed the motion upon additional facts. The papers before the court disclosed that prior to the action the defendant company had bought in, on execution sale, a stock of goods belonging to its judgment debtor, and sold the same to various customers, in the regular course of business, through an agent especially appointed for that purpose, and residing in the state of New York. Also that the defendant company had for many years previously obtained in said state orders for its goods through a traveling salesman resident in Ohio, but that the company had no office or regular place of business, nor did it transact business within the state of New York, except as aforesaid.

Walter D. Edmonds, for defendant company, appearing specially for the purpose of the motion.

Cited *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635, 637; *Golden v. Morning News*, 42 Fed. 112; *Atchison v. Morris*, 11 Fed. 582; *McGillin v. Claffin*, 52 Fed. 657; *Ahlhauser v. Butler*, 50 Fed. 705; *Bentlif v. Finance Corp.*, 44 Fed. 667.

Edward Schenck, for complainant.

Cited *Bryant v. Thompson*, 27 Fed. 881, 883; *Duncan v. Gegan*, 101 U. S. 812; *Estes v. Belford*, 22 Fed. 275; *Davis v. Railway Co.*, 25 Fed. 788; *Carrington v. Railroad Co.*, 9 Blatchf. 468, 469, Fed. Cas. No. 2,448; *Sweeney v. Coffin*, 3 Am. Law T. Rep. U. S. Cts. 18, Fed. Cas. No. 13,686; *Jones v. Andrews*, 10 Wall. 327; *Pope v. Manufacturing Co.*, 87 N. Y. 137; *Ex parte Schollenberger*, 96 U. S. 377.

LACOMBE, Circuit Judge. This case is within the principle of *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635; *Golden v. Morning News*, 42 Fed. 112. Motion to vacate service of process is granted.

NIPP et al. v. PARRISH et al.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 448.

PLEADING—SUFFICIENCY OF ANSWER—ACTION ON GUARANTY.

An answer to a complaint upon an alleged contract of guaranty, though loosely and inartificially drawn, and pleading the evidential instead of the ultimate facts, held to be sufficient, in substance, where the allegations and denials led to the conclusion that it denied that the written contract of guaranty was ever completely executed, so that it became an

existing agreement, and that it averred that the loans set forth in the complaint were negotiated under a conditional guaranty, the terms of which had not been complied with by the plaintiffs.

In Error to the Circuit Court of the United States for the District of Kansas.

Ben S. Henderson and J. D. Houston, for plaintiffs in error.

John D. S. Cook (A. N. Gossett, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case was sued out to reverse a judgment upon a guaranty alleged to have been made by J. B. Nipp and Charles Coe, the plaintiffs in error, of the payment of certain mortgage loans made by Dillwyn Parrish and James Brown Potter, the defendants in error, to certain clients of the plaintiffs in error. The defendants in error made the necessary jurisdictional allegations in their complaint, and then averred that in 1887 they were engaged in loaning money on notes and mortgages upon real estate in Kansas; that Edward Austin and Charles Tindal, who formed a copartnership styled Austin & Co., were their agents to negotiate such loans, and to take notes, mortgages, and guaranties to secure the loans for them; that on June 1, 1887, the J. B. Nipp Land, Loan & Trust Company, which was a copartnership composed of the plaintiffs in error, were engaged in the business of soliciting and obtaining loans for borrowers; that on that day they made a written agreement with Austin & Co. to guaranty to them, for the benefit of their principals, the payment of the principal and interest of all mortgage loans negotiated by them through Austin & Co., the guaranty not to be considered in default until after default for 6 months in payment of the principal, or default for 60 days in the payment of the interest, and the mortgage bonds, notes, and coupons representing the principal of any such loan to be assigned without recourse to them upon payment of the principal, interest, and charges upon it in full under the guaranty; that under this guaranty the plaintiffs in error procured various loans, the amounts, terms, and securities for which are fully set out, to be made by Austin & Co. for the defendants in error; that default was made in the payment of principal and interest of each of them more than six months before this action was commenced; that the defendants in error offered to assign the securities representing them to the plaintiffs in error, and demanded payment of the amounts due upon them under the guaranty, but they refused to pay. A demurrer to this complaint was properly overruled. The plaintiff in error J. B. Nipp then answered. In his answer he admits that he and his partner signed the written agreement of guaranty pleaded in the complaint; but he avers that, at the time they signed it, there was an understanding and agreement between them and Edward Austin, who procured their signatures, that each individual member of the copartnerships of Austin & Co. and the J. B. Nipp Land, Loan & Trust Company should sign the agreement of guaranty, and that

it should be inoperative and of no effect until each of them had signed it; that Austin afterwards notified them that his firm could not execute it for some time because his partner, Tindal, was in London, where he resided; that, before it was executed by either Austin or Tindal, they discovered a verbal variance between the oral agreement they had made with Austin & Co. and the written contract of guaranty, and prevented its execution, "at which time it was understood and considered by all of said parties that said partially executed contract was void and of no effect." He then avers that after the 1st day of June, 1887, and before the complete negotiation of any of the loans referred to in the complaint, Austin & Co. claimed that there was a misunderstanding on their part of the extent of the responsibility which the land company would assume as guarantors of the loans they might negotiate with Austin & Co.; and on June 29, 1887, the plaintiff in error Charles Coe wrote Austin & Co. that the conditions on which the land company would guaranty such loans were "that upon the failure of any borrower for whom the J. B. Nipp Land, Loan & Trust Company had negotiated a loan of money from the said Austin & Co. to pay his or their interest or principal when due, after the said Austin & Co. had used reasonable diligence in making demand of said borrower, and after failure to pay on demand, as aforesaid, said Austin & Co. were to immediately notify the said the J. B. Nipp Land, Loan & Trust Company of such failure to pay, and, in addition to such notice, said Austin & Co. were to transfer and assign all bonds or notes, interest coupons and all other papers connected with such loan in default, as herein alleged, to the said the J. B. Nipp Land, Loan & Trust Company, such transfer and assignment being for the purpose of collection, foreclosure, or such other action as the circumstances of each particular case required; that, upon and at the time of, the said transfer and assignment, said the J. B. Nipp Land, Loan & Trust Company, as evidence of their good faith, were to pay said Austin & Co. such sum or sums as were actually due at the time of said transfer and assignment and no more." He avers that in the same letter he notified them that, unless they accepted this offered guaranty with the conditions specified, the land company would at once place their business with some other company. He alleges that after they received this letter, and with such an understanding of the guaranty of the land company as the letter conveyed, Austin & Co. accepted the applications of the several borrowers named in the complaint, and the land company negotiated the loans and procured the securities; that Austin & Co. have failed to give to the land company immediate notice of the defaults of these borrowers as they occurred, and have failed to transfer and assign to the land company the securities as provided in the conditions of the guaranty stated in the letter of June 29th, and that the real estate which secured these loans has depreciated in value one-half. There are other allegations and denials in the answer, but none that essentially modify the effect of those we have recited, or that it is important to consider in the determination of the question now before us. The defendants in error demurred to this answer, on the grounds that it did not

state facts sufficient to constitute a defense to the complaint, and that it was inconsistent and insufficient; and the court below sustained the demurrer, and ordered judgment for the defendants in error. This ruling is assigned as error.

The answer is loosely and inartificially drawn. It pleads the evidential instead of the ultimate facts, and no court would make itself obnoxious to any just criticism if it became bewildered and lost in the wilderness of its words. But a careful examination and comparison of its seven pages of closely printed allegations and denials has led us to the conclusion that it does deny that the written contract of guaranty on which the defendants in error count was ever completely executed, so that it became an existing agreement, and that it avers that the loans set forth in the complaint were negotiated under a conditional guaranty, the terms of which have not been complied with by the defendants in error. It goes without saying that if no contract of guaranty was ever made, or if the contract of guaranty under which the loans were negotiated contained conditions that were required to be complied with by the defendants in error or their agents before any liability would attach to the plaintiffs in error, and those conditions have not been complied with, the plaintiffs in error have a defense to this action. We are of the opinion that the plaintiff in error Nipp has pleaded such a defense, and the judgment is accordingly reversed, and the cause remanded, with directions to grant a new trial.

DUPUY v. DELAWARE INS. CO. OF PHILADELPHIA.

(Circuit Court, W. D. Virginia. September 21, 1894.)

1. AUCTION—SALE OF CORPORATION'S REAL ESTATE—MANAGER AS AUCTIONEER.
The fact that the auctioneer who sells real estate of a corporation at public auction is a stockholder, director, secretary, treasurer, and a general manager of such corporation, does not affect the validity of the sale. *Kearney v. Taylor*, 15 How. 494, distinguished.

2. SAME—PRIOR AGREEMENT BETWEEN AUCTIONEER AND PURCHASER—EFFECT.
Where the conditions of such sale are that the land shall be paid for with stock in such corporation at 80 cents of the par value, an agreement by the auctioneer, made before the sale, to let the purchaser have sufficient stock to make such payment, does not affect the validity of the sale.

3. SALE OF REAL ESTATE—STATUTE OF FRAUDS.
Code Va. § 2840, which provides that no action shall be brought on a contract for the sale of real estate unless the contract, or some memorandum or note thereof, is in writing, and signed by the party to be charged thereby, or his agent, renders a parol contract for the sale of real estate voidable only, and not void.

4. FIRE INSURANCE—INSURABLE INTEREST.

A purchaser in possession of real estate under a parol contract of sale has an insurable interest therein, though the contract provides that the vendee shall complete a building thereon within six months, and the title shall not pass until such building is completed, and the building burns before it is completed; the purchase price being paid and deed executed after the loss occurs, and the loss occurring before the expiration of the six months.

5. SAME—CONDITIONS—FALSE STATEMENT OF ASSURED'S INTEREST.

Where a fire insurance agent has full knowledge of assured's interest in property at the time he issues a policy on it which misstates assured's interest, and he issues the policy on his own knowledge, without any statement or representation by the assured, the policy is not rendered void by a condition that it shall be void if such interest be not truly stated.

6. SAME—VACANCY OF PROPERTY—NEGLIGENCE OF AGENT.

In an action on a policy issued on a building not yet completed or fit for occupancy, it appeared that a vacancy permit for 30 days was indorsed on the policy, and defendant's agent promised assured that he would indorse such a permit on the policy every 30 days until the work of completing the building should be commenced, or until assured was otherwise notified; that after indorsing such permit twice the agent failed to again indorse it at the proper time, by inadvertence; and that the property burned more than 10 days after the permit expired. *Held*, that the condition in the policy declaring it void if the building remained vacant for 10 days was waived.

7. SAME—CONDITIONS IN POLICY—MANNER OF PRINTING—STATUTORY REQUIREMENTS.

Code Va. § 3252, provides that a failure to perform any condition of an insurance policy issued after the statute takes effect shall not be a valid defense to an action on such policy, unless such condition is printed in type as large or larger than that known as "long primer," or is written with pen and ink in or on the policy. *Held*, that such statute is not in conflict with any provision of the constitution of the United States or of the state of Virginia, and is valid.

This was an action in assumpsit by J. A. Dupuy against the Delaware Insurance Company of Philadelphia on a fire insurance policy.

Scott & Staples, for plaintiff.

Peatross & Harris, for defendant.

PAUL, District Judge. This action was originally brought in the circuit court of the state of Virginia for the county of Franklin, and removed into this court upon the petition of the defendant company; the plaintiff being a citizen and resident of the state of Virginia, and the defendant a corporation under the laws of the state of Pennsylvania, and having its principal office in that state. It is an action of assumpsit brought by the plaintiff upon a policy of insurance issued by the defendant on a dwelling house of the plaintiff situate in the city of Roanoke, Va. Its object is to recover damages for a loss caused by the destruction of the said dwelling house by a fire which occurred on the 14th day of October, 1892. By a stipulation between the parties, in writing, it is agreed that the issues of fact involved in this cause may be tried and determined without the intervention of a jury, a jury being expressly waived, and that the finding of the court upon the facts, whether general or special, shall have the same effect in this cause as the verdict of a jury.

The evidence, which is voluminous, discloses the case as follows: On the 1st day of July, 1892, the plaintiff purchased the house and lot involved in this action from the Janette Land Company, a corporation doing business in the city of Roanoke, Va. Several months prior to that date the stockholders of the said company, in general annual meeting, had passed a resolution directing the general managers of the company to offer for sale to the stockholders two houses

in process of erection, with the lots on which they are situated, and to receive in payment for the same the stock of the company at 80 per cent. of its par value; the purchaser to obligate himself to complete said building or building within six months from the date of the sale according to the plans and specifications on file with the general managers of the company, the company to retain title to the property until this condition had been complied with. In accordance with this resolution the general managers of the company fixed upon July 1, 1892, as the time, and the city of Roanoke as the place, for the sale of the two houses and lots mentioned in said resolution, and gave notice thereof to the stockholders by circulars addressed and mailed to each of them; and at this sale the plaintiff, being a stockholder in the said company, became the purchaser of one of the houses and lots mentioned in said resolution, and it is the same that is involved in this action. The price bid and agreed to be paid by the plaintiff for the property was \$6,000, which was equivalent to \$7,500 in the stock of the company. At the date of the sale there had been no scrip issued to the stockholders for the stock held by them, but the plaintiff had subscribed for, and paid the required assessments on, 37 shares, and had purchased from another stockholder 2 more shares, and was in fact the owner of 39 shares of the stock of the company, the par value of which was \$3,900. In order to make up the whole of the amount which he bid and agreed to pay in the stock of the company for the property, the plaintiff purchased of Taliaferro 4 shares, and of W. P. Dupuy, plaintiff's brother, enough more to make up the total of \$7,500, the amount in the stock of the company which the plaintiff bid and agreed to pay for the property. There was no writing made or signed by the plaintiff as purchaser, and no memorandum of the sale in writing at the time the sale was made. The sale was made by way of auction, and took place on the porch of the house sold. At the date of the sale the house was insured by the defendant in a policy issued by it in favor of the Janette Land Company, but, this policy having but a day or two to run, the agent of the defendant, W. P. Dupuy, immediately after the sale, and before the plaintiff had left the premises of the house where the sale took place, solicited from the plaintiff permission to insure the house as his (the plaintiff's) property, and the plaintiff agreed that the same should be done. And thereupon, on the same day, the policy formerly issued by the defendant to the Janette Land Company on the house was canceled, and a new policy issued on the said house to the plaintiff, and for a larger amount than the former policy covered. No written application was made or signed by the plaintiff for this policy, and he made no representation to the defendant as to his title to the property, or his interest in it. W. P. Dupuy, of the firm of Dupuy & Taliaferro, who were the agents of the defendant, was the auctioneer who sold the house and lot to the plaintiff. He was also a stockholder in the Janette Land Company, a director in said company, and its secretary and treasurer. He was also a member of the firm of Dupuy & Taliaferro, who were the general managers of the said company. He was fully acquainted

with the condition of the property, with respect to the title and interest of parties in it, and especially with the title and interest of the Janette Land Company prior to and at the time of the sale, and with the interest of the plaintiff in the property at the time he insured it. The policy was placed, together with other papers belonging to the plaintiff, in a compartment used by him in the safe of Dupuy & Taliaferro, the agents of the defendant. It was never seen by the plaintiff until a short time before the fire occurred, when he examined it to ascertain the amount of the insurance, and the character of the roof, as described in the policy, which he did with a view of giving some information to a party with whom he was endeavoring to negotiate a sale of the property. When this policy was issued to the plaintiff, there was attached to it what is called a "builder's permit" for the period of 30 days. A few days before this builder's permit expired by limitation, the defendant, by its same agents, issued to the plaintiff on this policy what is called a "vacancy permit" for the period of 30 days, and agreed to renew the same every 30 days until work on the uncompleted house should be resumed, or until the plaintiff should be notified otherwise. This vacancy permit was first indorsed on the policy on the 1st day of August by W. S. Ficklen, a clerk in the office of Dupuy & Taliaferro, the agents of the defendant, and on the 1st day of September it was renewed for the period of 30 days. But, in the latter part of September, Ficklen left the employment and office of Dupuy & Taliaferro, the agents of the defendant, and by inadvertence the renewal for another 30 days was not indorsed on the policy on the 1st of October. No notice was given to the plaintiff or to the defendant by Ficklen that such indorsement had not been made. The plaintiff and the defendant's agents both supposed that it had been made until after the fire occurred. It is further shown that on the day he purchased the property, and before leaving the premises after making the purchase, the plaintiff consulted H. H. Huggins, the architect and superintendent of the house, in regard to completing the building, and that he, some time after he had made the purchase, applied for and obtained the keys of the house, and accompanied a prospective purchaser to and through the house, exhibiting the same to him, with a view of inducing him to purchase it. It is further shown that the sale of the house and lot to the plaintiff was reported to the stockholders of the Janette Land Company at their next general annual meeting by the general agents of the company, Dupuy & Taliaferro, and that the sale was ratified by the stockholders, and a deed executed, conveying the property to the plaintiff.

The action is defended on the following grounds: First. That J. A. Dupuy, the plaintiff, had no insurable interest in the property when the policy was issued, and none when the property was burned; that the policy was therefore a wagering policy, and void. Second. That the interest of the plaintiff in the property was not truly stated, and the character of the property not truly described, when the insurance was obtained, and that there was a breach of warranty in this failure, and hence the policy was avoid-

ed. Third. That the house was insured only while occupied as a dwelling; that permission was only given, if at all, for it to remain vacant until 1st of October, 1892; that it was burned after that date, and while vacant; and that, therefore, the policy was void. It was further contended in the argument of counsel for the defendant that whereas W. P. Dupuy, the auctioneer who made the sale, was a stockholder in the vendor company, and hence part owner of the property sold; that he was also a general manager, director, secretary, and treasurer of the said company,—therefore the sale of the property made by him, and his memorandum of such sale, were void. It is not necessary to discuss this question, so far as it relates to any memorandum of the sale made by the auctioneer, for it is conceded by counsel for the plaintiff that no memorandum in writing was made of the sale by the auctioneer at the time of the sale, or afterwards, so as to bring the sale within the requirements of the statute of frauds. The question as to the validity of a memorandum in writing made by the auctioneer is therefore eliminated from this case.

As to the other contention of the defendant, to wit, that the sale was void because the auctioneer was a stockholder, director, secretary, and treasurer, and a general manager, of the company whose property he was selling, the court is of opinion that such a position is untenable. There is no principle of law which inhibits a man who is interested in any property, either as sole or part owner, from selling the same, either privately or at public auction. Counsel for the defendant have cited no authority for the position taken, nor does the court think any can be adduced. The evidence clearly shows that the auctioneer had no interest in the purchase of the property. All the authorities quoted by counsel for the defendant are to the effect that the auctioneer cannot be a purchaser of, or interested in the purchase of, the property which he is selling. This is the doctrine laid down in *Kearney v. Taylor*, 15 How. 494, which is a leading case relied on by counsel for the defendant. In that case it was sought to set aside a sale as void on the ground that the auctioneer who sold the property was a member of or interested in a company that became the purchaser. The failure of the case cited to apply to the case at bar is seen in its statement. Counsel for the defendant, in their brief, do not apply the doctrine to an auctioneer who is interested in a purchasing company, but to one who is interested in the company which is selling the property.

Equally untenable, in the opinion of the court, is the position taken by the defendant, that W. P. Dupuy was disqualified to act as auctioneer to sell the property because of the agreement made between him and the plaintiff, prior to the sale, that in the event the plaintiff should become purchaser of the property the auctioneer would let him have enough of his stock in the selling company to make up the requisite amount of such stock to pay for the property. This agreement was no more than any auctioneer might make with a prospective purchaser,—that, if such prospective purchaser had not money enough in hand to make up the purchase price, he (the

auctioneer) would lend him enough for the purpose. An agreement of this kind would by no means give the auctioneer an interest in the purchase, but would simply establish between him and the purchaser the relation of creditor and debtor. It seems unnecessary to discuss this question further.

The principal question in this case is whether the plaintiff had an insurable interest in the property which was insured. The defendant contends that because there was no contract in writing, signed by the purchaser or his authorized agent, the sale of the house and lot to the plaintiff was absolutely void, and cites in support of this contention the Virginia statute, as follows, from the Code of Virginia:

"Sec. 2840. No action shall be brought * * * upon any contract for the sale of real estate * * * unless the contract * * * or some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent. * * *"

A void contract is defined as follows:

"An act is void which, when done, was bad or against the law in respect to the whole community, and nobody is bound by it. But it is voidable if only bad as to a particular person, who may or may not avoid it. When void it may be so treated by any person, and without a special plea or motion, but when voidable it is generally otherwise, if it has been executed." 8 Myer, Fed. Dec. § 874.

The court is of opinion that the contract in this case was not void, but only voidable at the option of one of the parties to it; that it remained in full force until one of the parties should take some action or proceeding by which it would be avoided. The language of the statute relied on by the defendant is not that a contract for the sale of real estate shall be void unless made in writing, but that no action shall be brought thereon. The language is similar to that which is used in the Code of Virginia for the limitation of personal actions generally. See Code Va. § 2920. It is well settled that the statute of limitations does not affect the validity of contracts, but only the remedy for their enforcement. By analogy the validity of the contract here is not affected by the failure to reduce it to writing, but only the remedy is affected, and the defense to the binding effect of the contract can be made by no one except one of the parties to it. The current of authorities fully sustains the court in this position:

"Where the terms of the statute are not complied with, no action can be brought to charge a contracting party by reason of the contract, but the statute does not make the contract void." 3 Minor, Inst. p. 156.

"The plea of the statute of frauds is a personal privilege, which the party may waive, and no other can plead for him, or compel him to plead it, as, if he chooses to do so, the party may voluntarily perform the contract." Wood, St. Frauds, p. 877.

"As to what amounts to an insurable interest, there has been much discussion in the courts, without hitherto arriving at any satisfactory definition. It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested, pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospec-

tive pecuniary condition. An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property,—any *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." 2 May, Ins. § 76. "But insurable interest does not at all depend upon the completeness or validity of the title by which the insured property is held. Thus possession under a contract of sale, upon which partial payment has been made, may give an insurable interest, although the conditions of the contract have been so far violated that if the breach be insisted on the contract cannot be enforced, since the contract, notwithstanding the breach of its conditions, may be carried into effect by the parties in interest. And this is true though the vendor, availing himself of the violations of the conditions by the vendee, has resold the property, and is resisting a proceeding in equity brought by the vendee to compel a conveyance. If this were not so, the property might be destroyed pending the litigation, to the prejudice of the vendee, should he ultimately prevail." Id. § 87.

"The fact that the assured does not hold the absolute title to the property insured does not necessarily prevent him from recovering the full value of the property insured. Thus, a person who has gone into possession of the premises under a contract to purchase, but who has not paid all the purchase money, nevertheless has an insurable interest, to the extent of the full value, and may recover the same upon the policy." 2 Wood, Ins. § 483.

"The contract being one of indemnity, it follows, as a matter of course, that the person insured must have an interest in the property, and be so situated with reference to it that an injury thereto, or its destruction, would result in a pecuniary loss to him. An immediate pecuniary loss need not exist. It is sufficient if there is a reasonable expectation that the insured will derive a pecuniary advantage therefrom." 1 Wood, Ins. § 263. "It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest, in the subject-matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*." Id. p. 645.

"But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract. It affects the remedy only as between the parties, and not the validity of the contract itself; and when the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be treated as a valid, subsisting contract, when it comes in question between other parties for purposes other than a recovery upon it." *Amsinck v. Insurance Co.*, 129 Mass. 185.

"The policy contained a warranty on the part of the assured that he was the sole and unconditional owner of the property covered by the policy, and provided that any breach of the warranties therein contained should render the policy void. The plaintiff was not the unconditional owner of the real estate, but held therefor only a contract for a deed. The contract of insurance was made on the part of defendant by its recording agents at Algona, Hoxie & Reaver, and they issued the policy. When the contract was made, plaintiff fully informed Mr. Hoxie, one of the agents, of the character of his title; and it was fully understood by the agents, and their daily report to the defendant showed the facts in regard to it. Yet, with knowledge of such facts, the agents issued the policy in its present form, and the defendant accepted the premium, and permitted the policy to stand. The failure of the policy to state correctly the title of the plaintiff was due wholly to the fault of the defendant, and it will not be permitted to escape liability on account of it." *McMurray v. Insurance Co. (Iowa)* 54 N. W. 354.

"A right of property in the thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation, to accrue to the assured, may be sufficient, and a contingent interest thus arising may be made the subject of a policy." *Hooper v. Robinson*, 98 U. S. 528.

"That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While

the contract subsists the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property, but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it." *Insurance Co. v. Lawrence*, 2 Pet. 48; *Marshall, C. J.*, delivering the opinion of the court.

But in this case the question of insurable interest seems to be put at rest by the possession of the property by the plaintiff from the day of its purchase by him to the time of its destruction by fire. He, and he alone, exercised acts of ownership over it, and the property was susceptible of no other possession than that which he did exercise over it. The facts, as stated, show this. In addition to this it may be noted that the contract has been fully carried out by both parties to it. The consideration for the property has passed from the purchaser to the seller, and the latter has executed a deed conveying the property to the plaintiff. The plaintiff directed the cancellation of the stock which he held in the land company from which he made the purchase, thus surrendering to the seller its obligation, the surrender and cancellation of which was the consideration for which the land company had offered and agreed to convey the property to the purchaser; such purchaser being a holder of its stock, and obligating himself to complete the building within six months from the date of the purchase. It is true that the last-named condition was not complied with, but it had not been violated at the time the fire occurred. It could not be complied with because of the burning of the house, and was released because it was not possible to comply with it.

In the second place, as to whether the policy was void because the plaintiff's interest in the property was not truly stated, and the character of the property not truly described, when the insurance was obtained. The provision of the policy under which this defense is made is as follows:

"This policy shall be void * * * if the interest of the insured in the property be not truly stated therein, * * * or if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The evidence shows that Dupuy & Taliaferro were the agents of the defendant, and that W. P. Dupuy, a member of that firm, solicited from the plaintiff the insurance of the property for the defendant, and issued the policy on behalf of the defendant; that said W. P. Dupuy was the auctioneer who sold the property to the plaintiff; that he was a stockholder in the land company, the owner of the property; that he was a director, secretary, and treasurer of the company; and that the firm of Dupuy & Taliferro, of which he was a member, were the general agents of the said company. He was fully acquainted with the condition of the property, with respect to the title and interest of all parties, and

especially the land company, prior to and at the time of the sale, and with the interest of the plaintiff in the property at the time he insured it. This brings home to the defendant full knowledge of all the facts in connection with the ownership of the property at the time it issued its policy of insurance upon it to the plaintiff. Besides, it appears from the evidence that the plaintiff made no representation whatever, either in writing or otherwise, as to his interest in the property, but that the agent of the defendant, when soliciting the insurance of the plaintiff, relied upon his own full knowledge of all the facts and circumstances relating to the title and ownership of the property, and issued the policy of insurance to the plaintiff upon his (the agent's) own knowledge of the interest which the plaintiff had in the property at that time, the agent's knowledge being as full and particular as that of the plaintiff. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582.

"To deliver a policy with full knowledge of facts upon which its validity may be undisputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this, or to find that, in accordance with honesty and fair dealing, there was an intent to waive the known ground of avoidance, they will choose the latter. * * * Such an issue is tantamount to an assertion that the policy is valid at the time of the delivery, and is a waiver of the known ground of invalidity. So is the issue of a policy upon an application to a question in which no answer is given." *May, Ins. § 497.*

"It is well settled by the weight of authority that where a policy is issued containing conditions inconsistent with the facts, and the agent knew the facts when the policy was issued, the conditions are waived, so far as they conflict with the facts known to the agent; and this is, peculiarly the case when the agent fills up the application erroneously when the facts were correctly stated to him by the assured. In such cases the doctrine of estoppel is a very just application, as, if it was not permitted to apply, an innocent party could be made to suffer." 2 *Wood, Ins. § 90.*

The doctrine of the liability of insurance companies for the acts of their agents is so well established that the court deems it unnecessary to discuss the question, or to cite authorities to sustain it. The court finds nothing in the facts of this case to distinguish it from the reported cases sustaining this firmly-settled principle.

There was a provision in the policy making it void if the building "be or become vacant or unoccupied, and so remain for ten days," unless otherwise provided by agreement indorsed on the policy, or added to it. It is claimed by the defendant that under this provision the policy is void, because the building was vacant, and so remained for 10 days and longer, without permission of the insurance company indorsed on the policy, or added to it. The evidence shows that at the time the building was insured it had not been completed, and was not fit for occupancy. Because of this fact, there was indorsed on the policy when it was originally issued a builder's permit for the period of 30 days. When this builder's permit was about to expire, the building still remaining incomplete and unoccupied, and no work upon it being in progress, a vacancy permit, instead of the builder's permit, was indorsed upon the policy for the period of 30 days; and it was promised the plaintiff by the agent of the defendant that such vacancy permit should be

indorsed upon the policy by the agent of the defendant at the expiration of every 30 days until the work of completing the building should be commenced, or until the plaintiff should be notified otherwise. This was done in fact for each 30 days up to October 1st, when it was not done only because, through inadvertence, the agent of the defendant failed to do it, and the building was burned within the period of the 30 days next ensuing. Had the agent of the defendant made the indorsement upon the policy of the vacancy permit on the 1st of October, as he promised the plaintiff he would do, and as the plaintiff in good faith relied upon him to do, this question could not have arisen in this case. The evidence clearly shows that the agent of the defendant promised the plaintiff that this indorsement should be made upon the policy every 30 days; that the agent of the defendant had ready access to the policy for the purpose of making such indorsement; that for two of the periods of 30 days each the agent of the defendant did actually make such indorsement upon the policy; and that he failed to do it for the third of such periods only through his own inadvertence, which was his own fault, and for which the plaintiff is in no wise to blame. The agent of the defendant solicited the insurance and issued the policy with full knowledge that the house was not completed, and must remain vacant for an indefinite period. He was fully aware that the house had remained vacant from the day he insured it, and his promise to keep the insured protected from loss or risk by indorsing upon the policy a vacancy permit every 30 days must be taken as a waiver of the condition contained in the policy. His failure to make the indorsement upon the policy as he promised the plaintiff he would do, whether such failure was through inadvertence or otherwise, cannot be used to defeat the plaintiff in seeking the indemnity which the defendant had contracted to secure to him.

"If, at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the defendant to defeat the plaintiff's recovery." *Georgia Home Ins. Co. v. Kinnier's Adm'r*, 28 Grat. 106, 107. "Such waiver or estoppel (for the terms 'waiver' and 'estoppel' may be indifferently used in application to the subject we are now considering) may take place either pending the negotiation for the policy, or after such negotiation has been completed, and during the currency of the policy, and either before or after forfeiture incurred. Such waiver may be made by a general agent, acting within the scope of his powers, needs no consideration to support it, and may be by parol, although the written consent of the insurer is required by the terms of the policy. Nor will the party insured be bound, nor ought he to be bound, by any instructions given by the insurer to his agent, limiting the general powers possessed by the latter in relation to the subject of the agency, unless such instructions are made known to the assured." *Id.* 108.

Further citation of authorities on this point is unnecessary.

The court has discussed and disposed of all the material questions in the case presented in the pleadings and the arguments, except one, which was raised by counsel for the plaintiff, arising under section 3252 of the Code of Virginia. This statute, in brief, provides that the conditions of an insurance policy shall be printed
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in type as large or larger than that commonly known as "long primer," or be written with pen and ink in or on the policy. The preamble and the act, as originally enacted (see Acts Assem. Va. 1877-78, pp. 80, 81), are as follows:

"Whereas, it is the custom of many insurance companies to issue policies of insurance with conditions and other restrictive provisions printed in small type, difficult to be read and likely to escape the attention of the insured:

"(1) Be it enacted by the general assembly of Virginia, that in any action against an insurance company or other insurer, founded upon a policy of insurance issued after the first day of July, eighteen hundred and seventy-eight, no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense to such action, unless it appears that such condition or restrictive provision is printed in type as large or larger than that in which this act of assembly is printed, to-wit: that commonly known as long primer type, or is written with pen and ink in or on the policy."

The conditions and restrictive provisions in the policy sued on here are not printed in compliance with the requirements of the statute, and the policy is dated subsequent to the 1st of July, 1878. The argument of counsel on this statute has not been by any means exhaustive. Counsel for the plaintiff contend for its application to all the grounds raised by the defendant, except as to the question of an insurable interest. Counsel for the defendant insisted in the oral argument of the case that the statute is illegal, as being in conflict with that provision of the constitution of the United States which inhibits a state from passing any act impairing the obligation of a contract, but they do not refer to it in their written brief. The court, as at present advised, sees no ground to question the validity of the act. It is not in conflict with any provision of the constitution of the United States, being prospective in its operation, nor is it in conflict with the constitution of the state of Virginia. Its enactment is within the legislative powers of the state government. The reason recited in the preamble of the act for its passage is a sound one, and the act is in accord with a wise public policy, reasonable and just in its requirements. It is applicable to the conditions of the policy on which this action is based. The court has decided the case on other grounds, but if it were necessary to pass upon this question the court would hold that the said conditions are invalid as a defense to this action, because they do not conform to the requirements of the statute. Judgment will be entered for the plaintiff in the sum of \$3,170.54 with interest from the 20th day of December, 1892, until paid, and the costs of this action.

WINSTON v. UNITED STATES.

(Circuit Court, D. Washington, E. D. October 1, 1894.)

1. DISTRICT ATTORNEYS—COMPENSATION—WHEN FIXED BY STATUTE.

No fixed rate of compensation is provided by law for the services of district attorneys in cases involving the title to land occupied by the United States as a garrison and military post, cases on appeal to the circuit court of appeals against or by the United States, or against a collector to recover money exacted by him as a penalty under a statute of

the United States, or cases against Indian agents and military officers involving the right of the government to prevent the building of a railroad across the lands allotted to Indians.

2. SAME—ALLOWANCE BY ATTORNEY GENERAL—CONCLUSIVENESS.

A district attorney cannot recover, on the basis of a quantum meruit, a sum in excess of the amount allowed by the attorney general, for services rendered, for which no fixed rate of compensation or fees is provided by law.

3. SAME — EARNINGS OF DISTRICT ATTORNEY — DETERMINATION BY TREASURY DEPARTMENT.

The treasury department, in determining whether a district attorney has received earnings in excess of the maximum of personal compensation and emoluments allowed by law for a particular year, cannot include compensation for travel allowed by law on a mileage basis.

4. SAME—REFERENCE OF CLAIM TO COURT OF CLAIMS—EFFECT.

Where a particular item of claims for services by a district attorney, for which the statute fixes no fees, has been allowed by the attorney general, and is part of a case by the district attorney against the government, a recovery for such item will not be denied on the ground that it has been referred to the court of claims by the comptroller of the treasury, under Rev. St. § 1063, and that he desires that court's decision on the questions involved for future guidance, especially where it does not appear that such claim has been regularly transmitted to such court.

5. SAME—SERVICES AFTER REMOVAL—EMPLOYMENT.

Where a district attorney renders services after removal from office, pursuant to arrangements made before notice of his removal, and the attorney general allows him a certain sum, to pay which congress makes a special appropriation, recovery of such sum by the district attorney cannot be defeated on the ground that he was not lawfully authorized to act.

This was an action by Patrick Henry Winston against the United States to recover compensation alleged to be due him for services rendered defendant as United States district attorney.

Alexander M. Winston, for plaintiff.

William H. Brinker, U. S. Atty.

HANFORD, District Judge. The plaintiff held the office and performed the duties of United States district attorney for the district of Washington from the 19th day of February, 1890, to the 30th day of May, 1893; and he has brought this action against the United States, under the provisions of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States" (1 Supp. Rev. St., 2d Ed., 559), to recover compensation for special services rendered by him under the direction of the attorney general, and for mileage in addition to payments made to him. His claim is itemized as follows: (1) For services as attorney for the defendants upon the trial in this court at the July term, 1890, held at Tacoma, of the case of the Catholic Bishop of Nesqually v. General John Gibbon et al., involving the title to the land occupied as a garrison and military post at Vancouver, in this state, \$2,500 in addition to \$2,500 paid to him for said services. (2) For services as attorney for the United States upon the hearing in the United States circuit court of appeals for the ninth circuit, at San Francisco, in April, 1892, of the case of the United States v. The Steam Tug Pilot, on appeal from the district court for this district, \$287.21

in addition to \$212.79 paid to him for said services. (3) For services as attorney for the defendant upon the hearing on appeal in the said United States circuit court of appeals in April, 1892, of the case of *Dunsmuir v. Bradshaw*, as collector of customs for the collection district of Puget Sound, which was an action to recover a sum of money which had been exacted by said collector as a penalty under a statute of the United States, \$500. (4) For services as attorney for the United States upon the hearing in said United States court of appeals in April, 1892, of the case of the *United States v. Gee Lee*, appealed from the United States district court for this district, \$250. (5) For services as attorney for the defendants in the superior court of the state of Washington for King county, and in this court at a term held at Seattle in March, April, May, and June, 1893, in two cases against Edwin Eells, as United States Indian agent, and certain officers of the United States army, involving questions as to the right of the government to prevent the building of a railroad across lands which had been allotted and patented to certain Indians pursuant to a treaty made by the United States with the Puyallup tribe (see *Ross v. Eells*, 56 Fed. 855), \$1,500. (6) For actual and necessary traveling in going from his place of abode to the several places at which terms of the United States courts are held in this district, and returning, and in going to and returning from examinations before United States commissioners of persons accused of violations of laws of the United States, between January 1 and May 30, 1893, a balance of \$1,379.84. (7) For fees and emoluments fixed by statute, earned between February 19 and December 31, 1890, a balance of \$799.71. (8) For the year 1891, a balance of \$810. (9) For the year 1892, a balance of \$490.83.

That the plaintiff rendered the services charged for, as alleged by him, is not denied, and he has proved the value thereof as alleged. If the law authorized a recovery upon a quantum meruit, I should have no hesitancy in awarding to plaintiff the first five items claimed. I hold that the plaintiff's services in the several cases above enumerated were not of the kind for which a fixed rate of fees or compensation is provided by law. In protecting the interests of the government the attorney general often finds occasion to require the district attorneys to take charge of important litigation, and incur expenses in connection therewith, for which the law provides no compensation. It has been usual, however, for the treasury department to audit and pay accounts for such services and expenditures in amounts authorized by the attorney general, and since 1889 congress has recognized the practice by including in each of the annual appropriation bills for sundry civil expenses an item for such special compensation of district attorneys as may be fixed by the attorney general for services not covered by salary or fees. There is no other authority given by law for paying a district attorney for services to the government in his professional capacity, not covered by his salary or fees. The plaintiff is therefore precluded from recovering any sum in excess of the amount fixed by the attorney general as compensa-

tion for any particular service. No allowance can be made by the court upon the basis of a quantum meruit, as the law gives to the attorney general power to pass upon the question as to the value of the service, and his determination is final and conclusive upon the government as well as the claimant. *U. S. v. Bashaw*, 152 U. S. 436, 14 Sup. Ct. 638; *U. S. v. Shields*, 153 U. S. 88, 14 Sup. Ct. 735. On this ground, judgment must go against the plaintiff as to the first item, the sum allowed to him by the attorney general for his services in the *Bishop of Nisqually Case*, viz. \$2,500, having been paid. The attorney general allowed in the *Pilot Case* \$400, of which \$212.79 has been paid, and the balance of \$187.21 was credited and retained by the treasury department on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which the money was earned. The attorney general also allowed in the *Gee Lee Case* \$250, and the same was credited and withheld upon the same account. From the uncontradicted evidence I find that the plaintiff's emoluments, as stated, included compensation for travel allowed by law on a mileage basis, amounting in each year of his incumbency to more than the several sums deducted from his earnings as excess. The opinion of the court of claims, by Chief Justice Richardson, in the case of *Smith v. U. S.*, 26 Ct. Cl. 568, affirms that mileage "is a commutation or substitute for expenses estimated to be necessary for travel, and is fixed by law at ten cents a mile, which ordinarily, or on the average, it is supposed, will cover the actual amount required. It relieves public officers from the trouble of keeping itemized accounts of small disbursements, and avoids controversies between them and the accounting officers upon insignificant matters. The commutation for such expenses can no more be regarded as fees and emoluments than would be items of actual expenditures, if required to be included in the emolument return, which latter, we apprehend, nobody would claim to be either fees or emoluments." I concur in that opinion, and consider all the deductions from the plaintiff's earnings on account of excess above his lawful maximum to be erroneous. Therefore, my findings as to the two items for \$187.21 and \$250 will be for the plaintiff.

The attorney general fixed the amount of the plaintiff's compensation in the case of *Dunsmuir v. Bradshaw* at \$310, and that sum has been neither paid nor credited to the plaintiff. I hold that he is entitled to recover the same in this action. In behalf of the government the court is urged to refuse to consider this item, on the ground that plaintiff's claim has been referred to the court of claims, under section 1063, Rev. St., and the comptroller of the treasury desires to have the decision of that court upon the questions raised by his objections, to guide him in passing upon other claims of a similar kind. This argument would have greater weight if the comptroller would accept the decisions of the court of claims which have not been reversed nor overruled by the supreme court, and follow their guidance in passing upon similar questions. I find, however, from the record in this case,

that in the matter of the mileage allowed by law to district attorneys the comptroller persists in construing the law according to his own ideas, which are at variance with the decision in the Smith Case, above referred to. It does not appear that this claim has been regularly transmitted to the court of claims by the secretary of the treasury or the head of any department; and, if it were, the item is part of a case of which this court has acquired jurisdiction, and I can find no warrant for sending the plaintiff to litigate one part of his case in another forum without his consent. For the services in the Puyallup Indians Cases the attorney general fixed the sum of \$400 as compensation for work done while the plaintiff was in office, and \$600 for continuation of his work under his special employment after his removal from office. Upon grounds already gone over in this opinion, I hold that the plaintiff is entitled to recover in this action the amount of \$400 so allowed by the attorney general.

The other part of the allowance is objected to on the ground that the plaintiff was not lawfully authorized to represent his clients after his official connection with the government had been severed. The court did not permit pending proceedings to be interrupted by the wielding of the political axe, and the plaintiff earned the compensation allowed by the attorney general by remaining at his post, discharging his professional duty, under his special employment as attorney for the defendants, during the actual trial of the cases, pursuant to arrangements made previous to notice of his removal. Congress, at the last session, has made a special appropriation to pay this \$600, and thereby removed all doubts as to the legality of allowing the same. The findings will be in favor of the plaintiff, on account of this item, for the full sum of \$1,000, as allowed by the attorney general; but, as the \$600 appropriated by congress for the purpose has been already paid, that much will be deducted from the amount of the judgment.

As to the sixth item, I find that the total earnings in 1893, including the \$1,000 special compensation for the Puyallup Indians Cases, and mileage amounting to \$1,629.60, is the sum of \$5,164.60. The plaintiff is lawfully entitled to receive and retain the following: Maximum personal compensation in the way of fees and emoluments, \$2,465.75; mileage, \$1,629.60; commissions on proceeds of forfeited opium, \$11.60; clerk hire, printing, and other incidental expenses, approved by the attorney general, \$776.60; aggregating the sum of \$4,883.55. He has been paid, including the \$600 specially appropriated for his services in the Puyallup Indians Cases, \$3,842.35, so that there is a balance yet due him on his account for 1893 of \$1,041.20. I deduct from this the \$400 awarded on account of the Puyallup Indians Cases and find in favor of the plaintiff upon the sixth item in the sum of \$641.20.

The seventh, eighth, and ninth items may be disposed of in a bunch. Of moneys earned during the years 1890 and 1891, there was withheld, as excess of the maximum, the following: In 1890, \$566.38; in 1891, \$750. In each of said years there was an amount of mileage in excess of said sums carried into the emolument

account, without which there would have been no surplus of earnings above the maximum. I therefore find in favor of the plaintiff upon the seventh item in the sum of \$566.38, and upon the eighth item in the sum of \$750. I do not find that any part of the earnings for 1892 was withheld, except part of the special compensation for services in the Gee Lee and Pilot Cases, which amounts will be made up to the plaintiff by the award on account of the second and fourth items. I therefore find in favor of the government on the ninth item.

In re SCHECHTER.

(Circuit Court, D. Minnesota, Third Division. October 13, 1894.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATUTORY REGULATION BY STATES.

A state statute requiring every person selling fruit trees or other nursery stock grown outside the state to file an affidavit with the secretary of state, and a bond of \$2,000, and to exhibit to each purchaser a certificate of the secretary that he has complied with these provisions (Laws Minn. 1887, c. 196, §§ 1-3), is unconstitutional, as imposing vexatious and annoying restrictions upon interstate commerce (article 1, § 8, cl. 3), and cannot be upheld on the ground that it is intended to protect the citizens of the state from the fraudulent representations of such dealers.

2. SAME—SPECIAL PRIVILEGES.

"When a state undertakes by statute to deprive citizens of other states who deal in sound articles of commerce produced in those states of that presumption of honesty and good intent which it indulges in favor of its own citizens who deal in its own products, and which the law raises in favor of every man, it effectually deprives the citizens of those states of some of the most valuable privileges and immunities its own citizens enjoy."

This was a writ of habeas corpus to procure the release of C. H. Schechter from imprisonment under commitment of a justice of the peace.

N. Kingsley and W. E. Todd, for petitioner.

Henry A. Morgan and A. L. Hoppaugh, for the State.

SANBORN, Circuit Judge (orally from the bench). The prisoner, a citizen of the state of Iowa, is deprived of his liberty under the commitment of a justice of the peace of the state of Minnesota, on the sole ground that, as the agent of citizens of the state of Illinois, he sold fruit trees that were grown in the state of Illinois in the state of Minnesota, without complying with the provisions of sections 1-3 of chapter 196 of the Laws of Minnesota for the year 1887. There is no claim that any false representations were made or any fraud committed in this sale. Section 1 of this chapter provides that it shall be unlawful for any person to sell or offer for sale any tree, plant, shrub, or vine, not grown in the state of Minnesota, without first filing with the secretary of state an affidavit setting forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principals, and a statement

as to where the nursery stock to be sold is grown, together with a bond to the state of Minnesota, in the penal sum of \$2,000, conditioned to save harmless any citizen of this state who shall be defrauded by any false or fraudulent representations as to the place where such stock sold by such person was grown, or as to its hardiness for climate. Section 2 provides that the secretary of state, on compliance with the provisions of section 1, shall give to the applicant a certificate setting forth the facts that show a full compliance by the applicant with the provisions of the act, and that said applicant shall exhibit this certificate, or a copy of it, to any person to whom stock is offered for sale. Section 3 provides that any person, whether as principal or agent, who shall sell or offer for sale any foreign-grown nursery stock within this state, shall furnish to the purchaser a duplicate order, with a contract specifying that such stock is true to name, and as represented. Section 4 imposes a penalty of not less than \$25 nor exceeding \$100, or of imprisonment in the county jail for a term not less than 10 nor more than 60 days, in the discretion of the court, for the sale by any person of any foreign-grown nursery stock within this state without complying with the first three sections of the act. There is no law of the state of Minnesota which imposes any such restrictions upon the sale of any tree, plant, or vine grown in this state.

The third clause of section 8 of article 1 of the constitution of the United States provides that "the congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The effect of this provision of the constitution has been so frequently and forcibly declared by the supreme court of the United States that it is sufficient for the purposes of this case to state a few of the propositions that the decisions of that court have established. The power to regulate commerce among the states was carved out of the general sovereign power held by each state, and granted by the constitution to the congress of the United States. This power was thus vested in congress exclusively, and no state, by virtue of any power not thus granted, whether under the name of the "police power," or under any other name, can lawfully infringe upon this grant. This power to regulate commerce, thus granted to congress, is not subordinate to any of the powers not granted, but paramount to all the powers of the state, and any act of the state which interferes with interstate commerce in a well-known and sound article of commerce is unconstitutional and void. Now, while there are certain subjects in their nature local, such as harbor pilotage, beacons, bridges, etc., regarding which a state may legislate when congress has not, yet when the subject-matter is the sale of a well-recognized article of commerce, such as vines, trees, or shrubs; or any other well-known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that congress alone can prescribe. In all cases where congress has passed

no law regulating interstate commerce in any well-recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of the state which prohibits or restricts it must be held to be in violation of the constitution. I do not intend to hold that valid quarantine and sanitary laws may not be passed by the legislature of the state. There is no such question presented in this case. It is not claimed that these trees that were grown in the state of Illinois were deleterious to the health or the comfort, or dangerous to the lives or property, of the citizens of this state. Nor do I intend to hold that a proper inspection law may not be passed by the legislature of this state to prevent the introduction here of any diseased or dangerous article which might interfere with the health, comfort, well-being, or happiness of the people of this state. No questions of that kind are presented in this case. This law imposes a restriction upon the sale of foreign-grown trees by its very terms; and any law which imposes any vexatious or annoying restriction upon the sale of articles that are themselves sound articles of commerce must be held to be an interference with commerce, and thus in violation of the clause of the constitution to which I have referred. To provide that every man who sells a foreign product shall be required to file an affidavit with the secretary of state, and a bond of \$2,000, and to exhibit to every man who purchases the article a certificate of the secretary of state that he has complied with these provisions, certainly imposes a vexatious and annoying obstruction to commerce in the article mentioned. For that reason I think that this law is in violation of this clause of the constitution.

Moreover, article 4, § 2, of the constitution of the United States, provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This provision of the constitution, in my opinion, gives to the citizens of other states the right to introduce and sell the products of those states in Minnesota on the same terms that her own citizens sell like products of this state. The Illinois tree, the Wisconsin vine, the Iowa shrub, that is sound, and is of the same character as that grown in the state of Minnesota, seeking sale in this state, is entitled to be sold by those who deal in it on the same terms and with no greater restrictions than the like article produced in the state of Minnesota; and any restriction which imposes upon the dealers in foreign articles that are themselves sound, burdens that are not imposed on the dealers in like articles produced in the state of Minnesota, in my opinion, violates that provision of the constitution to which I have last referred.

It is said that the bond required here is to prevent the dealers in foreign trees from perpetrating fraud in their sale, and that it is competent for the state to protect its citizens against the fraudulent representations of such dealers. The answer is that when a state undertakes, by statutory regulation, to deprive citizens of other states, who deal in sound articles of commerce produced in other states, of that presumption of honesty and innocence of wrong which it indulges in favor of the dealers in its own products, and which

the law raises in favor of every man, it very effectually deprives the citizens of other states of the most valuable privileges and immunities its own citizens enjoy.

For these reasons, I think the prisoner must be discharged. Let an order be entered to that effect.

CONSOLIDATED VAPOR-STOVE CO. v. ELLWOOD GAS-STOVE & STAMPING CO.

(Circuit Court, W. D. Pennsylvania. September 17, 1894.)

No. 8.

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—GASOLINE STOVES.

The Whittingham patent, No. 235,600, for a gasoline stove, if valid, is strictly limited by the terms of its specifications, and by the prior state of the art, to a stove having a burner plate with the vaporizing and "fixing" chambers projecting laterally therefrom, and connected by a conduit extending across the under side thereof, and is not infringed by a stove in which the fixing chamber is located on the under side of the burner plate.

This was a suit for the alleged infringement of a patent.

George H. Christy and Hoyt & Dustin, for complainant.

John R. Bennett, Harold Binney, and Lyon, McKee & Sanderson, for defendant.

BUFFINGTON, District Judge. The Consolidated Vapor-Stove Company of Cleveland, Ohio (assignees of the patent), file this bill against the Ellwood Gas-Stove & Stamping Company of Ellwood, Pa., for alleged infringement in the manufacture of gasoline stoves of letters patent No. 235,600, issued December 14, 1880, to Charles and Joseph Whittingham. The answer denies patentability and infringement. The device described in the Whittingham patent is, in the parts needful to now consider, described as follows: From an elevated oil fount a pipe leads to one of two chambered ears or projections on opposite sides of a burner plate, and connected by a conduit across the lower side and at one side of the central tube of said plate. From the second chamber depends a pipe having an arm with a socket, in which a valve stem is screwed for controlling a jet orifice, which is located directly under, and a short distance from, the central tube. Surmounting the plate is a burner cap, provided with two rows of jet holes, the lower one being just above the upper surface of the chambers. After the burner is initially started,—the mode of doing which is not material to the present inquiry,—its workings are as follows: The upper surface of the chambers being highly heated by direct action of the flames from the lower row of jet holes and the connecting conduit by conduction through the heater plate, the oil passes to the first or vaporizing chamber, where it is vaporized. This vapor then passes through the conduit, where it is superheated, and into the second or "fixing" chamber, where it is still further superheated, and becomes "fixed," or a sort of fixed gas. It then passes through to the jet orifice, and spurts into the central tube, carrying with it a supply

of air up to the burner cap, and passes out the rows of holes, where combustion takes place. The flames from the lower row serve the double purpose of furnishing heat for cooking, a vessel being placed above the burner cap, and of vaporizing the oil and fixing the gas by means of the chambered projections and the connecting conduit.

The only claim in question is the first, which is for—

“The circular plate, B, having the chambered projections, C, D, and connecting conduit, E, and provided with the central tube, F, surmounted by the perforated cap, S, in combination with the vertical tube, A, and angular pipe, G, H, and socket, I, provided with orifice, K, controlled by the valve, J, as shown and described, and for the purpose specified.”

At the date of the patent the “angular pipe, the vertical feed tube, with its socket, orifice, and controlling valve,” were old, and were used in connection with a vertical commingling tube. As touching the chambered projections, the specification says:

“Surmounting the plate, B, is a perforated cap, S. The flames from the lower row of perforations supply heat to the upper surfaces of the chambered projections, C and D. These two points are where the generation of vapor takes place, and is therefore perfect, being the hottest place, and without detracting from the heat of the burner for the other uses to which it is designed.”

And to distinguish it from Kell's patent, to which reference had been made, the patentees added:

“We are aware that a rectangular chamber located between the two jets of flames from the perforated cap has been used, and that said chamber has been connected with an induction oil pipe and an eduction vapor pipe; but this has detracted materially from the efficiency of the burner, because of its interference with the flames. This objection is entirely overcome by the use of the chambered projections at the side of the perforated combustion cap, and just below the level of the lower row of flame jets.”

The departure from former methods will thus be seen in so locating the flame which was used for vaporizing and fixing that its efficiency for cooking purposes was not diminished, and this result the patentee secured by placing the chambers where they were impinged from above by flames, viz. at the two points “where the generation of vapor takes place, and is therefore perfect, being the hottest place, and without detracting from the heat of the burner for the other uses to which it is designed.” That is plainly shown by a detail study of the patent. The claim specifies “the chambered projections, C, D,” “as shown and described,” and “for the purpose specified.” “As shown and described,” in the specifications and drawings, they extend laterally from, and on the plane of, the heater plate. They are described as “hollow ears,” or “projections on opposite sides.” While the term “projections” may apply indifferently to either a downward or lateral one, the term “hollow ear” is limited to a lateral connection. Webster defines an “ear,” in a mechanical sense, as “a projecting part from the side of anything.” Then, too, the word “projection” is qualified by the limitation, “on opposite sides,” and, to further emphasize it, the “ears,” or “projections” are described as “connected by a conduit across the under side of said plate,” and “across” does not mean half or three-quarter way, but *quite over* the whole width of the heater plate, all of which is shown in the illustrated drawing. That the location shown and

described was specific and functional, and not indifferent, will appear from "the purpose specified." In this respect, the specification is explicit. The two points are claimed to be where "the generation of vapor takes place," as "the hottest place," as "therefore perfect," and as "not detracting from the heat of the burner for the other uses." This language cannot be explained away by saying it is a statement of the best mode in which the patentees thought to apply their principle. It is more than that; it is a description of the essential and functional elements necessary to the application of their principle, and is rather a compliance with the statutory requirement to particularly point out and distinctly claim the part, improvement, or combination which they claim as their invention or discovery.

But a much broader construction of the claim is contended for. Complainant's expert testifies that:

"The whole gist of the Whittingham invention, as set forth in the first claim of the patent at issue, is the casting of the downwardly projecting chambers, C, D, and the conduit, E, integral with the heater plate, and so locating and directing them that they can be formed economically without the use of coring, and be within the best, or practically the best, position to get the effect of the waste heat of the burner."

It is contended that the chambered projections in the claim are downward projections, and downward projections only; that they need not project sideways to fulfill the object of the inventor; that the novelty consists not only in these downwardly projecting chambers, "but in the way they are located on the plate, forming the base of the burner cap, so as at the same time they can be economically formed integral with that cap, and at one and the same time, and for this purpose they must necessarily project downwardly, in order that they may be cast without coring;" that by this method of casting they avoid particles of sand sticking to the casting which wash out from the flow of gas and clog the jet orifice. Such a reading of the clause is more ingenious than sound. As opposed to the construction now made by the expert, we have the significant silence of the patent on these points. Indeed, if the gist of the invention was what is now alleged, the patentees were signally successful in not disclosing it. Nor is such a construction proper in view of the prior art, for to so construe it is to work its destruction. The Whittinghams were not pioneers in the field, nor their invention of a primary character. Numerous patents are cited in anticipation, a large number of which were urged as such on argument, but for present purposes it suffices us to discuss but two, viz. Kell's, No. 231,674, issued August 31, 1880, and Prentiss's reissue, No. 7,636, dated April 24, 1877. The Prentiss patent shows a vaporizing chamber at the side of the heater. Though it is claimed to be heated by direct impingement of the flame, we are inclined to the view that it is by conduction. From it a conduit leads along the lower side of the heater plate to a fixing chamber located on said lower side, and heated by conduction. Both chambers are on the same side of the central tube. The specification states:

"Surmounting the central tube, and beneath the cone [burner top], is a plate, upon which the flame from the lower row of perforations in said

cone impinges. This plate is denominated a 'heater plate,' and serves to conduct heat to the generating chamber and surrounding parts of the burner, thereby facilitating the conversion of the oil or fluid into gas."

While the device differs from the Whittingham patent, the process of vaporizing and fixing by two chambers is the same. The fixing chamber, located on the lower side of the heater plate, and heated by conduction, is identical with that of the respondent's device, as we shall see, save that it is on the same side of the central tube with the vaporizing chamber. As far as function goes, the locations are substantially identical, and it clearly anticipates the fixing chamber of the Whittingham device, should that patent have the broad construction contended for. In Kell's patent an induction pipe leads to, and an eduction one from, a central gas generator, which is formed by four conduits at right angles with each other. Above and below the generator was a row of burner jets, so located that the flames from the two rows impinged on them respectively from above and beneath for vaporization purposes. Upper and lower rows were necessary to vaporize the heavier grades of hydrocarbon for which the burner was designed, but it is admitted, if the lighted grades were used, the lower row could be dispensed with, and the device operated by simply enlarging the upper row of jet holes. The chamber and conduit connections of this device may be cast integral, and coring dispensed with.

The prior art being as above, it is clear the advance set forth in the Whittingham patent was not great. Whether it involved patentability we do not feel called upon to decide. It is sufficient for present purposes to pass upon the question of infringement only. The respondent's device has a heating chamber identical with that of the Whittingham patent, but the fixing chamber does not project laterally from the opposite side of the heater plate. It is located on the lower side of that plate, within the periphery of the flame-jet row. The connecting conduit does not lead across the heater plate, but part way only. Consequently the flames from the lower jet row do not impinge on it, but it is heated by conduction through the heater plate. Giving the Whittingham claim what we regard as its reasonable and proper construction, it is clear it is not infringed by this device. The bill must therefore be dismissed at complainant's cost.

Our attention has been called to the case of the present complainant against the National Vapor-Stove & Manufacturing Company, where the present patent was sustained by the circuit court, for the northern district of Ohio, eastern division. 63 Fed. 1000. The facts now before us, and the issues to be passed upon, are wholly different from those in that case, and for that reason the present case must be decided without reference to the conclusion there reached upon different proofs. Let a decree be drawn dismissing the bill, with costs.

ACHESON, Circuit Judge, concurs.

KLEIN v. CITY OF SEATTLE.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

1. PATENTS—INVENTION—ELECTRIC INSULATOR PINS.

The Klein patent No. 297,699, for a pin for holding insulators supporting electric light wires, which consists of a combination of the pin proper, of iron or steel, with an enlarged head of lead or other soft metal molded thereon, and firmly secured by first notching the pin end, is void for want of invention.

2. SAME—PLEADING—DEFENSE OF PRIOR USE.

The defense of prior use should be pleaded, or notice should be given before trial, specifying when, where, and by whom the article was made.

This was a suit by John M. Klein against the city of Seattle for infringement of a patent.

A. Byers, for plaintiff.

W. T. Scott and Frank A. Steele, for defendant.

HANFORD, District Judge (orally). This is an action brought by the plaintiff against the city to recover damages for infringement of letters patent No. 297,699, granted to the plaintiff for an improvement in pins for holding insulators supporting electric wires. What is claimed by the application, and to be considered as protected by the patent, is a pin of iron or steel, of suitable size and any length, with an enlarged head of lead, or any soft metal, upon it, with a thread to fit the inside of glass insulators, which are made with a spiral groove for screwing onto a screw head. The heads are cast upon the ends of pins by running molten lead into a mold while the end of a pin is held therein. A firm union of the lead to the iron is secured by notching the pin end, or making it rough with a chisel. These pins are designed to be used in connection with glass insulators in common use. No particular kind of insulator is required, and the insulator is not part of the combination which the plaintiff claims as his invention. The kind of pins most commonly used are wooden pins with a thread on the end to hold the insulator; but wooden pins are objectionable because they cannot be made of sufficient strength without being of a size that unfits them for use in many places. For instance, they cannot be set into arms upon telegraph and telephone poles without requiring either very large arms, or making the arms in common use too weak. In all places where the wire makes an angle, a wooden pin must be of considerable thickness to be strong enough to support the wire and bear the strain that is necessary. Iron pins were in use for such purposes a long time before the plaintiff in this case claims to have conceived the idea of this invention, and, in order to use them in connection with glass insulators, of course some material had to be used to fill the cavity of the insulator, and accordingly a filling of wood, of canvas coated with white lead, and all the different kinds of cement were used. Cement in a plastic state was run into the cavity in which the iron pins were set, and exactly the same method of making the iron pins available was in use before this invention, except

that other materials were used instead of lead. It is also shown by the testimony that lead was used in a different manner. Instead of being molded in proper form, sheet lead was wrapped upon the end of the pin. The evidence shows—and in fact it is a matter of general knowledge—that soft metal has been in common use to fill cavities and unite metals or hard substances for a very long time, so that there is nothing new in the use of this kind of material for this purpose. The manner of making an iron pin adhere to soft metal by notching it or roughing it is not new. There is no invention in that, for that principle has been long applied in many ways. In principle, it is the same as the key commonly used for securing a wheel upon a central shaft, so that both will make the same revolutions. Now, all that can be claimed as the invention in this case is the combination consisting of the use of iron in place of wood for a pin, and lead in place of rags, wood, or cement for a filling, and the process of making a firm union of the lead head and the iron pin; and it is my opinion that there is nothing in this that amounts to an invention. It seems to me that any person of intelligence directed to take an iron pin and a glass insulator, and insert one in the other, and make a firm union between the two, would discover that this was obviously a good method for doing that very thing.

The plaintiff has cited several cases to show that, in matters of similar character, the fact that an improvement is found to be of such general utility as to cause the improved article to go immediately into general use, and supplant all other methods, is proof of an invention. But the proof here is that wooden pins are still in use, and this new contrivance has only been used to a limited extent, and that there is no such special utility in it that it has supplanted the old methods. The policy of the law is to reward inventors by giving them, for a limited time, the fruit of their productions. But mere improvements produced by the use, in a usual manner of previously known instruments, from materials in general use, without application of any new principle, do not entitle their authors to monopolies. Every-day work in shops and on farms makes necessity for many contrivances; and when a farmer fixes up a broken harness by his own peculiar method, or makes an improvement in the operation of agricultural implements, or when a mechanic adapts his tools to the creation of an article required to suit the ideas of a customer, the results are not patentable inventions. The patent laws cannot be so construed as to restrict ingenuity in the common employment of the people without becoming intolerably burdensome, rather than beneficial. *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717.

In my consideration of the testimony in this case I have read the depositions, and I have concluded to overrule one and all of the objections that are noted. The other defenses in this case are, in my opinion, unavailable under the pleadings. I think the different defenses that have been discussed in this case should have been set forth fully and with greater particularity in the answer, to enable the defendant to take any advantage of them.

For instance, that the patent was anticipated by actual use is something that should have been pleaded, or, before the trial, notice should have been given, specifying when and by whom and where the patented article was in use. The rules for defending against patents on this ground are somewhat rigid, but they are just, and it is my duty to enforce them. I shall find against the defendant on all grounds except as already indicated, but I hold the patent to be void for want of originality, and therefore find for the defendant.

THE ADVANCE.

GRAY v. PROCEEDS OF THE ADVANCE et al.

(District Court, S. D. New York. June 11, 1894.)

ADMIRALTY JURISDICTION — REMNANTS AND SURPLUS — MORTGAGEE'S PETITION — RECEIVER.

Upon a default in a mortgage, before the appointment of a receiver, a mortgagee of a vessel has such a vested legal interest in the vessel mortgaged as entitles him to maintain a petition in admiralty for the remnants and surplus after a sale, as against the receiver of the shipowner seeking to draw all litigation concerning the mortgagees into the state court.

In Admiralty. Claims of surplus. Mortgagee and receiver.

Stetson, Tracy, Jennings & Russell and Mr. Van Sinderin, for the receiver.

Carter & Ladyard, E. L. Baylies, and W. W. Goodrich, for Atlantic Trust Co.

BROWN, District Judge. Upon various libels for the enforcement of maritime liens against the steamships Advance, Allianca, and Vigilancia, heretofore belonging to the United States & Brazil Mail Steamship Company, those vessels have been sold under process of this court, and considerable sums still remain in the registry as the proceeds of each. Besides the maritime claims already paid from the funds, there are various other maritime liens in course of adjudication. A surplus being anticipated after the payment of all the maritime claims, the Atlantic Trust Company, as mortgagee in trust for bondholders to the amount of \$1,250,000, has intervened to resist any improper demands on the funds, claiming that any such surplus should be paid to it as mortgagee. The receiver of the steamship company, first appointed temporarily on March 18, 1893, and made permanent receiver on March 6, 1894, has also intervened by petition to procure payment of such surplus to himself, and contends that the mortgagee can only seek the application of the funds to the mortgage debt, by proceedings in the state court, and that this court has no jurisdiction of the mortgagee's application as against the receiver, or to determine any questions the receiver may choose to raise as to the validity of the mortgage, or the amount due on it. The trust company has answered the receiver's petitions, and insists upon its superior right to such proceeds by virtue of its mortgage.

In behalf of the receiver it is urged, not only that the mortgagee

has no maritime lien, but that it acquired no legal title to the res, until after the appointment of the receiver on the 18th of March, 1893, because the election of the bondholders to claim a default in the whole mortgage for the nonpayment of any interest on and after January 1, 1892, according to the terms of the mortgage, was not asserted until the 23d of March, 1893, after the receiver was appointed, and not made known to the trust company until the 30th.

But even if the mortgagee had not acquired any legal title until the election referred to, that circumstance would not, I think, be material here; for the mortgage long antedates the receiver's appointment, and the mortgagee's lien dates from the execution and delivery of the mortgage. Through default in the payment of interest, and under the conditions of the mortgage, the conveyance of the vessels, which was originally conditional, ripened into an absolute legal title a few days after the receiver's appointment, and long before the intervention in this action was filed. The mortgagee stands upon its title as now presented, the receiver never having acquired possession of the vessels, and no rights, except subject to the mortgagee's prior claims.

In fact, however, the mortgagee held a conditional legal title from the time the mortgage was executed and delivered. A mortgage of chattels in this respect differs from a mortgage of real estate, under the law of this state. A mortgage of chattels is in law and in fact what its terms naturally import, viz., a present conveyance of the legal title upon condition; and that title becomes absolute at law on default of payment according to the terms of the mortgage. 4 Kent, Comm. *138. The relation of the parties to the title is in this respect accurately stated by Earl, J., in *Kimball v. Bank*, 138 N. Y. 511, 34 N. E. 337. The form of expression used at page 504, 138 N. Y., and page 337, 34 N. E. in the same case, viz., that "the legal title passed * * * upon default of the mortgagor to pay the debt when due," refers to the absolute legal title; it does not mean that the legal title did not previously pass conditionally, which would be quite inaccurate.

The absolute legal title having thus become vested in the trust company, as mortgagee, subject only to an equitable right of redemption on the part of the steamship company, or its receiver, there is no reason why the mortgagee's title to the remnants and surplus should not be recognized by a court of admiralty as much as the title of the mortgagor, or of any vendee of the mortgagor, had he sold the res meantime; nor should the right of either mortgagee or vendee be prejudiced by the mere circumstance that the mortgagor, or vendor, or his representative, may choose to deny his transfer, or its validity; unless the court, in its discretion, should for sufficient reason direct the parties to litigate their disputes elsewhere.

I do not find any new question in this case. The practice of courts of admiralty in this country, in disposing of the surplus remaining after a sale of property and payment of maritime liens, has been long settled. The distribution is not restricted to those who claim

under an absolute legal title alone, like an owner, a vendee, or a mortgagee after default; all that is required is, that the petitioner shall show some specific vested interest in the fund, or in the res from which it was derived. A creditor at large, or a judgment creditor merely, without a lien, has no such interest; and he therefore cannot be heard to make a claim to the fund as against the legal owner. But where any vested legal interest, or lien, is shown, howsoever it was created, that right is universally recognized in this country, and, so far as I know, without a single dissenting adjudication. This rule was directly affirmed in the supreme court in the case of *The Lottawanna*, 21 Wall. 558, 582, where Mr. Justice Bradley, upon this point, says:

"The court has power to distribute surplus to all those who can show a vested interest therein in the order of their several priorities, no matter how their claims originated. * * * It is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the district court could refuse to act and refer the parties to a more competent tribunal."

The claim in that case was made by a mortgagee, as in this case. The same subject was considered, and the same rule followed, by Mr. Justice Matthews, in the cases of *The Guiding Star*, 18 Fed. 263, and *The E. V. Mundy*, 22 Fed. 173; by Mr. Justice Jackson, in *The Balize*, 52 Fed. 414; and by other judges in *The Wyoming*, 37 Fed. 543; *The Wexford*, 7 Fed. 674, 684; and *The Peerless*, 45 Fed. 491. In the latter case, the contention was between the mortgagor and the mortgagee, and the superior right of the mortgagee sustained. In the recent case of *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, this rule is again reaffirmed. Though the court of admiralty, it is said, has no jurisdiction of a libel to foreclose a mortgage or to assert the title or right of possession under it, the court "has jurisdiction after the vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund; and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material men in this case."

The passage cited to the contrary from *Benedict's Admiralty Practice* (3d Ed. § 592; 2d Ed. § 562) is ambiguous, and liable to convey an erroneous impression. At the end of the paragraph should be added the statement, that any specific vested lien upon the res, or upon the fund derived from it, is enforceable in the admiralty against the remnants and surplus, whether such interest was a maritime lien or not. The superior right of the mortgagee is, therefore, sustained. Nothing has been presented to the court showing any such complications as would make needful an independent action in the state tribunals in order to determine the mortgagee's claims. Any evidence touching the validity of the mortgage, or the amount due upon it, can be presented, if desired, to the commissioner before whom other claimants upon the same fund are proceeding with the testimony.

FREIGHTS OF THE KATE et al.

GRAY et al. v. FREIGHTS OF THE KATE et al. (five cases). BROWN et al. v. SAME (five cases). HUNTINGTON et al. v. SAME (five cases). ATLANTIC TRUST CO. v. SAME (five cases). GRAY, Receiver, v. SAME (five cases).

(District Court, S. D. New York. October 16, 1894.)

1. MARITIME CONTRACT—LETTERS OF CREDIT—HYPOTHECATION OF FREIGHTS—GENERAL LIEN.

The United States & Brazil Mail Steamship Company, owning several ships and chartering others, obtained several bankers' letters of credit in New York for the purpose of disbursing their ships in Brazil. As collateral security for payment of the drafts drawn thereon at 90 days' sight on London, they hypothecated to the bankers "all freights earned and to be earned." Before the drafts matured the company failed. *Held*, (1) that the hypothecation was a maritime contract; (2) that it created a general lien on all freights of the line, including those of vessels subsequently chartered; (3) that the bankers could enforce this lien in admiralty against the freights of vessels arriving after the failure of the company, for any drafts outstanding; (4) that this general lien was subordinate to any specific lien on the same freights for advances actually applied to assist the current voyage.

2. SAME—GUARANTORS—ORAL HYPOTHECATION.

Other similar letters of credit having been obtained through the personal guaranties of third persons, to whom the freights were likewise orally hypothecated: *Held*, that the guarantors had a similar maritime lien, enforceable in admiralty.

3. SAME—CHARTERED VESSELS—LIENS OF—PRIORITY—DAMAGES.

Under a clause in the charter giving to the shipowner a lien "on all cargoes and subfreights for any amount due under this charter": *Held*, that the shipowner was entitled to a lien on the freights of each vessel, (1) for the charter hire earned; (2) for necessary advances for the voyage; (3) for indemnity against claims for supplies to the ship or damages to cargo which the charterer was bound to pay; but (4) not to damages for the less profitable employment of the vessels during the remainder of the charter period after withdrawal by the owners from the charterers' service, in consequence of their insolvency; (5) that these liens were specific, and superior to the bankers' general lien.

4. SAME—MORTGAGE—RECEIVER—PRIORITIES.

Upon a mortgage by the charterers, of all the vessels of their line, including all leases, tolls, rents, issues and profits, which mortgage was in default before the issue of the above letters of credit, and the mortgagee never having taken possession: *Held*, that the freights earned were subject to the charterers' disposition, and that the bankers' general lien on freights under the express hypothecation, was valid as against the mortgagee, as well as against the receiver subsequently appointed.

In Admiralty. Competing claims upon the freights of five steamers chartered by the United States & Brazil Mail Steamship Company.

Convers & Kirlin, for James Gray and others.

Cary & Whitridge and W. P. Butler, for John Crosby Brown and others.

Benedict & Benedict and Maxwell Evarts, for petitioners C. P. Huntington and others.

Carter & Ledyard, Mr. Baylies, and Mr. Goodrich, for petitioner Atlantic Trust Co.

Stetson, Tracy, Jennings & Russell and Mr. Van Sinderen, for petitioner Henry W. Gray, receiver, etc., of United States & Brazil Mail S. S. Co.

BROWN, District Judge. The above 25 libels and petitions were filed by five different claimants of the freights earned by the various steamships above named, upon the last voyage of each from Brazil to New York. The Kate arrived here on March 27, 1893; the Joshua Nicholson on March 17th; the Etherly on April 2d; the Elsie and the Enchantress about April 29th. The vessels were all running in the service of the United States & Brazil Mail Steamship Company, under written charters from their owners, made (except that of the Enchantress) in the latter part of 1892, or January, 1893. The net freights remaining after deducting port charges and the expenses of delivering the cargoes here, amount to the following sums, viz.:

Those of the Kate to \$9,856.08; of the Elsie, \$12,946.99; of the Etherly, \$8,745.17; of the Enchantress, \$11,280.26; of the Joshua Nicholson, \$6,975.38.

The first five libels are by the different owners of the five steamships, to recover the unpaid charter hire, and certain other demands, for which liens upon the freights are claimed under the express provisions of the several charters.

The second five libels are by Brown Bros. & Co. for moneys paid on account of the steamship company, the charterers, upon drafts drawn by that company on letters of credit issued to it by Brown Bros. & Co., on the faith of an express hypothecation of "all the freights earned and to be earned," as "collateral security" for the payment of the drafts.

The five petitions of Huntington and Pratt are for moneys paid by them as guarantors upon three letters of credit issued by Heidelberg, Ickelheimer & Co. to the steamship company, on the alleged credit and pledge of the freights to the guarantors as security for their guaranty.

The five petitions of the Atlantic Trust Company present its claim to the freights as mortgagee of all the "ships, property, leases, tolls, income, rents, issues and profits" of the steamship company; and the five petitions of the receiver of the steamship company claim whatever is not legally vested in the other claimants.

The steamship company failed in February, 1893. On March 18, 1893, the petitioner Henry Winthrop Gray was duly appointed by the state court temporary receiver of the company; and on March 6, 1894, this appointment was made permanent.

The charters of all the steamers were in substantially the same terms, except that of the Joshua Nicholson, which varied a little in the express lien secured to the owners.

The charter of the Kate, which is a representative of the rest, was dated December 15, 1892, and was what is commercially known as a time charter. The steamer was let to the company for two round trips from New York to Brazil and back, at the rate of 6/6 per ton per month, payable monthly in advance. She was to be

manned, officered and provisioned by the owners; while the charterer was to load her, and supply coal, etc. Clause 21 of the charter provided that "the owners shall have a lien upon all cargoes and all subfreights for any amount due under this charter." The charter of the Joshua Nicholson gave this lien for "charter hire" only, instead of for any amount due.

Shortly before the arrival of the Kate at New York at the close of her first voyage, the steamship company having failed, and in answer to inquiries having stated that it did not propose to load the steamer again, the owners, on March 20, 1893, notified the company in writing that they "hereby withdraw the steamer from your [the company's] service under the charter party, without prejudice to any claim they or their agents may have on you in pursuance of this charter party or otherwise." This notice was in accordance with a right to withdraw reserved by the fifth clause of the charter party, in case of any default in payment of the hire monthly in advance. At the time of this notice, upwards of one monthly payment was due and unpaid. On March 27th the Kate arrived at New York, whereupon the owners, without dissent by the company, took possession of her through their agents, Messrs. Winchester & Co., who delivered the cargo and collected her freights now in suit. The same notices were given as regards the four other chartered steamers; and on their arrival afterwards, similar proceedings were taken for the delivery of the cargoes and the collection of their freights; and soon afterwards the above libels were filed by the shipowners, and the freights were deposited subject to the order of the court.

The libelants, James Gray and others, shipowners, claim to recover against the freights of the vessels respectively, (a) the unpaid charter hire of each vessel up to the end of unloading, viz.: For the Kate, \$4,070.85; for the Elsie, \$7,909.14; for the Etherly, \$7,811; for the Enchantress, \$14,482.48; for the Joshua Nicholson, \$2,938.86. To the liens for charter hire there are no valid objections; though there are some counter charges presented to diminish the amounts due upon each; and in the case of the Enchantress a considerable deduction of time is claimed, on account of a breakdown in her machinery.

The shipowners further claim liens for (b) certain advances and supplies furnished by them to the charterers before and after sailing from Brazil upon the last voyages; for coal obtained at Rio, and for port charges, and extra meals at St. Thomas, where the Kate was obliged to put in for supplies, which, under the charter, the Brazil Company was required to provide; also for some mats bought of the master of the Enchantress; the expenses of replacing a bulkhead, and the master's services as purser; all of which the company agreed to pay; (c) indemnity against certain liens claimed against these steamers, some of which are in suit, for supplies furnished by material men in New York on the previous voyages out; and also against certain claims of cargo owners made against the ship for cargo damage, and for short delivery on the last voyage; which claims the charterers, it is said, are bound to pay; also (d) damages for the nonemployment of the steamers during the residue

of the charter period after the vessels were withdrawn, i. e., for the period required for another voyage to Brazil and back, or about three months; except in the case of the *Enchantress*, whose charter expired with the current voyage.

The libelants John Crosby Brown and others constitute the firm of Brown Bros. & Co., bankers, of this city and London, who, since 1887, have been in the habit of issuing to the steamship company letters of credit for the disbursement of its steamers at Brazilian ports upon a hypothecation of the freights. Several such letters were issued in 1892. The last of these was issued and dated on November 29, 1892, to the president of the steamship company, and forwarded to him at Rio, where he then temporarily was, for £8,000, all of which was availed of there by drafts on Brown, Shipley & Co., London, at 90 days' sight. On the back of this letter of credit, as upon previous ones, was an agreement signed by the secretary and treasurer of the company at the time the letter was issued, by which, among other things, the company agreed to put Brown Bros. & Co. of New York in funds sufficient to pay any drafts drawn upon the letter of credit, 15 days before the maturity of such drafts in London; and also agreed that "all freight moneys earned and to be earned, and the policies of insurance thereon, are hereby pledged and hypothecated to them [Brown Bros. & Co.] as collateral security for the payments as above promised; and to give them any additional security that they may require whenever they may see proper to demand it."

When this last letter of credit was issued and the hypothecation signed on November 29, 1892, only one of the above-named five chartered steamers, viz., the *Enchantress*, was running in the service of the company; the *Kate*, and the other three steamers were chartered, and entered the company's service, within the two months following. The company also owned five other steamers, which ran regularly in its service. The *Kate*, chartered on December 15, 1892, sailed on her first trip on December 25th. It is contended, however, in behalf of Brown Bros. & Co., that the hypothecation to them was general, and was intended to cover not only the freights of the specific voyages assisted by the drafts, but "all freights" earned by any steamers of the line, until all the drafts were paid; and that they have, therefore, by the express contract, a general lien upon all the freights of the line for the payment of any of the drafts unpaid.

Six drafts were drawn and negotiated by the company's agents at Rio under Brown Bros. & Co.'s last letter of credit. They were dated December 6, 1892, £2,000; December 16, £1,000; December 27, £1,000; January 2, 1893, £2,000; January 9, £1,000; January 21, £1,000. They were drawn on London at 90 days' sight, and became due at various dates from March 30 to May 15, 1893; and the steamship company having failed in February previous, they were all paid by Brown Bros. & Co. at maturity. The proofs show that the funds derived by the company at Rio from even the last of these drafts were all exhausted before the end of January, 1893; while none of the bills for these five chartered steamers on their last voyages were paid at Rio or Santos until in February and

March following. As their drafts, therefore, were not used to aid the chartered ships on these last voyages, Brown Bros. & Co. can have no specific lien on the freights here in question for moneys supplied to disburse the ships on the last voyages, but can only stand upon their claim of a general lien on all the freights of the line, under the terms of the express hypothecation.

Under three other letters of credit issued earlier for similar purposes and on the same terms, dated respectively, July 13, September 24, and September 29, 1892, other similar drafts were drawn and negotiated by the company, which, on its failure about February 23, 1893, Brown Bros. & Co. were obliged to take up at their maturity, from March 2 to May 4, 1893, amounting in all to \$80,300.74. There were no laches on the part of Brown Bros. & Co. in proceeding against the first freights available after the company's failure, viz., those of the steamships, *Advance*, *Allianca* and *Vigilancia*. On February 24, 1893, a suit in equity was brought by them in the supreme court of the state to impound those freights; though they mistook the proper forum. *Brown v. Gray*, 70 Hun, 261, 24 N. Y. Supp. 61.

1. For the mortgagee and the receiver it is contended that Brown Bros. & Co. have no general lien upon all the freights; and that the express hypothecation gives them only a lien on the freights of the specific voyage assisted by their letters of credit, and to the extent of such assistance only; which, for convenience, I shall hereafter call a specific lien, to distinguish it from the general lien claimed.

I am satisfied, however, that a general lien was intended to be created; because the language of the hypothecation naturally imports this, and because nothing less would afford any substantial security available when needed.

It is the ordinary practice of bankers to require some kind of security for letters of credit. Here an hypothecation of the freights was the only security taken. That was the basis of the loan. The credit of 90-day sight drafts on London amounted to very nearly four months' credit after the drafts were drawn and negotiated at Rio. The bills at Rio or Santos for a particular voyage were mostly not paid, nor the drafts drawn to obtain money to pay them, until from two to four weeks after the ship sailed; and as the voyage to New York was usually but three or four weeks long, the freights of the particular voyage assisted by the drafts would usually be collected by the steamship company in New York from two to three months before those drafts became due. A specific lien on the freights of that voyage alone would, therefore, be of no value, unless the bankers should arrest the freights in advance on arrival of the vessel months before the drafts matured, and hold the fund "as collateral security for the payment of the drafts." Though the bankers, doubtless, had the right to do this on the failure of the company, under the terms of the hypothecation, it was manifestly contrary to the intent and expectation of the parties that they should arrest the freights in advance so long as the steamship company was solvent, conducting its business as usual, and paying its bills at maturity. The very object of the credit of 90 days after sight must have been to give the company

so much time in which to pay the drafts. To arrest the specific freights in advance, and lock them up until the drafts matured, while the company was in good credit and paying its bills at maturity, would defeat the very object of the credit, and at once stop the company's business by seizing and locking up its only resources for continuing its business. During the five years' previous dealings on similar letters of credit, no such arrest in advance had been made. The right to immediate arrest was waived, and was intended to be waived, so long as the company was solvent. The company needed credit; the bankers needed a continuing security coextensive with the credit given. A specific lien alone was wholly unsuited and inadequate to the needs of either party. A general lien was necessary to the needs of both. Evidently what the parties intended by this hypothecation was a real and substantial security, to be available when needed; and by the broad language of the contract hypothecating "all freights earned and to be earned," it seems to me they plainly intended both a specific and a general lien on all the freights of the company's line. And if that was the intent, effect must be given to it, so far as it is lawful, and is not incompatible with the rights of others.

The hypothecation was sufficient in form, and absolute. *Christmas v. Russell*, 14 Wall. 69. It gave a vested interest in the freights from the time they began to be earned, i. e., when the vessels sailed, as "collateral security" for the payment of all drafts negotiated. 2 Story, Eq. Jur. §§ 1040, 1045. It reserved no power of revocation or control in the debtor, inconsistent with the enforcement of it by the pledgees whenever they chose to enforce it; and it gave them the right to collect the freights on demand and notice at any time before they were otherwise lawfully appropriated. *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644.

2. I see nothing invalid in such a general hypothecation. The parties, in effect, treated the vessels run by the company as constituting a line, and dealt with the line and all the vessels running in it, as with a single vessel. See *The Rosenthal*, 57 Fed. 254. This was the undoubted intention. In the negotiations, no particular steamers were named; the drafts were to disburse the company's steamers, i. e., any or all of them, as might be needed. As between the parties, there is surely nothing invalid in procuring necessary supplies for a line of vessels by an extended hypothecation of that kind. A master could not make such an extended hypothecation, because his authority extends only to his own vessel. But the owner is not thus limited. "No one has ever questioned," says Butler, J. in *The Mary Morgan*, 28 Fed. 199, "that an express lien may exist whenever the owner chooses to create it." The freights belonged to the steamship company; and in thus hypothecating them, they exercised no more than an owner's ordinary right. The extended hypothecation was adapted to the modern modes of business, and was not violative of any rule of the maritime or municipal law.

3. It is not a valid objection that this general lien is more extended than that which would be given by implication of law alone, which is specific only. For under the civil and maritime law,

hypothecations have always been recognized as created "by the mere agreement of the parties," as well as "by implication of law, or by judicial decree." Pothier de l'Hypothèque, c. 1, art. 1, § 1; 2 Bell, Comm. (3d Ed.) Nos. 1290, 1291; Macl. Shipp. (3d Ed.) 66. Accordingly maritime liens, resting wholly on express contract, have constantly been enforced. Such is the ordinary express contract of bottomry; the lien for supplies, under the English practice; the lien for charter hire upon the subfreights of a chartered vessel in possession of the charterer; the lien for supplies by material men, or for advances by the ship's agent, on dealings with the owner alone. The *James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195; *Id.*, 5 Blatchf. 496, Fed. Cas. No. 7,196; *Id.*, 9 Wall. 758; The *Kalorama*, 10 Wall. 214; The *Patapsco*, 13 Wall. 329; The *Stroma*, 3 C. C. A. 530, 53 Fed. 281, 283; The *Erastina*, 50 Fed. 126. See, also, The *Volunteer*, 1 Sumn. 551, Fed. Cas. No. 16,991; The *Kimball*, 3 Wall. 37, 44.

Upon this view, Mr. Justice Thompson, in the case of *The Mary*, 1 Paine, 671, 674, Fed. Cas. No. 9,187, observing that there is no limitation on the authority of the owner, and that he "has the absolute control over his property, and a right to pledge his vessel for money borrowed for any purpose, to be applied to repairs, outfits, or to the purchase of the cargo," sustained a bottomry bond executed by the owner upon his vessel in the home port.

In the case of *The Draco*, 2 Sumn. 157, Fed. Cas. No. 4,057, Mr. Justice Story not only reaffirmed that decision, but upon a long review of the subject held that a bottomry bond may be executed by the owner in the home port for "any other maritime purposes, as well as the necessity of the ship." "In my opinion," he says, "there is not the slightest ground to uphold the doctrine that in order to constitute a bottomry bond as such, in the sense of the maritime law, it is necessary that the money should be advanced for the necessity of the ship, or for the cargo, or for the voyage. Where it is given by the owner, he may employ the money as he pleases. It is sufficient if the money be loaned on the bottomry of the ship, at the risk of the lender for the voyage." 2 Sumn. 186, Fed. Cas. No. 4,057. This goes beyond what is needed to support the present hypothecations. For if the owner may hypothecate the vessel and freight for any maritime purpose, independent of the particular voyage, plainly he may hypothecate the freights of vessels B., C. and D. to procure necessary supplies for vessel A.; and this case involves nothing more, in hypothecating all the freights of the line in order to obtain necessary supplies for each and all of its vessels.

In the case of *The Jacob*, 4 C. Rob. Adm. 245, Sir William Scott held that even the ordinary language of a bottomry bond, hypothecating ship and freight, would bind the freights of a subsequent voyage nearly a year afterwards, where no superior rights of third parties intervened.

There are no higher authorities in the maritime law than these. They show that it is sufficient, for a maritime privilege, that the hypothecation is for maritime purposes, (such as was the sole purpose here), though not necessarily to aid the particular voyage.

4. Nor is it a valid objection that the hypothecation covers future and prospective voyages. The case of *The Jacob*, last cited, is in point. See, also, *The Warre*, 8 Price, 269, note, and other cases below cited. Bottomry usually involves more or less of the same future element. An hypothecation of freights on bottomry is often given to enable repairs to be made to the ship before cargo is loaded, or even engaged. An hypothecation under the maritime law, is equivalent to an assignment as security under the municipal law. The law, in general, recognizes assignments of future interests as a valid security from the time they come in esse. 2 Story, Eq. Jur. §§ 1040, 1040b, 1053. This has been often applied to rents, crops, wool to be grown on sheep, income, and the freights of vessels or railways. *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Beall v. White*, 94 U. S. 382, 387; *Congreve v. Evetts*, 10 Exch. 298; *McCaffrey v. Wooden*, 65 N. Y. 459; *Field v. Mayor, etc.*, 6 N. Y. 179. Cases of freights of vessels are *Kimball v. Bank*, 138 N. Y. 500, 34 N. E. 337; *The Warre*, 8 Price, 269, note; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *Lindsay v. Gibbs*, 22 Beav. 522; *Stewart v. Fry*, 3 Ala. 573, 577. The claims of the present mortgagee rest wholly upon this principle.

5. Such a general lien by express hypothecation, so far as it reaches freights of future voyages of the same vessel, extends in this case, as in the case of *The Jacob*, *ut supra*, no further than the ordinary maritime lien on the ship extends, for supplies furnished to her on a prior voyage; since that lien continues through future voyages, except as against subsequent bona fide purchasers or incumbrancers, until the lien is paid, or lost by laches; though it is subordinate to any specific liens arising out of later voyages. *The Columbia*, 13 Blatchf. 521, 523, Fed. Cas. No. 3,036; *The Martino Cilento*, 22 Fed. 859; *Nesbit v. The Amboy*, 36 Fed. 926.

The same subordination must exist here as against specific liens acquired for aid to subsequent voyages of the same vessel, and to the voyages of the other vessels. The general lien is inferior in rank to the specific lien. Creditors acquiring specific liens by aiding the voyage on which the freights are earned, either of the same vessel or of other vessels of the line, have, by the maritime law, a superior privilege over any lien which has not aided the particular voyage. Thus, under the maritime law, no creditor can be injured by such a general lien, who has dealt with the ship on the credit either of the ship or of the freight; and no other creditor is in a situation to complain.

The only other party in the case who might complain of the general hypothecation, is the mortgagee; and under both the maritime, and the municipal law, I think the mortgagee's rights are inferior to this express hypothecation.

The mortgagee represents the holders of bonds to the amount of \$1,250,000, secured by three several mortgages for that amount made by the steamship company, dated July 1, 1889, and September 17, 1890, and June 5, 1891, conveying to the Atlantic Trust Company, as trustee, the steamships, *Finance*, *Advance*, *Allianca*,

Seguranca, and Vigilancia, and also all the franchises of the steamship company, and all its property then in possession, or thereafter to be acquired; and also "all leases, contracts, * * * tolls, income, rents, issues and profits arising out of said property." Freights are not mentioned by name; nor any chartered vessels, or their freights. The latter only are here in question. They are covered, if at all, by the above general words alone. The steamship company, by the terms of the mortgages, was to remain in possession till default; and after default, upon the request of bondholders to a certain amount, the trust company was authorized to take possession. Default occurred by the nonpayment of the semi-annual interest that became due on January 1, 1892. No interest was thereafter paid; but no steps were taken by the bondholders or the mortgagee to obtain possession of the mortgaged vessels or their freights, nor of the freights here in question, until March, 1893, after the company's failure; and before the mortgagee could obtain possession, the vessels owned by the company were attached by the marshal, and the freights here in question were deposited subject to the order of the court. The rights of all parties must, therefore, be adjudged as they existed at that time.

6. The mortgagee and receiver contend that any such general lien as above stated is inferior to their claims. The ordinary rule, however, is that a mortgage of vessels is inferior in rank to subsequent maritime or statutory liens for supplies; because the former is a nonmaritime security, while the latter are in aid of the necessities of commerce and navigation. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498.

In cases like the present, where the mortgagee and the lienors have both alike dealt with the line as a whole, I see no reason why this rule is not as applicable to a general lien as to a specific one. If the mortgage were only upon a single vessel of the line, a general lien on all the vessels for a benefit to one only might operate inequitably upon the mortgagee's special interest. Of such a case I do not speak. But here both the mortgagee and the lienors dealt with the line as a whole. The general hypothecation added nothing to the aggregate of the particular liens, each and all of which were superior to the lien of the mortgagee. The contract for a general lien was a beneficial and a meritorious one; it was not beyond the legitimate exercise of the company's lawful power over its own freights to be earned, and of its lawful rights in managing the navigation of the line, while left in possession by the mortgagee. And as both dealt with the line as a whole in the same general way, the nonmaritime security of the mortgage must be postponed to the express maritime hypothecation, by means of which the general freights mortgaged could alone be earned, in accordance with the usual maritime rule.

The decisions of the supreme court holding that a mortgage of income in railway mortgages means the net income after paying the current expenses and charges in earning it, is a recognition by the municipal law of the same equitable principle. *Fosdick v. Schall*, 99 U. S. 235, 252; *Burnham v. Bowen*, 111 U. S. 780, 4 Sup. Ct.

675; *Kneeland v. Machine Works*, 140 U. S. 597, 11 Sup. Ct. 857; *Trust Co. v. Souther*, 107 U. S. 591, 594, 2 Sup. Ct. 295; *Kimball v. Bank*, 138 N. Y. 500, 34 N. E. 337. The hypothecation here was equivalent, as I have said, to an assignment at law; and being made while the mortgagor was in possession of the vessels, and made upon full consideration, as a necessary means of earning the freights, it has the highest equity in its support, as against a prior mortgagee not in possession. *Bank v. Schuler*, 120 U. S. 511, 516, 7 Sup. Ct. 644; *Spain v. Hamilton*, 1 Wall. 604, 624.

It is urged that the decisions in the cases of railway mortgages are not to be extended; citing *Wood v. Safe-Deposit Co.*, 128 U. S. 421, 9 Sup. Ct. 131; *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950. In the passages cited from those cases, however, the court was speaking of preferences given to unsecured claims; while the present claims are all made under express hypothecations. In the case also of *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, cited for the mortgagee, there was no hypothecation or pledge to the car company. It was a mere creditor at large.

Considering the importance of the freights of such a line, the omission to mention them in the present mortgages makes it certain that they were not specially contemplated, and somewhat doubtful whether they were designed to be included in the mortgages at all.

The form of mortgage used was the common form of railway mortgages; and if freights can fairly be held to be covered by the words, "leases, tolls, income, rents, issues and profits," which the mortgages use, it would seem to be a fair inference that the parties in using those words intended no more than their legal import and effect, as well settled at that time. The context, "rents, issues and profits," moreover, indicates that only the net income was intended; the term "profits" clearly signifies this.

In the case of *Burnham v. Bowen*, 111 U. S. 780, 4 Sup. Ct. 675, stress was laid upon the circumstance that the mortgagee after default had still suffered the mortgagor to remain in possession and deal with the mortgaged property as before. That is the case here. All the hypothecations in question, and every draft here presented, were made months after default in the mortgages, and while the mortgagee still suffered the mortgagor to remain in possession of the vessels, prosecuting voyages which required this money to be raised on the faith of these hypothecations. Even, therefore, if this general hypothecation were not a maritime lien at all, the appropriation of these freights by express contract as a security for the letters of credit issued upon the faith of the pledge, as well as the legal restriction of "income" to net income in mortgages of this kind, would give to the pledgees a vested equitable interest under the municipal law, according to the cases above cited, superior to that of the mortgagee out of possession, and to that of a receiver subsequently appointed.

In what has been said above as to the mortgagee's rights, it has been assumed that the mortgages had legal force to attach, or create a lien, upon the freights earned before the mortgagee came into possession of the vessels. But the decisions of the supreme

court seem to forbid the allowance of that fundamental assumption. In the cases of *Gilman v. Telegraph Co.*, 91 U. S. 603, and of *Bridge Co. v. Heidelberg*, 94 U. S. 798, upon mortgages substantially identical with the present, covering the "tolls, rents, issues and profits" of the mortgaged property, and in the former case expressly including "freights" also, the supreme court adjudged that the mortgagee acquired no present interest or lien upon the income, because it had not taken possession of the mortgaged property either by itself or by a receiver appointed in its behalf. In the first case, an attaching creditor, who garnisheed the freights that were earned after a decree of foreclosure, but before a sale under it, no receiver having been appointed, was held entitled to the freights and income as against the mortgagee. Mr. Justice Swayne, in delivering the opinion of the court, after citing the words of Lord Mansfield in *Chinnery v. Blackman*, 3 Doug. 391, that, "until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made," continues as follows:

"It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the net income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist."

The case of *The American Bridge Co.*, 94 U. S. 798, is no less decisive. There the mortgagee, after default, filed a bill in equity to secure the income and freights mortgaged. A few weeks later a judgment creditor's bill was filed, claiming payment out of the same moneys. The later bill, though no lien on the fund until the bill was filed, was held entitled to priority, on the ground that the mortgagees had not obtained possession either by themselves or by the appointment of a receiver. The prior bill filed by the mortgagees, it was held, did not affect the lien acquired by the filing of the later bill, because it (the mortgagee's bill) was "an attempt to extend the mortgage to what it cannot be made to reach." "Such a proceeding," says the court, "does not create any new right. It can only enforce those which exist already. The bill of the [mortgage] trustees is as ineffectual as if the fund were any other property * * * and never within the scope of the mortgage."

I do not find the binding force of these adjudications weakened by any subsequent decisions, but rather recognized and maintained. *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 306-308, 14 Sup. Ct. 86. See, also, *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420; *Trust Co. v. Shepherd*, 127 U. S. 494, 507, 8 Sup. Ct. 1250. The decisions in *Kimball v. Bank*, 138 N. Y. 500, 34 N. E. 337; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 30 Fed. 332, 339; and *Mississippi, V. & W. R. Co. v. United States Exp. Co.*, 81

III. 534.—are to the same effect. Under these decisions the necessary conclusion is, that as the trust company, the mortgagee, in this case never obtained possession of the ships or freights, the freights in question were absolutely at the disposal of the steamship company; and that its hypothecation of them in good faith, for full consideration, and for maritime purposes, being lawful and valid, it cannot be overreached by any subsequent claim filed by the mortgagee in these proceedings.

The receiver is evidently in no better position than the mortgagee. Both, therefore, must be postponed to the liens arising upon the express hypothecations for the letters of credit, as well as to the liens under the charters.

The claims of C. P. Huntington, and of Pratt & Co.:

7. The libelants C. P. Huntington and Pratt & Co. claim to have been induced to become guarantors of three other letters of credit issued by Heidelberg, Ickelheimer & Co., of New York, to the superintendents of the steamship company at Santos and Rio for similar purposes, on the faith of the oral pledge of the ships and freights of the company. The first of the three letters of credit was for £4,000, dated October 14, 1892, and was sent by the steamship company to its agents at Santos; the second and third were for £8,000 each, dated January 9, 1893, and February 8, 1893, respectively, and sent by the steamship company to its superintendent at Rio. These letters authorized drafts within four months on C. J. Hambro & Son, of London, at 90 days' sight, and were accompanied by similar agreements of the steamship company to provide Heidelberg, Ickelheimer & Co. in New York, with funds to pay all drafts 15 days before their maturity in London. They did not, however, contain any pledge or hypothecation either of ship or freight; but instead of that security, they were accompanied by a written personal guaranty, the first two signed by Mr. Huntington, and the last by Pratt & Co., that the steamship company would perform its agreement, and that they, the guarantors, would pay the drafts in case of the company's default.

Under the first of these three letters, two drafts were drawn and negotiated at Santos for £2,000 each, dated November 16, 1892, and December 2, 1892, which on maturity, after the failure of the steamship company, were paid by Mr. Huntington on March 1, and March 13, 1892, respectively.

Under the second letter of January 9, 1893, five drafts, amounting in all to £8,000, were drawn and negotiated at Rio from the middle of January, 1893, to about February 1, 1893, all of which were paid by Mr. Huntington at maturity between May 6 and May 19, 1893. Under the last letter of credit of February 8, 1893, only three drafts were drawn, viz.: on February 18th and 21st and March 3d, amounting in all to £4,500, which, at maturity, were paid by Pratt & Co. from May 26 to June 5, 1893. Some of the proceeds of these drafts, as I find, were used to disburse the last voyages of the Kate, the Enchantress and the Joshua Nicholson, to which I shall refer below.

Considerable evidence has been given touching the oral hypothecation and pledge of the ships and freights as a security to Mr. Hunt-

ington and to Pratt & Co. The negotiations were between Mr. Babbige, the secretary and treasurer of the company, and Mr. Huntington, and Mr. Gates, his attorney in fact; and they have each given their evidence on this subject. The counsel for all the other parties insist that the evidence is insufficient to establish any hypothecation at all, and that the testimony is too general and indefinite to sustain any lien by contract.

While the testimony of the witnesses on this point is lacking in the precision and exactness that would be expected in written instruments of hypothecation, it is impossible, I think, to doubt these essential facts; that Mr. Huntington, who was a stockholder and a vice president of the steamship company, but took little part in the management of its affairs, and Pratt & Co., stockholders, both positively refused to make any further advances of money to the company, as they had for some time previously been doing, upon the company's general credit and responsibility, though its need of additional funds to disburse the ships in Brazil was urgently pressed upon them, because of their knowledge of the company's precarious condition; and that their consent to guaranty the three bills of credit above named was given reluctantly, and only upon the credit of at least the future freights to be earned; that these freights were repeatedly referred to in the negotiations with Mr. Babbige as their security for the guaranty asked of them, and were in effect agreed to be appropriated therefor, as in the case of Brown Bros. & Co., whose lien upon the freights on their letters of credit was well known, and was referred to in the negotiations, both parties understanding that the guarantors were to have a similar lien to that of Brown Bros. & Co. The circumstances showing the intent to create a lien, are somewhat similar to those in the case of *The Kalorama*, 10 Wall. 214, where Clifford, J., says:

"It is fully proved that the appellants (who had been previously disbursing the ship, as her agents) subsequent to the two trips, refused to make further advances on the credit of the owner, and that the owner expressly requested that the advances should be made on the credit of the steamer."

And the lien was consequently sustained. The cases of *The Patapsco*, 13 Wall. 329, and *The Havana*, 54 Fed. 201, have also some analogy to the present case in the known absence of any corporate responsibility beyond the ships and freights.

The knowledge which the parties possessed of the lien that Brown Bros. & Co. had always provided for in their letters of credit, and the reference to that lien in the negotiations, in connection with the other testimony, seem to me important, not only as evidence of the intent that Huntington and Pratt should have a lien, but of the general nature of the lien intended. I am satisfied that it was the common understanding that the lien should cover "the freight list," as Mr. Huntington in his testimony expressed it, and be similar to that of Brown Bros. & Co. For reasons stated in the cases of *Brown v. The Allianca*, 63 Fed. 726, I am satisfied that the lien does not extend to the ships in favor of either.

The transaction was not for the personal benefit or advantage of either Mr. Huntington or Pratt & Co., except as it might benefit

every other stockholder; to them personally, it was purely a burden, reluctantly undertaken for the company's benefit, and free from all suspicion of personal gain. Though Mr. Huntington was a vice president of the company, and he and Pratt & Co. were stockholders, these relations, therefore, do not invalidate such a contract, or the lien given by it (per Mr. Justice Brown, in *The Murphy Tugs*, 28 Fed. 429, 432), although they may afford some explanation why the contract was so loose and informal.

Nor do I perceive any lack of authority in Mr. Babbige as secretary and treasurer of the company to obtain funds upon the general pledge of all the freights. That was precisely what Mr. Babbige has been long accustomed to do in the company's behalf, in dealing with Brown Bros. & Co.; only here the hypothecation of the freights was made to Huntington and Pratt & Co., as personal guarantors of the letters of credit, instead of being given to Heidelbach, Ickelheimer & Co., the bankers, directly. The long practice by Mr. Babbige as treasurer and secretary to obtain letters of credit on these terms, must have been with the knowledge and approval of the board; and that is sufficient evidence of his authority in this instance to pledge the freights of the line as was usual theretofore.

8. The counsel for the mortgagee has renewed, with some insistence, the contention heretofore made in previous stages of these causes, that none of the transactions with Brown Bros. & Co., or with Huntington and Pratt & Co., above referred to, were maritime, or within the jurisdiction of this court, as an original cause of action; urging that the main transaction was a mere issue of letters of credit, in no respect different from a loan of money for the general business of the steamship company, and that such a loan is not maritime; that the express hypothecation was but an incident of a nonmaritime contract, not giving any different character to the transaction; and that the general character of the pledge allies it to a mortgage, which also is not maritime.

I cannot but adhere, however, to my previous rulings upon this point, which are also supported by the decision of the supreme court of the state at general term (*Brown v. Gray*, 70 Hun, 261, 24 N. Y. Supp. 61). A letter of credit, like a loan of money, is in itself indifferent in character; it may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these.

Every loan, whether of credit or of money, to assist a vessel on her voyage, and on the pledge of her freights, is presumably a maritime loan. Mr. Justice Thompson, in the case of *The Mary*, 1 Paine, 671-673, Fed. Cas. No. 9,187, says: "All civilians and jurists agree that marine hypothecations fall under the denomination of maritime contracts." The oral evidence strengthens the presumption

derived from the hypothecation itself, and there is not the least evidence to the contrary. Not only were the letters of credit issued by Brown Bros. & Co. all accompanied by an express hypothecation of "all freights earned and to be earned," but the other proofs show that on every application for the letters of credit there was an express representation that the moneys to be obtained thereby were to be used at Brazilian ports for the purpose of disbursing the steamers run by the company; that the letters of credit were issued for that specific purpose, and that these disbursements were necessary in order to enable the company to keep its steamers running, and to earn the freights hypothecated. From Mr. Hoffman's testimony, it is evident that the loan and the pledge were so connected and so dependent on each other, in the intent of the contract, that any substantial diversion of the funds to other uses than to disburse the ships of the line, would have been a plain departure from the contract, and would have justified a revocation of the letters. The general business of the company was itself a purely maritime business. The hypothecation of the freights was not an immaterial or collateral circumstance, but a substantial part of the contract. The present libels are to enforce that part of it; and it is that part which stamps the contract, by the clearest possible evidence, as maritime. Whether the hypothecation of the freights was general, or specific only, does not in the least affect the maritime nature of the contract of hypothecation itself, but only its rank as compared with other maritime liens.

No valid argument by analogy against the maritime character of such loans as these can be based on the nonmaritime character of mortgages of ships, except when a mortgage instrument is used to secure the loans. Even if a loan clearly maritime in its nature and intent, is to be held nonmaritime when secured by a mortgage, that could only be because a mortgage is a nonmaritime instrument, having peculiar legal incidents of its own; and because the parties, by adopting that form of security, might be presumed voluntarily to have abandoned or waived consideration of the maritime nature of the transaction, and intended to rely upon a nonmaritime security alone. Whether such a rule is sound or not, is a question not here involved; because the parties here did not adopt a mortgage security; they adopted the immemorial maritime form of an "hypothecation," and waived nothing of its maritime nature.

The company's contract with Mr. Huntington and Pratt & Co. to obtain their personal guaranties on the faith of a pledge of the freights, is of the same maritime character. The letters of credit of Heidelberg, Ickelheimer & Co., considered by themselves alone, and independently of the guaranty by Messrs. Huntington and Pratt, and the pledge of the freights therefor, would have nothing about them necessarily maritime; since those letters were not accompanied by any kind of hypothecation; nor is there any evidence before me that Heidelberg, Ickelheimer & Co. in issuing their letters had any reference to the maritime objects of the loan, or any interest in the appropriation of the moneys to the prosecution of these voyages; or that they issued their letters for that especial purpose,

or upon the faith of any credit of ship or freight; and in the absence of such evidence, their dealings should, perhaps, be treated as ordinary nonmaritime commercial dealings. But that fact does not in the least affect the nature of the additional arrangement between the steamship company and their guarantors, as respects the latter's means of indemnity; and that additional agreement, and that alone, is what is sought to be enforced in these libels and petitions. That agreement contained two essential elements, in addition to the terms of the contract with Heidelberg, Ickelheimer & Co.; first, that the proceeds of the drafts were to be used to supply necessities to the company's vessels in foreign ports, to enable them to complete their voyages and earn freight; and secondly, that the guarantors should enable these means to be procured by their guaranty, to be given upon the credit of the freights of the line. This contract, like that with Brown Bros. & Co., was a purely maritime agreement, and within the jurisdiction of this court, whether the contract between the steamship company and Heidelberg, Ickelheimer & Co. was so or not.

I therefore find the general liens upon the freights given by the express hypothecation to Brown Bros. & Co., and to Huntington, and to Pratt & Co., to be valid, though subordinate and inferior to any particular liens acquired through aid furnished on the credit of the ship or freight, to the particular voyage on which the freights were earned.

There remain to be considered the legal priorities as between the liens of the shipowners and the liens of Brown Bros. & Co., and of Huntington and Pratt & Co., as well as some items claimed under the charter, which are in dispute.

9. Amounts due under the charter:

The charter of the Joshua Nicholson gave a lien for "charter hire" only. The other charters gave a lien on "all cargoes and all subfreights for any amount due under this charter." This clause is a common one in time charters. The words "due," and "under the charter," are words limiting the extent of the lien given. They are used in their ordinary commercial sense, and mean sums which are "due" and payable at the time when any freights are due and collectible, and which might be then lawfully collected and applied to the sums then "due" in case of the charterers' default, as distinguished from future or contingent liabilities, not then payable; and also such sums as become due under the provisions of the charter.

This lien, will, therefore, include charter hire up to the time when the vessels were withdrawn from the company's service, and such other amounts also as were then actually "due" to the shipowners from the charterers, for advances made for charterers' account, for coal, provisions, port dues, and any other sums which the provisions of the charter required the company to pay; also any sums then due and payable on account of short delivery or damage of cargo, through the fault of the steamship company, for which the company, by the terms of the charter, was bound to indemnify the ship and owners. One of these damage claims, against the Advance,

amounting to \$900; has been already paid by the shipowners, and other suits on similar claims are pending. All these obligations became fixed and payable at the close of the voyage, when the sub-freights pledged were due and collectible; and they were "due" under the provisions of the charter.

10. Damages to the shipowners through the less profitable employment of the vessels by themselves during the residue of the charter period, after they had voluntarily and absolutely withdrawn the vessels from the company's service, and thus terminated the charter from that time forward, are not, I think, within the meaning of the lien clause. A claim to mere damages accruing after rescission by the owners, is not a claim for an "amount due under the charter." That clause means the contract obligations under the stipulations of the charter. There is no stipulation as to future damages in case of termination or rescission by the owners. After that withdrawal there could no longer be any action to recover the subsequent charter hire; because the service of the vessels was the consideration for the payment of hire (*Compania, etc., v. Spanish American Light & Power Co.*, 146 U. S. 483, 498, 13 Sup. Ct. 142); and the owners voluntarily terminated the service on account of the insolvency of the company. Nothing but a doubtful claim for future possible damages remained; and for that, the charter did not provide. See *In re Kelly*, 51 Fed. 194.

Had the owners suffered the vessels to remain in the company's service, or subject to the company's or the receiver's orders, they could have claimed the full charter hire at the end of the charter period; but they could not have had a lien on the prior freights therefor, because not then "due."

It is the same as respects the future right to damages, if any. None were then due, for it was uncertain whether there would be any damages; or, if any, what amount. That depended upon the success of the future employment of the vessels by their owners during the remainder of the chartered period. See *Bleakley v. Sullivan*, 140 N. Y. 175, 35 N. E. 433. Cases like *The Hermitage*, 4 Blatchf. 475, Fed. Cas. No. 6,410; *Blowers v. One Wire Rope Cable*, 19 Fed. 444,—are not applicable, because here there was no rescission by the charterer.

It is further urged in behalf of the shipowners, that having become possessed of the freight moneys through the collection thereof by their agents, they are entitled, aside from any claim of lien under the charter, to an equitable set-off to the extent of their damages in respect to the subsequent employment of their vessels. All the cases cited in support of this doctrine, are cases of liquidated damages on contract. It seems to me unnecessary, however, to consider this point at length; because however such a right to an equitable set-off might stand as between the shipowner and the charterer, or the receiver as the representative of general creditors, no such equitable right exists as against a previous express and valid marine hypothecation of these freights. The subsequently accruing claim for mere damages cannot possibly override such an hypothecation.

11. There are certain minor claims as between the steamship

company and the shipowners, which I find should be allowed. These embrace claims in favor of the company for the value of coal returned; for advances made to the captains in Brazil; or for freight moneys collected by the captains, and not already specifically applied upon the charter hire, or otherwise. Minor claims in favor of the shipowners include any debts incurred by the company to them for supplies, or expenses for the company's use not strictly provided for by the charter, such as extra meals; \$200 for replacing bulkhead in the *Etherly*; the value of the mats bought of the captain of the *Enchantress*; and the amount agreed to be paid to the captain for acting as purser; all of which I allow. The nonlien claims due and payable at the close of the voyage can be first offset against each other so far as they go. Any balance against the shipowners may be offset against their claims, if any, for prior supplies of coal or other materials in New York for which the company was bound to pay, and for cargo damage through the company's fault, for which the ship may be liable; and anything remaining may be offset against the charter hire.

12. In the case of *The Enchantress*, a deduction of 20 days from the owner's claim for charter hire should, I think, be made for the time the steamer was laid up in Buenos Ayres waiting for a new piston rod to supply the place of one broken on the voyage out; and also the expense of putting in to Pernambuco for the same cause; but not in this case for mere decrease of speed. The charter required the owner to maintain the ship in a condition of thorough efficiency. The temporary repair was not to be trusted, and the steamer was not in proper working condition until the new piston rod arrived. A notice that she was off hire was served on the captain at the time she was thus laid up. On this point, however, the testimony of the captain may be taken on the reference, for further consideration, under the liberty reserved at the trial.

13. Priority of liens:

(a) The liens first entitled to be paid out of the funds, after the payment of the port expenses of the vessels, including the expenses of discharging the cargo and of collecting the freight, which I understand have been already paid, are the advances made or expenses incurred for the necessities of the last voyage of each vessel after she left Brazil.

(b) Next, the specific liens for unpaid charter hire, pro rata, up to the time when the vessels were withdrawn from the company's service. These liens, expressly secured by all the charters, are superior, in my judgment, to any specific liens that Huntington and Pratt & Co. may have for moneys proved to have been supplied to disburse three of these ships on their last voyages by means of the drafts guaranteed. For the use of the chartered vessels, and the shipowners' attendant lien on the freights for the charter hire, were the basis and necessary conditions of the contemplated voyages which Huntington and Pratt & Co. proposed to assist. They knew these conditions. They could not count, therefore, on using the chartered vessels, or assisting the steamship company to use them in order to earn freights as a security to them for their guaranty, ex-

cept in subordination to the conditions of the charters, and the shipowners' lien for the use of the vessels by which the freights were to be earned. This is not a case of a supply to chartered vessels in distress, and merely to bring the vessels home; such as may sometimes outrank the shipowners' lien. The repeated issue of these letters of credit, and the subsequent continuance of the voyages of the other vessels of the line after their first return to New York, negative any such exceptional case as that of distress in a foreign port, and show that the aim was to continue the navigation of the vessels in the ordinary course of the company's business, upon the security of the freights.

(c) Next come the specific liens of Mr. Huntington and of Pratt & Co. for so much of the proceeds of the drafts guarantied by them as may be proved to have been applied in Brazil to pay bills for the necessary disbursements of the chartered steamers on their last voyages, to be determined upon a reference, if not agreed on.

I find that a part only of the amounts claimed by Messrs. Huntington and Pratt was supplied to the chartered vessels so as to constitute specific liens on the freights here in question. The entire proceeds of the first letter of credit guarantied by Mr. Huntington were exhausted at Santos before January 21, 1893, and therefore none of those funds entered into the disbursements of any of the chartered vessels on their last voyages, since these bills were not paid until in February and March. Parts of the proceeds of the second and third letters of credit, as the evidence shows, were used for the voyages of three of the chartered vessels. Of these proceeds about \$16,000 were sent from Rio to Santos at five different dates between January 31 and March 7, 1893, both inclusive; and from these moneys at least a part of the disbursements of the Kate and of the Enchantress at that port on their last voyages was paid, viz., the disbursements paid before March 9th, from and after which date different funds were supplied to pay all the subsequent disbursements. This fact excludes the freights of the Elsie and of the Etherly, so far as respects any specific lien, resting upon any contribution of funds towards their last voyages.

At Rio no payments for the last voyages of the chartered steamers were made before February, 1893; and all such payments made after March 6, 1893, were made from other moneys. Between those dates, however, considerable amounts were paid in disbursing the Kate and the Joshua Nicholson for their last voyages from Rio, which were derived from the second and third letters guarantied by Messrs. Huntington and Pratt; and to the extent of the moneys obtained by their guarantied letters that may be shown upon a reference to have been paid between those dates to disburse those vessels for their last voyages, as well as for the disbursements for the Kate and the Enchantress paid between January 31st and March 9th at Santos for their last voyages, they are entitled to a specific lien, which outranks the general lien of Brown Bros. & Co.

Concurrent with these specific liens, are any sums advanced for supplies furnished by the shipowners in Brazil on the steamship company's account, for the necessary disbursements of the last voyages.

(d) Next come the shipowners' claims for indemnity against liability for the supplies to the steamers in New York previous to the last voyages from Brazil; and also for indemnity against claims made against their ships for cargo damage during the last voyage, by the fault of the company or its employes, whether already paid by the owners, or not; for all which liabilities the owners have a lien under the stipulations of the charter. Liens for the supplies furnished at New York on the prior voyages, if the vessels should be held therefor, and damages to cargo on the current voyage, are, by all maritime rules, inferior in rank to necessary supplies for the last voyage. But these liens are, nevertheless, specific; and as such they take precedence of any mere general hypothecation for moneys not aiding the particular vessel, or voyage.

Against any such claims as are still pending and undetermined, the shipowners, who, under the provisions of the charters, would have liens on the freights for anything they were compelled to pay for the above causes, are entitled to be indemnified to the extent of the fund applicable thereto in case such claims are sustained, before the fund can be withdrawn by any other claimants of inferior rank. *Milburn v. Lloyd*, 58 Fed. 603.

(e) Whatever may remain of the freights of either of the chartered vessels after satisfying all the above described specific liens, should be applied pro rata upon the amounts remaining due and unpaid to Brown Bros. & Co., and to Mr. Huntington and Pratt & Co. on their general liens, after all their specific liens on these freights, or on any other freights or funds for the same debts, have been exhausted. As between themselves, I see no sufficient ground for giving a preference to either general lien above the other. They were in part concurrent in time; and each in part overlapped the other; and both contributed alike remotely, and in the same general way indirectly, to the funds in suit.

Decrees may be entered in conformity herewith, with an order of reference, as above stated, to report the amounts due upon the various classes of claims above specified.

THE ALLIANCA.

THE SEGURANCA.

THE ADVANCE.

BROWN et al. v. THE ALLIANCA et al. (four libels). HUNTINGTON v. THE SEGURANCA AND FREIGHTS. HUNTINGTON et al. v. PROCEEDS OF THE ADVANCE et al. ATLANTIC TRUST CO. v. PROCEEDS OF THE SEGURANCA et al. GRAY, Receiver, v. SAME.

(District Court, S. D. New York. October 16, 1894.)

1. MARITIME LIENS—LETTERS OF CREDIT—HYPOTHECATION OF FREIGHTS—AGREEMENT FOR FURTHER SECURITY.

A steamship company in New York, in order to obtain letters of credit to disburse their ships in Brazil, hypothecated all freights, and agreed

to give "further security when required:" *Held*, that the agreement for further security was too indefinite to constitute any lien on the vessels themselves, or their proceeds; and that no such lien could be allowed upon the insufficiency of the freights to pay the drafts drawn upon the letters of credit.

2. SAME—TREASURER'S AUTHORITY TO PLEDGE VESSELS—DEALINGS WITH THE OWNER ALONE—SUBROGATION.

Upon a claim by the personal guarantors of letters of credit, that the treasurer of the steamship company, owner, had pledged both vessels and freight to them for their security: *Held*, upon conflicting evidence, (1) that the pledge was only proved as respects the freights, which the treasurer had been previously accustomed to pledge in writing for similar purposes; (2) the treasurer's authority to pledge the vessels, without the action of the board of directors, questionable; (3) that as the dealings of the guarantors were wholly with the owner in New York, they had no direct implied lien upon the vessels for the moneys obtained by the sale of drafts drawn against the letters of credit in Brazil and applied to disburse the ships there in the absence of any agreement for such a lien; (4) for the same reason, and also because the moneys obtained on the drafts were the company's moneys, and because the purchasers of the drafts had no lien, the guarantors could have none by subrogation to any liens of material men in Brazil in the absence of any intent or contract to that effect in the original transaction.

3. SAME—REMNANTS AND SURPLUS OF SALE—MORTGAGEE'S CLAIMS.

There being no liens arising out of the letters of credit, either general or specific, upon the vessels, or their proceeds: *Held*, that the mortgagee was entitled to the surplus after satisfying the maritime liens already decreed.

In Admiralty.

Cary & Whitridge and W. P. Butler, for libelants John Crosby Brown and others.

Benedict & Benedict and Maxwell Evarts, for C. P. Huntington and others.

Carter & Ledyard, Mr. Baylies, and W. W. Goodrich, for petitioner Atlantic Trust Co., mortgagee.

Stetson, Tracy, Jennings & Russell and Mr. Van Sinderen, for petitioner Henry Winthrop Gray, receiver of the United States & Brazil Mail S. S. Co.

BROWN, District Judge. The steamships *Advance*, *Allianca*, *Seguranca* and *Vigilancia* were owned by the United States & Brazil Mail Steamship Company, and were run by that company between New York and ports in Brazil until the failure of the company in February, 1893. On March 18, 1893, the petitioner, Henry Winthrop Gray, was appointed by the supreme court of this state receiver of the company.

All the above claims are based upon the same transactions as were presented by the same parties in the actions against the freights of the *Kate* and four other chartered steamers, tried at the same time herewith; and the general rules and the points decided in those cases will be applied in these. 63 Fed. 707.

The *Advance*, the *Allianca*, and the *Vigilancia* all arrived in New York on their last voyage from Brazil on February 21, 1893; the *Seguranca* arrived on April 2d. The first three were attached by

the marshal on libels for seamen's wages, soon after arrival; and afterwards, on March 18, 1893, they were attached under the three libels first above named. The Seguranca was attached on April 2d, immediately on arrival, under the fourth above libel filed March 25th, as well as for seamen's wages. Under the libels for seamen's wages, the four steamers have been sold; the Advance, the Allianca, and the Vigilancia on April 3, 1893, realizing respectively \$91,000, \$83,000, and \$81,000; the Seguranca, on December 20, 1893, and realizing \$125,000. From these proceeds large sums have been paid out upon the decrees for seamen's wages, and also other sums in partial payment of various decrees against the steamers for repairs, materials and supplies, which have been admitted by the parties to constitute liens upon the vessels. Considerable sums, however, are still held in reserve and unpaid upon those decrees in order to meet the pro rata share of any possible sums found due by the decrees upon the libels and petitions above named, and some other claims. The mortgagee and the receiver claim whatever is not shown to constitute maritime liens superior to their rights.

1. The letters of credit issued by Brown Bros. & Co. to the steamship company were accompanied by the latter company's hypothecation of "all the freights earned and to be earned;" but not by any hypothecation of the ships. The steamship company also at the same time agreed to give Brown Bros. & Co. any further security demanded; but the evidence does not show that any particular kind of security was named or asked for. Payment of the freights not being made to Brown Bros. & Co. when demanded, a suit in equity was begun by them against the company in the supreme court of the state, to enforce the general hypothecation to them of the freights, including those of the four steamships above stated, a few days before their above libels were filed. That court has decided at general term that as it was a maritime cause in equity, that court had no jurisdiction of the action. *Brown v. Gray*, 70 Hun, 261, 24 N. Y. Supp. 61.

In behalf of Brown Bros. & Co. it is now contended that the agreement to give further security on the demand thereof, and the non-payment of the freights as pledged, together with the fact that the moneys drawn upon the drafts were designed, and at least in part used, for the purpose of paying the necessary disbursements of these vessels in Brazil, and to enable them to complete their voyages, create a maritime lien upon the vessels, in addition to the express hypothecation of the freights, at least to the extent that the moneys realized upon the drafts were used in disbursing the ships at Brazilian ports.

Our law does not sustain this contention. The dealings being wholly with the owner, no maritime liens can be upheld beyond what is expressly contracted for, or shown clearly to be within the common intent of the parties at the time the letters of credit were issued; and the evidence leaves no doubt that the only lien or hypothecation then contemplated was upon the freights. In the cases of *Brown v. Freights of The Seguranca*, 63 Fed. 733, tried at the same time with these cases, I have sustained this hypotheca-

tion of the freights to the extent admissible upon the facts in evidence. The agreement "to give further security" would have been as truly fulfilled by giving further personal security as by giving a further maritime lien. So indefinite an agreement does not constitute of itself any lien upon the vessels, nor even any equitable assignment or appropriation, such as might be recognized on a distribution of surplus moneys; nor does it extend the maritime lien beyond that specified and agreed upon at the time. These four libels claiming liens upon the vessels are therefore dismissed.

2. The claims of Huntington et al. to the freights of the *Seguranca*, have been considered in the previous decisions in regard to the freights of the other steamers owned by the company. Their libel against the *Seguranca*, and their three petitions against the proceeds of the *Advance*, the *Allianca*, and the *Vigilancia*, all present the same question, which, under my previous decision in respect to the freights of the *Kate*, etc., depends upon whether in the negotiations leading to the guaranty of the letters of credit issued to the steamship company by Heidelberg, Ickelheimer & Co., there was any express pledge of the steamships, or any common understanding of such a pledge as the basis of the guaranty, such as I have found existed in respect to the freights.

In the decision of the cases against the freights of the *Kate*, I have stated the main facts and circumstances, and here need to refer to them but briefly. Mr. Gates, who signed the first guaranty as attorney for Mr. Huntington, nowhere testifies to any other pledge than this, viz.: that "what money the ships earned was to apply in liquidation of the amount guarantied," and he testifies that the agreement upon the other letters of credit was the same. Mr. Babbige, the secretary and treasurer of the company, who alone conducted the negotiations on the company's behalf, states no other pledge, or agreed appropriation, than of the freights to be earned, and a similar lien to that of Brown Bros. & Co., which was referred to in the negotiations. Mr. Huntington, indeed, states in general terms that he was "to have a lien on the freight list and the American ships;" that such was his "expectation" and "impression;" but he was unable to give any specific conversation with Mr. Babbige to that effect, and he apparently relied to a considerable extent on his supposed rights in furnishing supplies to vessels in foreign ports. His "impression" as regards a pledge of the ships not being confirmed by Mr. Gates or by Mr. Babbige, I regard the evidence as insufficient to establish an express agreement or a "common understanding" that the vessels were hypothecated for these guaranties. The testimony by Mr. Babbige of his "assurance" to them that the freights would take care of the drafts, repels the theory that he understood he was pledging the ships as well as the freights.

I doubt, moreover, the legal authority of Mr. Babbige to pledge the vessels in this way. That was quite a different matter from a pledge of the freights alone, such as he had long been accustomed to make in obtaining letters of credit from Brown Bros. & Co. So far as appears, he had made no previous pledge of the vessels to

anyone; and there is no evidence that he had any authority to do so. A dealing in the home port so important as a hypothecation of all the ships of the line by an under officer to a superior officer of the same corporation, in the absence of proved authority from the directors, I must hold to be *prima facie* irregular, and not very likely to have occurred; and the making of such a pledge by Mr. Babbige I cannot hold sufficiently proved, except upon more certain and explicit evidence than is found in this case. Nor should such a pledge by his action alone be held competent or valid, I think, without some kind of previous authority, or some subsequent ratification, by the company, either express or implied from previous usage, such as existed in the case of the freights. I find, therefore, that there was no hypothecation of the vessels by agreement, but only of the freights.

3. Counsel have strenuously contended, however, that without any express contract or understanding that the guarantors should be secured by a lien or hypothecation, the mere furnishing of their money, or their credit, for the necessary disbursements of these vessels in foreign ports, would give them by operation of law a maritime lien therefor on the vessels and on the freights of the voyage assisted; i. e., either a direct lien for the money itself, as a supply necessary for the voyage; or a lien indirectly, through subrogation to the liens of those whose claims for the supply of labor or materials were paid by the moneys furnished. Many authorities are cited, and many passages from decisions are quoted giving color to this contention. But they all occur in cases where the facts are materially different from the present; and the expressions are to be limited to the state of facts before the court. In none of them were the dealings with the owner in the home port, and where, as here, an express agreement of a particular character was proved.

I cannot, for several reasons, sustain the claim of subrogation to liens of Brazilian material men, which was the only ground of lien originally set up by these claimants. No such liens have, in strictness, been proved; non constat but that the circumstances may have negatived any liens at all in their favor. There is even some evidence that supports that possibility. But assuming that some or all of the bills paid to disburse these ships in Brazil were liens in favor of the Brazilian material men, and assuming also that the transaction in New York was equivalent to a supply of moneys by Mr. Huntington and Pratt & Co. to the company's superintendent in Brazil, in order to disburse the ships there, and to enable them to complete their voyages, still the circumstances, and the negotiations in New York, strongly negative any intent at the time to loan money or credit on the security of subrogated liens; and when that fact appears, any such subrogation must be excluded. The negotiations proved show that the intent was to enable the superintendent in Brazil to prevent or to discharge liens, not to preserve them. Huntington et al. had no dealings with the lienors, as in *The Cabot*, Abb. Adm. 150, Fed. Cas. No. 2,277, nor with the masters or agents of the vessels assisted, as in most of the other cases of

subrogation. Their dealings were exclusively with the owner company in New York, the home port; and the prima facie presumption of a personal credit of the owner alone, applies as much against an intended subrogation to foreign liens, as against the acquisition of a primary and direct lien for the supply of the money itself. If the transaction had been with the master, and for the relief of a particular vessel; or if, being with the owner, the agreement with him, or the circumstances, had shown an intended subrogation as the basis of the loan, the subrogation should be upheld and enforced, as a direct lien would be. Here the circumstances and the negotiations show what the basis of the guaranty was, viz., a lien, as I have found, upon the freights alone. No subrogation to Brazilian liens was mentioned or referred to in the negotiations with Mr. Babbige; and afterwards, no such attention was given either to the facts raising a lien if there was any in favor of Brazilian material men, or to the evidence thereof, or to its preservation, or to the amount of such liens, as was to be expected had the least idea of any such subrogation been entertained at the time when the guaranties were given.

The transaction, moreover, was not precisely equivalent to a loan of money made by Mr. Huntington and Pratt & Co. at that time, or to a loan made in Brazil. It was, in fact, a loan of their credit only. The negotiations, the guaranty, and the final payment of the moneys by Huntington et al. about four months afterwards, were all in New York. The money to pay the bills in Brazil was raised by the superintendent there by the sale of drafts in Rio at 90 days' sight on London, although the company was able to procure the drafts only upon the credit of Mr. Huntington and Pratt & Co. as guarantors. With the moneys thus raised, the superintendent paid the bills of the different ships, and presumably discharged all liens for those bills, if there were any existing liens therefor. At that time Huntington and Pratt & Co. could not have had any lien by subrogation for the bills paid, without an agreement therefor; because the company was the primary debtor for the moneys raised by the drafts, and Huntington and Pratt & Co. were only guarantors, or sureties; they had not, as yet, advanced any of these moneys to pay the ship's bills, and they might never pay anything on the drafts; either because the steamship company itself might have paid the drafts at maturity some four months afterwards, as it was primarily bound to do; or because the guarantors themselves might have failed to pay them upon the company's default. No lien, or subrogation to any lien, could be implied by law until they had advanced money to aid the ship. Nothing but a specific agreement with the owner could keep alive for purposes of subrogation such former liens, if there were any, for bills which the company had thus paid with the proceeds of its own drafts; and there was no such agreement.

Again, the money that paid the ship's bills was not the money of Huntington and Pratt & Co.; although their guaranty enabled the company to procure it. It was the company's money, derived immediately from the persons who purchased the company's drafts in

Rio. It is certain that those purchasers had no lien, by subrogation or otherwise; because they did not buy the drafts on any credit of the ship, or with reference to any liens to which they might be subrogated; so that aside from some contract between these parties, I do not perceive how Huntington and Pratt & Co., by the mere payment of those purchased drafts, as guarantors, three or four months afterwards, could acquire any lien by subrogation. *Hard v. The Advance*, 63 Fed. 142.

For the same reasons mostly, I cannot sustain any direct lien independently of the contract. The dealings here, as I have said, were all with the steamship company, the owner, in New York, the home port. Neither Brown Bros. & Co., nor Huntington and Pratt & Co., had at any time any dealings whatsoever with the vessels in Brazil; nor with the masters there; nor with the material men in Brazil; nor even with the agent or superintendent there. Nor did they even send or deliver anything whatever to any one of these vessels, or to its master, in the foreign port, as was done in the cited cases of *The Sarah J. Weed*, 2 Low. 555, Fed. Cas. No. 12,350; *The Agnes Barton*, 26 Fed. 542; *The Chelmsford*, 34 Fed. 399; *The Bombay*, 38 Fed. 512; and *The James Farrell*, 36 Fed. 500,—to which reference has been made. In those cases it was the latter circumstance alone—the fact that the dealings of the lienors were not with the owners only, but directly with the ships and masters as well; the fact that the lienors made delivery of the supplies directly to the ship and master in a foreign port—that permitted the inference of a common intent to deal upon the credit of the ship, even though the articles were sent and delivered to the ship on the owners' request. Here those circumstances do not exist; and the dealings being exclusively with the steamship company as owner, and in the home port, the well-settled presumption, in the absence of any reference to ship or freights as a basis of credit, would be that only a personal credit of the owner was intended. In such cases a lien will be recognized when, and only when, sufficient affirmative evidence appears of a common intent to deal on the credit of the ship or freight. *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195; *Id.*, 5 Blatchf. 496, Fed. Cas. No. 7,196; *Id.*, 9 Wall. 758; *The Kalorama*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Union Express*, Brown, Adm. 538, Fed. Cas. No. 14,364; *Thomas v. Osborn*, 19 How. 22; *The Francis*, 21 Fed. 715, 921; *The Havana*, 54 Fed. 201; *The Stroma*, 3 C. C. A. 530, 53 Fed. 281, 283; *The Kate*, 56 Fed. 616.

The transaction, as respects Huntington and Pratt & Co., was a loan, not of their money, but of their credit, to the shipowners, to enable the latter to raise money to disburse the ships on the strength of their guaranty, as in *Nippert v. Williams*, 42 Fed. 533. For this guaranty and loan of credit, they were entitled to just such liens as the agreement at the time of the negotiations gave them, and no more. For a loan of credit as guarantor only, upon a dealing exclusively with the owner, I find no principle or authority for recognizing any other maritime or equitable lien, either directly or by subrogation, beyond what their agreement gives; and that, in this case, was for a lien on the freights alone. The libel and petition

of Huntington and Pratt & Co. as respects the proceeds of the four vessels must, therefore, be also dismissed.

The Atlantic Trust Company, as mortgagee, having a vested interest in the vessels under the mortgage for \$1,250,000, and its legal title having become absolute by the default in the mortgage before the receiver's appointment, is exclusively entitled, as I find, to the surplus proceeds of these vessels, as against the other claims set forth in the above libels and petitions; but subject to the payment of any other maritime liens already decreed, or which may be hereafter decreed in pending actions.

THE VIGILANCIA.

THE SEGURANCA.

HUNTINGTON et al. v. FREIGHTS OF THE VIGILANCIA et al. SAME v. THE SEGURANCA et al. BROWN et al. v. FREIGHTS OF THE SEGURANCA et al. ATLANTIC TRUST CO. v. SAME. GRAY, Receiver, v. SAME.

(District Court, S. D. New York. October 16, 1894.)

1. MARITIME LIEN—FREIGHTS—STATE COURT DEPOSITARY—CONFLICT—ATTACHMENT IN ADMIRALTY.

Where maritime freights were proceeded against in the state court in equity without jurisdiction, and were in the hands of a depositary: *Held*, that a subsequent attachment in admiralty to enforce a maritime lien thereon was valid.

2. HYPOTHECATION OF FREIGHTS—LETTERS OF CREDIT—MORTGAGEE—RECEIVER. Upon facts and claims of the same general nature as in the case of *Freights of the Kate*, 63 Fed. 707, the same rules applied.

In Admiralty. Liens upon freights.

Benedict & Benedict, for libellant C. P. Huntington.

Cary & Whitridge and W. P. Butler, for petitioners John Crosby Brown and others.

Carter & Ledyard, Mr. Baylies, and Mr. Goodrich, for petitioner Atlantic Trust Co., mortgagee.

Stetson, Tracy, Jennings & Russell and Mr. Van Sinderen, for petitioner Henry Winthrop Gray, receiver of U. S. & Brazil Mail S. S. Co.

BROWN, District Judge. The libel first above named was filed on April 13, 1894, to enforce an alleged maritime lien upon the sum of about \$30,000, on deposit in the Central Trust Company of this city, being the net freights earned by the steamships *Advance*, *Allianca* and *Vigilancia* on their last voyages respectively from Brazil to this port, all arriving on the same day, February 21, 1893. The steamers all belonged to the United States & Brazil Mail Steamship Company, and were run in their service. That company failed on February 23, 1893. On March 18, 1893, the petitioner Gray was appointed receiver by the state court, and that appointment was made permanent on March 6, 1894.

Upon a suit in equity brought in the supreme court of this state by the petitioner, John Crosby Brown and others in February, 1893, to enforce their claim to a lien upon these freights, upon an alleged express hypothecation thereof as collateral security for letters of credit issued by them to the steamship company, the freights were deposited under stipulation with the Central Trust Company, as depository, to abide the decision of that action, to which afterwards the receiver was made a party.

Upon an appeal in that action to the general term of the supreme court from an interlocutory order granting an injunction, it was held by the general term that that court had not jurisdiction of the cause, as its object was to enforce a lien that was maritime, by a suit in equity, contrary to the provisions of the United States constitution, and the ninth section of the judiciary act (Rev. St. U. S. § 711), by which the federal courts alone have cognizance of such actions. *Brown v. Gray*, 70 Hun, 261, 24 N. Y. Supp. 61.

Objection was made on the receiver's behalf to the service of process on the Central Trust Company in the libel first above named, and the jurisdiction of this court was denied, on the ground that the fund is sub judice and in control of the state supreme court under the stipulation above referred to. The objection was overruled on two grounds: First, that the objection is valid only when the state court has jurisdiction of the subject-matter, and is competent to adjudicate the cause (*Moran v. Sturges*, 154 U. S. 256, 274, 284, 14 Sup. Ct. 1019, reversing *In re Schuyler's Steam Towboat Co.*, 136 N. Y. 169, 32 N. E. 623), which is not the case here, as the state supreme court has itself adjudged; and secondly, because the fund being in the hands of a depository only, who is within the jurisdiction, it is competent for this court, which can alone adjudicate and enforce maritime liens, to proceed at once, and without delay, in the interests of justice, to adjudicate the maritime questions relating to said fund, upon due notice to the depository and all others interested, and to render an appropriate decree, which, upon final adjudication, the state court would be bound to respect and to enforce, even if the fund was lawfully in its own custody as respects some part thereof not affected by maritime claims; and because the decree of this court would be binding upon any mere depository, as respects the amount subject to maritime claims. The practice in all such cases has been to proceed with the cause. See *The Caroline*, 1 Lowell, 173, Fed. Cas. No. 2,419, and *The Sailor Prince*, 1 Ben. 234, Fed. Cas. No. 12,218, where this subject is fully discussed. Nothing but intolerable confusion, and delays equivalent to a denial of justice, could result from a contrary practice.

The *Seguranca*, on her arrival, was attached under process issued out of this court before the delivery of her cargo. The net freights collected were deposited under the order of this court with a depository, amounting to about \$8,500, without prejudice to any and all liens thereon. A few days afterwards, on April 13, 1893, the libel of Mr. Huntington, against the *Seguranca* and her freights, was filed.

To the first-named libel of Mr. Huntington, all the other petitioners above named have made answer, and have filed claims to the same freights.

All of these opposing claims are of the same kind, and are based upon the same grounds, as set forth in the decision of the cases of Gray and others against the freights of the steamship Kate and four other chartered vessels, tried at the same time herewith. The owners of the chartered vessels have no interest in the present cases; as regards the other claims, the rules of decision applied in those cases are to be applied here.

The evidence indicates that a part of the moneys raised at Rio by the drafts drawn upon the letters of credit guarantied by Messrs. Huntington and Pratt & Co., were applied to pay some of the necessary disbursements for all the steamships above named upon their last trips from Brazil by which these freights were earned; and that they have consequently a specific lien to some extent upon these freights, under the agreement by which the guaranty was procured.

The Vigilancia, on her voyage out, arrived at Rio de Janeiro on January 4, 1893, left for Santos January 6th, arrived there January 7th, and left on January 27th for Rio, where she arrived on the 28th, and sailed thence for New York on February 2d.

The Advance arrived at Santos January 21, 1893; left there on the 23d for Rio, where she arrived January 24, and sailed thence for New York on January 28th.

The Allianca arrived at Rio January 19, 1893; left on the 21st for Santos, where she arrived on the 22d; left there on the 24th, reached Rio on the 25th, and sailed thence for New York on January 29.

The Seguranca arrived at Rio on February 11, 1893; left on the 14th; arrived at Santos on the 15th of February, and left on the 17th for Rio, which she reached on the 18th, and sailed thence for New York on February 26th.

None of the disbursements testified to as made in November or December for these vessels at Rio or Santos could, therefore, have been made on account of the last voyages; but other disbursements testified to as made for them in January and February, were in part at least for the last voyages. During these months large amounts were obtained from the drafts drawn upon the letters of credit guarantied by Huntington and Pratt & Co.; and during January, £4,000 were also obtained upon drafts drawn upon Brown Bros. & Co. This was exhausted, as the evidence shows, by the end of January, so that no part of Brown Bros. & Co.'s drafts went specifically to disburse the Seguranca on her last voyage. Each, however, have a specific lien for so much of the necessary disbursements for either of these vessels as upon a reference they can trace as paid for the last voyages by the proceeds of their own drafts; and for such further necessary disbursements for those voyages as were paid by the commingled and concurrent funds supplied to both, they should share pro rata as specific lienors.

The specific liens, as thus ascertained, should be paid from the freights of each vessel next after satisfying any claims for neces-

saries arising during the voyage after the vessel left Brazil, as well as the port expenses here and the charges attending delivery of cargo and collecting the freights; the seamen's wages, as I understand, having already been paid.

Should there be any residue remaining after the above claims are paid, the general liens in favor of Brown Bros. & Co. and of Huntington and Pratt & Co., under the express contract and the understanding of the parties, take precedence of the claims of the mortgagee and receiver, according to the decision in the cases against the freights of the *Kate*, etc. These liens will be more than sufficient to exhaust the residue of the fund; and they will divide the residue pro rata, according to the whole amounts remaining unpaid upon each.

An order of reference may be taken to adjust the amounts, if not agreed on.

THE SAMUEL MORRIS.

PELLEY et al. v. THE SAMUEL MORRIS.

THREE OTHER CASES v. SAME.

(District Court, E. D. New York. September 11, 1894.)

MARITIME LIENS—PRIORITY.

Claims having accrued within 40 days held to take priority in payment over older claims, in the apportionment of the proceeds of a vessel. The *Proceeds of the Gratitude*, 42 Fed. 299, followed.

Apportionment of the Proceeds of the Sale of the Vessel.

Peter S. Carter, for Pelly and Stanwood.

Alexander & Ash, for Greason and others.

Benedict & Benedict, for Palmer.

BENEDICT, District Judge. These cases come before the court on the question of apportionment of the proceeds of the sale of the vessel. The amount in court is \$848.26. The claims amount to \$1,848. The first libel was filed on July 2, 1894. Of the claims, the claim of Greason, for \$125.80, and that of Palmer, \$54.40, accrued within 40 days from the time of the filing of the libel. All the other claims arose between July, 1893, and May 1, 1894. The question is whether the rule applied by Judge Brown in the case of *The Proceeds of The Gratitude*, 42 Fed. 299, shall be applied in a case like this, according to which rule claims having accrued within 40 days take priority in payment over older claims. The rule laid down in the case of the *Gratitude* seems to be a very proper rule, and I see no reason why it should not be applied in a case like this. Accordingly the order will be that Greason and Palmer be paid first in the distribution of the proceeds.

UNITED STATES TRUST CO. OF NEW YORK v. OMAHA & ST.
L. RY. CO.

(Circuit Court, S. D. Iowa, W. D. October 11, 1894.)

1. RAILROAD IN RECEIVER'S HANDS—REDUCTION OF WAGES.

Where a receiver petitions for a reduction of employes' wages, the employes concerned should be notified, and accorded a hearing.

2. SAME.

Where the wages paid to faithful and competent employes of a railroad in the hands of a receiver are not shown to be excessive for the labor performed, and are not higher than the wages paid to like employes on other lines of similar character, operated under like conditions through the same country, the court will not, against the protest of its said employes, reduce their wages because of inability of the railroad to pay dividends or interest, even though present opportunity exists for securing other employes for less wages.

3. MASTER'S REPORT—HOW FAR CONCLUSIVE.

The master's conclusions on such petition are of fact, and are not necessarily to be accepted by the court.

This was a suit by the United States Trust Company of New York against the Omaha & St. Louis Railway Company, in which J. F. Barnard was appointed receiver. He thereafter petitioned for the reduction of wages of employes, and the matter was referred to a master in chancery, who recommended such reduction. The matter now comes before the court on exceptions to the master's report.

Theodore Sheldon, for the receiver.

J. J. Halligan, for employes excepting.

WOOLSON, District Judge. The Omaha & St. Louis Railway Company is the owner of a line of railway extending from Council Bluffs, in the state of Iowa, to Pattonsburg, in the state of Missouri,—a distance of 136 miles. This line of road was in former years leased by, and operated as a part of, the Wabash system, but since the year 1887 has been operated by its owners. It is unnecessary, for the purposes of this hearing, to state the changes heretofore had in the ownership of this line. Since the line was taken out of the Wabash system, it has been operated in close connection with that system, under traffic arrangements, and serves as the Council Bluffs extension of that system. On petition duly presented to this court, J. F. Barnard was on June 22, 1893, appointed receiver of this line of road, and yet continues in that capacity. In May, 1894, a petition was presented to this court by the receiver, recommending certain reductions in rates of pay of different classes of employes, and requesting the court to take action thereon. The receiver has also reported to this court his inability, after full attempt had, to agree with said employes on a reduced schedule of wages. The court, accordingly, by its order of July 16, 1894, referred the hearing of the matter to Hon. L. W. Ross, one of the standing masters in chancery of this court, and directed him to take proofs upon said petition of said receiver, and also as to what wages are now being paid on other lines of similar character, operated under like conditions

through the same country, and to report the same, together with his findings thereon, to this court, with all reasonable speed; that he cause to be delivered a copy of this order to each of the employes, so far as practicable, who are to be affected by said proposed reduction of wages; that the receiver furnish transportation, going and returning over his own line, to such of said employes as shall attend before the master in chancery, and that he pay the reasonable and necessary expenses of said employes while attending upon said master; and that all employes of said receiver, so desiring, whose wages are by said petition sought to be reduced, have leave to appear, in person or by attorney or attorneys or other representative, before said master at time and place of hearing, there to offer such proper proof as they may deem fit, bearing upon the matters presented in said receiver's petition. The hearing was had accordingly, commencing July 25, 1894, in which said employes participated, they being also represented by counsel. Evidence was submitted on the part of the receiver and of the employes. The master has filed his report, recommending the reductions asked for by the receiver, and the matter is now before the court on the exceptions filed thereto by said employes. An extended hearing has been given the matter, and counsel for the respective parties have fully presented their views to the court.

Whatever may be the practice in other circuits, that which is to obtain in this circuit has been authoritatively stated. That the practice here obtaining is fair and just to the employes is beyond question. In delivering the opinion of the court in the matter of the proposed rates of pay upon the Union Pacific system (*Ames v. Railway Co.*, 62 Fed. 7), Circuit Judge Caldwell emphatically declares it to be the duty of a receiver to give notice and invite the employes to a conference respecting any proposed reduction of rates of pay. The receiver, in the matter now on hearing, has observed this requirement. And the men have also had full opportunity to present their case, and to urge the same, before the master, to whom the matter was referred, and also to the court. In the opinion to which reference has just been made, Judge Caldwell states at some length "the leading principles which courts of equity keep in view" in matters like the present:

"When a court of equity takes upon itself the conduct and operation of a * * * line of railroad, the men engaged in conducting the business and operating the road become the employes of the court, and are subject to its orders in all matters relating to the discharge of their duties, and entitled to its protection. The first and supreme duty of a court, when it engages in the business of operating a railroad, is to operate it efficiently and safely. No pains and reasonable expense are to be spared in the accomplishment of these ends. Passengers and freight are to be transported safely. If passengers are killed or freight lost through the slightest negligence to provide all the means of safety commonly found on all first-class roads, the court is morally and legally responsible. An essential and indispensable requisite to the safe and successful operation of the road is the employment of sober, intelligent, experienced, and capable men for that purpose. When a road comes under the management of a court, on which the employes are conceded to possess all these qualifications,—and that concession is made in the fullest manner here,—the court will not, upon light or trivial grounds, dispense with their service or reduce their wages."

He further declares, with regard to the commendable desire and duty of the receiver to so administer the affairs of the railway in his hands as to effect the best financial result practicable:

"The court shares in their anxiety to have an economical administration of the trust, to the end that those who own the property, and have liens upon it, may get out of it what is fairly their due. But to accomplish this desirable result the wages of the men must not be reduced below a reasonable and just compensation for their services. They must be paid fair wages, though no dividends are paid on the stock, and no interest on the bonds."

The remarks above quoted have peculiar pertinency when applied to the matter now on hearing. The receiver bears cheerful and hearty testimony to the faithful, intelligent, and capable character and conduct of the men employed on the line of railway under his charge. But his petition and testimony, as well as the master's report, bring out in strong light the greatly lessened net receipts of the road, notwithstanding the highly commendable, and in very many respects successful, attempts of the receiver to reduce the expenditures under his experienced management, and also show his inability to report any funds available for payment of accrued interest on outstanding bonds. We may not overlook the fact that it is desirable, from every standpoint, that this road shall not long remain under the charge of the court. This charge has been temporarily assumed by the court only because the necessities of the situation compelled such a course. And it is the desire and expectation of the court that these necessities be relieved within the earliest time possible, and that the road be turned over, with all speed practicable, to those who may be found entitled to assume its control and management. In determining the questions submitted, therefore, the court will act, not as dealing with a matter which is to remain permanently, or for any considerable length of time, under the order which may be herein entered, but rather with the expectation that the order is to be only temporary in its effect, and subject, as soon as the road can be turned over, to such change as the then owners may desire.

The evidence introduced has largely and naturally been with reference to the rates of pay in operation on those Missouri lines of the Wabash system which connect with, or are divisions or branches of the lines thus connecting with, the railway in receiver's hands. It appears without contradiction that for many years the rates of pay on these Wabash lines and the rates in force on the line in receiver's hands have been the same for like kinds of service; and that in May, 1894, the rates of pay on the Wabash were reduced substantially to the figures now recommended for the employés under the receiver. The argument is strongly presented that since the general traffic on these two lines is closely connected, and is, except as to merely local business on the line, under a joint traffic arrangement, the rates of pay should be the same, and the receiver be authorized to reduce the rates of pay on his line to the Wabash rates as they have been reduced. On the other hand, it is as forcibly urged that the Wabash line is better ballasted, its grades generally less strong, its curves less sharp, and the speed of its trains much greater, and that thereby the Wabash employés are en-

abled to earn a greater mileage in the same number of hours than can be earned by the receiver's employes, engaged in like service, and with less labor correspondingly to the Wabash men, and that, since the receiver has only "Mogul" engines on trains operated by the employes to be affected by the proposed reduction, the rates of pay of enginemen and trainmen under the receiver should be greater, because of the more onerous labor performed, than the rates of those on the Wabash system for like services, with trains and engines requiring less onerous service. That the grades on the lines in the receiver's hands are the heavier, and that the Wabash employes are able to earn the greater mileage within a given time, admit of no doubt, under the evidence. The tabulated rates of pay on these two lines, the time-table schedules as presented, showing schedule time between division points on these lines of the several divisions scheduled, and the computations based thereon as to the rate of pay per hour therefor to the various classes of train employes on the rates as now in force on the two roads, all of which have been introduced in evidence, show that the present pay per hour on the receiver's line is much less than the pay per hour to like classes of employes for similar services under the Wabash reduced wages. If it be urged that, under the reduced earnings of the road for the past few months, the present pay becomes disproportionate thereto, the language of Judge Caldwell in the opinion above cited is pertinent,—that "the employes, under the present [mileage] system, share the burden of diminished business. They make less mileage, and get less pay per month."

One of the recognized tests in this matter is that of comparing the rates of pay, as proposed, with those in force upon "other lines operated through similar country, and under like conditions," so far as the same can be done. Unless the Wabash shall be regarded as one of these "other lines" to which reference has just been made, there does not appear to be any line closely meeting these "like conditions." But there are a number of lines in the same general section of country which in many respects are similar in conditions to the receiver's line. The tabulated rates of pay of these lines, which have been separately submitted by counsel upon either side, and which tables are in substantial accord, show that these lines pay rates of wages greater than those proposed for like services in the proposed and reduced schedule submitted by the receiver. At the request of the court, the receiver has furnished, since the hearing before the master, a table showing the amounts paid for each month from April, 1893, to March, 1894, both inclusive, upon the receiver's line, for the different classes of service whose rates are proposed to be reduced; that is, the table contains the amount actually paid by the road for each of these months, for the one year, to different persons engaged during that year on this line of railway. The men selected are a fair illustration, in each line of service, of the wages paid during that time to those so engaged. The table includes nearly all the employes who have testified before the master on the matter of wages. Turning to this table, we find the average of wages to be as follows:

	Per year.	Per month.
Passenger engineers.....	\$1,387 57	\$115 63
Passenger firemen.....	784 87	65 40
Freight engineers.....	1,175 68	98 72
Freight firemen.....	600 92	50 08
Freight conductors.....	1,097 40	91 44
Freight brakemen.....	788 19	65 70

These tables show that the wages received by the several employés in the same line of service are not the same to each employé. The rule in force, of "first in, first out," appears to make such differing wages inevitable. Thus, while one freight brakeman received \$926.32 during the year, another received but \$700.04 for the same period. And, as to each of these employés, his monthly aggregate of wages varies. Thus, in May, 1893, one brakeman received \$120.85, while in the next month he received only \$55.56. Another brakeman's maximum monthly wages in that year were \$81.38, and his minimum \$30.96, during the same year. As partially explaining this inequality, and the low point reached at times in the monthly wages of the same person, it may be stated that the evidence shows that on this line of railway—and the evidence shows the same fact obtains with railways generally—the pay roll carries a larger force than is necessary to man the trains actually run. There must be others besides the men actually engaged and necessary to man the trains as run. Else, in case of sickness or casualty disabling an employé from duty, the train to which he belonged could not be run, unless, by a rare and favorable occurrence, his place could be supplied by some person outside the railroad's employ,—an occurrence so rare, indeed, that no railway manager would hazard the operation of his road by relying thereon. The evidence does not show that these yearly and monthly averages are higher than the rates paid on other lines operated, as nearly as can be found, "through similar country, and under like conditions." And in the opinion of the court the payments shown to have been made by the schedules now in force are just and equitable, and the rate now paid not higher than it should be for the service rendered,—at least, not higher to such an extent as to require the enforced order of this court in the matter; especially under the fact, apparent from the evidence, that the rates, as applied to the greatly reduced volume of business lately passing over this road, will result, of necessity, in greatly reducing payments to these employés.

I do not overlook the testimony introduced on the part of the receiver that the rates, as proposed in the schedule recommended, are fair and just to the men. The witnesses are experienced railroad operators. Their testimony is largely based on the reduced earnings, and the fact that the expenditures of the road for some months have exceeded the receipts; and also on the fact, shown by the evidence, that at the present time many railroad men are unemployed, and seeking employment, so that there would be no present difficulty in engaging others in the place of those who might quit the service because of the reduced pay. The court does not regard these reasons as entitled to much weight in considering the matter to be here decided. The retention of faithful, intelligent, and capa-

ble employ  s is of greatly more importance than temporary decrease in earnings, or present ability to secure other employ  s at reduced wages. The court is not justified in discharging trusted, satisfactory employ  s, or compelling their retirement from the service of the court, because present ability to employ others at reduced wages would turn a present operation at a loss into such operation without loss. If, as has already been determined, the wages now paid are not in excess, in the particulars considered, of the wages paid by other roads running through the same general country, and operating under practically similar conditions, and the wages now paid on this line are not excessive for the services performed, the reasons presented for a reduction, by the court, of those wages (and against the protest of the men affected thereby), should be weighty indeed, and should appeal with most convincing power, before the order for such reduction is entered. The evidence shows that some of the employ  s, with families to support, are scarcely able to maintain them on present wages. "The highest and best service cannot be expected from men who are compelled to live in a state of pinch and want." The court has examined with care and confidence the testimony of the receiver, and the reports regularly filed by him, which have been introduced in evidence. He appears to have administered his trust with faithful ability and commendable economy. But the court is unable, after such examination, to concur in the reductions proposed.

Nor has the court been unmindful of the general rule obtaining, that the report of the master in chancery is to be accepted, as to facts by him found. The master gave the matter referred to him patient hearing and careful consideration, and the facts found by him appear to be fully warranted by the evidence. Had his conclusions, as based on these facts, been mere conclusions of law, the court might have accepted them as of persuasive force. But such conclusions were not, and under the situation could not be, mere legal conclusions. The question related to the propriety and justice of a reduction of the wages of the employ  s. The general rule above stated as applicable to the facts presented in a master's report is not here applicable to the ultimate question submitted for decision. And the court has felt, while giving to the master's report large weight in the decision reached, that it must, for itself, decide this question, and record its own judgment.

On the hearing it was conceded by counsel for employ  s that the rates of pay now in force on the railway in the receiver's hands, for local freight enginemen and trainmen, is larger than the rates in force on the other lines, to which reference has been made above, and with which comparison has been made. The schedules submitted manifest, beyond question, this fact. And, in what has been above written, exception has been intended as to the employ  s last named. Their rate of pay should be reduced. The court is unable, however, to accept as the proper reduction that which has been recommended for the enginemen, but accepts that which has been recommended for the trainmen. The reduction recommended for local freight engineers is from 5 cents per mile,

the present rate, to 4 cents per mile, and for local freight firemen from 2.7 per mile (present rate) to 2½ cents per mile. In the judgment of the court, a reduction should be made for local freight engineers to 4½ cents per mile, and for local freight firemen to 2.4 cents per mile. Let an order be drawn overruling the petition, except as to local freight engineers and trainmen, and, as to them, fixing the reduction of pay of such enginemen at 4½ cents per mile, and of such firemen at 2.4 cents per mile, and, as to such trainmen, fixing the reduction at the figures named in the petition; this reduction to become operative from and after November 1, 1894.

AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Limited, v.
WHALEY et al.

(Circuit Court, D. South Carolina. June 21, 1894.)

1. USURY—COMMISSIONS FOR PROCURING AGENT INCLUDED IN LOAN.

A lawyer, advertising money to loan, through whom is made a written application for a loan, giving full description of the property with abstract of title, and the banking company to whom he sends the papers, who negotiates the loan with one of several mortgage companies with whom it deals, without preference, receiving no compensation therefor, will not be held agents of the mortgage company loaning the money, so as to render the mortgage usurious because 20 per cent. commissions, for negotiating the loan, were divided between the banking company and the lawyer, where the representatives of both companies through whom the loan was negotiated deny any relation of principal and agent, or that the mortgage company had any interest in or knowledge of the commissions, or that the banking company had any interest in the mortgage company, or negotiated loans therefor, and where it appears that the money was not paid over to the banking company, to be forwarded, until after the loan was accepted, though the banking company had for collection the notes given for the loan and the lawyer, who also certified to the title, paid off existing incumbrances, and procured the property to be insured.

2. SAME—COVENANT FOR ATTORNEY'S FEES.

A provision in a mortgage that, in case of foreclosure either under the power of sale or by action, an attorney's fee of \$500 shall become due immediately on notice of sale or on service of summons (the mortgage being for \$5,000), is controlled by a provision in the note which it was given to secure that, in case of suit, 10 per cent. on principal and interest shall be allowed as counsel fees, and does not render the transaction usurious, the payment being contingent upon breach of the contract.

This was a suit by the American Freehold Land Mortgage Company of London, Limited, against J. J. Whaley and P. W. Farrell, for foreclosure of a mortgage.

John T. Sloan, Jr., and Allen J. Green, for complainant.
McCrady & Bacot and W. R. Kelly, for defendants.

SIMONTON, Circuit Judge. When the facts of this case are clearly understood, the legal questions involved in it are easily solved. W. H. Duncan, Esq., a member of the bar, residing in Barnwell county, S. C., put in his county paper an advertisement, "Money to lend in sums from \$500 to \$500,000, on five years' time." He was not a capitalist himself, but was the correspondent of the

Corbin Banking Company, a firm in New York City. His method was this: When any person desired a loan, he was presented with a printed form of application, containing 47 questions, directed to information as to the quantity and kind of land on which the money was to be borrowed, the improvements thereon, its productive capacity, how it was cultivated, whether by the owner or by tenants, the length of time during which it had been cultivated, and the number of years the applicant himself had cultivated it, its distance from a railroad,—in short everything which could enable one at a distance to form a true estimate of its value. To this was attached a diagram of the land, concluding with the statement that, if the application is negotiated by Duncan, it will be on the representations contained in the application, which are affirmed to be true, and made to be used by Duncan, as his agent, in procuring the loan. Contemporaneously with the application, the person desiring the loan signed a paper stating the fact that he had that day employed Duncan to negotiate a loan for him, stating the amount and rate of interest upon a mortgage of the property, describing it, to secure a note, and then promising in case Duncan succeeded in negotiating the loan within 30 days, upon the usual conditions exacted by eastern money lenders as to security, perfecting title, insurance, etc., to pay Duncan a fixed sum in full of his commissions and of the commissions of those whom he shall employ to assist him in making the negotiation; also, an agreement to furnish abstract of title, and to pay the fee for recording the mortgage. On receipt of this application, duly filled out, Duncan sent it on to the Corbin Banking Company, who with it negotiated a loan with some money lender, such as the American Freehold Land Mortgage Company of London, Limited, the Security Mortgage Company, the Dundee Investment Company, the American Mortgage Company of Scotland, Limited, the New England Mortgage Security Company of Connecticut, the Union Banking & Trust Company of London, Limited, and sometimes from individuals. Of these the most business was done with the Union Banking & Trust Company of London. No more business was done with this complainant than with the others. When the loan was negotiated and accepted, the Corbin Banking Company sent back to Duncan the abstract and the mortgage, with the note it was intended to secure, prepared for signature and execution, and their check for the amount of the loan. The contract was then concluded, and the mortgage recorded. The defendant J. J. Whaley was a neighbor and friend of W. H. Duncan. He met the latter at a railroad meeting held in the latter part of December, 1886, or the early part of January, 1887. During the course of conversation, he mentioned that he was in need of money because a mortgage he had given on his farm to a Scotch mortgage company for some \$2,000 and upward was called in, and he owed some small debts. Duncan said he could get the money for him, and Whaley told him to go ahead and get it. Duncan then prepared an application by filling up the printed form above described, in which every question was answered, and this was signed by Whaley, 12th January, 1887. He asked for a loan of \$5,000, for

five years. At the same time he signed the separate agreement in the form above referred to, reciting that he had employed Duncan to negotiate a loan for him for \$5,000 for five years, interest at the rate of 8 per cent. per annum, and consented in case of success to pay Duncan \$1,000 in full of all of his commissions and the commissions of those whom he employed to assist him. This application had printed on its back the words: "Received by Corbin Banking Company." Duncan did send it on to this company, by whom it was received on 17th January, 1887. The application was accompanied by a full abstract of title, made and certified to by W. H. Duncan, as an attorney at law, and in both was mention made of an existing incumbrance by way of mortgage to the Scotch mortgage company, of which one Palmer was agent. The Corbin Banking Company, on receipt of this application, presented it and the abstract to the American Freehold Land Mortgage Company of London, Limited, and negotiated a loan of \$5,000 with the agent and representatives of that company in New York City. The loan was approved. On 19th February, 1887, J. J. Whaley executed his promissory note to the American Freehold Land Mortgage Company of London, Limited, in the words and figures following:

"\$5,000.00

Blackville, S. C., Feby. 19th, 1887.

This note is secured by a mortgage on 760 acres
Barnwell county, S. C.

"On the nineteenth day of February, 1892, promise to pay the American Freehold Land Mortgage Co. of London, Limited, or order, at the office of the Corbin Banking Company, New York City, five thousand dollars, in the gold coin of the United States of the present standard of weight and fineness, with interest from this date, at the rate of eight per cent. per annum, payable annually, as per 5 interest notes hereto attached, value received. Should any of said interest not be paid when due, it shall bear interest at the rate of ten per cent. per annum from maturity; and, upon failure to pay any of said interest within thirty days after due, said principal sum may, at the option of the holder of this note, be declared due, without notice, and may thereupon be collected at once, time being of the essence of this contract; and, in case this note is collected by suit, agree to pay all costs of collection, including ten per cent. of the principal and interest as attorney's fees. It is expressly agreed and declared that this note is made and executed under and in all respects to be construed by the laws of the state of South Carolina, and is secured by mortgage of even date herewith, duly recorded.

"No. 42,538.

J. J. Whaley."

Coupons were attached to this note; and on the same day he executed the mortgage (an exhibit to the bill) to secure said note to the said land mortgage company. This mortgage was duly recorded 28th February, 1887, in the proper office of Barnwell county. On the 19th February, 1887, Whaley gave a receipt to the Corbin Banking Company for \$5,000, proceeds of loan negotiated by them for him with the American Freehold Land Mortgage Company of London, Limited, less commissions as agreed. These commissions were 20 per cent., of which the Corbin Banking Company took 15 per cent. and Duncan got 5 per cent. The agent of the Corbin Banking Company who negotiated this loan, and the agent of the American Freehold Land Mortgage Company with whom this negotiation was made, distinctly and unequivocally deny that any relation of principal and agent existed between the banking company

and the mortgage company, or that any other relation existed between them than that of one who, having money to lend, lent it on the application of the other in due course of business as a business transaction wholly. The mortgage company had no interest whatever in the commissions of the banking company. The banking company had no interest in the money of the mortgage company, and no connection with the transaction whatever other than the purchaser at par of an approved security. So far as the agent of the mortgage company knew,—and he says he is in a position to know,—W. H. Duncan had no relations of agency whatever with the mortgage company. The mortgage contained a power of sale in the mortgage in case of default, and provided for the payment in case of such sale of all counsel fees, premiums of insurance, and costs and charges of such sale. The money lent came through Duncan from the Corbin Banking Company. He first took up the Scotch company mortgage, \$2,497; paid, at Whaley's request, certain debts owed by the latter in Blackville, giving therefor checks payable to Whaley's order; retained \$50, to pay insurance; and gave him a small balance left. Afterwards he returned all of the \$50 but \$12, saying he could not effect insurance. The Corbin Banking Company got from the mortgage company \$5,000, of which \$4,000 was all that Whaley got the use of. Several coupons on the note were paid by Whaley by remittance to the Corbin Banking Company. At last he defaulted, and this bill was filed for the foreclosure of the mortgage.

The defense to the action is usury. On its face, this contract is not usurious under the law of South Carolina. To taint it with usury, there must have been an intention on the part of the mortgagee knowingly to contract for or take usurious interest. *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301. There can be no doubt that when one negotiates a loan through a third party with a money lender, and the latter bona fide lends the money at a legal rate of interest, the contract is not made usurious merely by the fact that the intermediary charges the borrower with a heavy commission, the intermediary having no legal or established connection with the lender or agent. *Fowler v. Trust Co.*, 141 U. S. 385, 12 Sup. Ct. 1; *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841; *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301. It is also the established law that when an agent authorized to lend money for his principal exacts, without the knowledge or authority of such principal, money from the borrower for his own benefit, this does not make the contract usurious. *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301. But when a lender authorizes his agent to make loans for him under a general arrangement that he must look to the borrower for his compensation, and such agent, for the lender, effects a loan, and charges the borrower a commission, this will make the contract usurious, whether the lender knew of the charge or not (*Fowler v. Trust Co.*, 141 U. S. 385, 12 Sup. Ct. 1); for this exaction is by the authority of the lender, the principal.

The question in this case, therefore, is, were the Corbin Banking Company or Duncan, both or either, agents of the American Free-

hold Land Mortgage Company of London, Limited, the mortgagee complainant in this case? This was the controlling fact in *Bates v. Mortgage Co.*, 37 S. C. 90, 16 S. E. 883; in *Brown v. Brown*, 38 S. C. 173, 17 S. E. 452; in *Sherwood v. Roundtree*, 32 Fed. 122; and in *Security Co. v. Gay*, 33 Fed. 636. The direct testimony bearing on this point is this: W. G. Wheeler, who transacted the business for the Corbin Banking Company, after stating that the banking company lends no money of its own, but acts simply as brokers to procure, if possible, for borrowers, as agents for such borrowers, comes to this transaction in question. He swears that there was no connection or business arrangement between the banking company and the mortgage company; that the banking company did not negotiate and place loans for the mortgage company; that the banking company is not paid by the mortgage company; that the mortgage company knows nothing about the compensation of the Corbin Banking Company, either as to the amount received by it, if any, or from whom it was received. James K. Sherwood, who was the representative of the mortgage company in this country, swears with equal directness and positive certainty to the same effect. Duncan died before this suit was brought. This is all the direct evidence. The witnesses have not been impeached. The testimony of witnesses, although their character has not been attacked, can be compared, however, with the testimony of other witnesses, and, indeed, with admitted facts in the case, and may be overborne by these. When, however, it is proposed to contradict the direct testimony of unimpeached witnesses by inferences from facts, this result cannot be reached unless the existence of these facts and the natural inferences from them cannot be reconciled with the conclusion that the direct evidence is true.

There are certain facts in this case which it is claimed show that Duncan and the Corbin Banking Company were really acting for the mortgage company, and that they bore the relation of agents to the mortgage company as principal. The money was paid to the Corbin Banking Company. If the money had been placed in the hands of the banking company, anterior to the negotiation of the loan, to be invested by it for the mortgage company, then this fact would be almost conclusive, under *Fowler v. Trust Co.*, supra; for, whether the lender knew or not that its agent was charging the borrower, it did know that its agent was not compensated by it. As the universal presumption in business is that something is never done for nothing, the principal knew that his agent must be paid by the only other party interested,—the borrower. The testimony has been carefully examined, and the dates compared. There is no reason to believe that the mortgage company parted with the money until it accepted the offer, and had bound itself to make the loan after inspection and examination of the abstract of title. So, also, if the Corbin Banking Company invariably placed their loans with this American Land Mortgage Company, the conclusion would be almost irresistible that there was a business connection between them; or, if the mortgage company was the principal lender in loans made by them, the conclusion would not be so strong, indeed, but it

would be a strong circumstance adding to other suspicious circumstances in the case. But the evidence is that the Union Banking & Trust Company of London dealt most frequently with the Corbin Banking Company, and that business of no other character was done with these complainants than with the long list of other money lenders. The mortgage company must have put into the hands of the banking company the money lent, before it received the mortgage. But this, of itself, would not constitute the banking company agent of the mortgage company in effecting the loan. Indeed, that had been effected already. In order to complete it, inasmuch as the mortgagor resided in South Carolina and the mortgagee was in New York, it was necessary either that the mortgagor should execute his mortgage without receiving the money, or the money should be placed somewhere to be delivered contemporaneously with the execution of the mortgage. It was not unnatural—surely, it is not a suspicious circumstance—that the mortgage company should be willing to intrust this to the Corbin Banking Company, a prominent and well-known banking house. Indeed, something similar to this is done in every transaction involving the lending of money. The money did not get into Whaley's hands until the mortgage to the Scotch mortgage company was satisfied by Duncan. This was for the benefit of the mortgagee. True. But Duncan, as attorney at law, had examined the title, made the abstract, recommended the title, and had given the certificate. He was personally liable for the removal of incumbrances. When he satisfied this former mortgage, he primarily relieved his own personal liability, and his act was his own act, done for himself. So, also, with the insurance. Duncan had not only signed as attorney; he certified to the facts as inspector. He was bound to see this contract of insurance carried out, and he did this for his own protection. Whaley paid the interest on his note, which was the property of the mortgage company, to the Corbin Banking Company, and took their receipt, although the coupons were payable to the order of the mortgage company. This seems to lead to the conclusion that the banking company, being thus the agent of the mortgage company in part of the transaction, was its agent in the whole transaction. But this conclusion is not inevitable. The Corbin Company is engaged in the general business of banking, and the collection of money is a large part of that business. The debtor resided in South Carolina,—a farmer,—away from the centers of trade. The creditors reside in New York City. Sending the money through a banker was a protection for the debtor, a convenience for the creditor. The coupons are all made payable at the banking house of Corbin Banking Company. This may—indeed, must—have facilitated the loan. It is difficult to consider the questions in this case without realizing a strong inclination to assist the defendant. It seems monstrous to hold him for a debt of \$5,000 when he got only \$4,000. Yet he is a man of age and experience. He knew exactly what he was doing. He was being pressed by a mortgage which he could not pay. He saw a mode of relief. He counted the cost. His southern blood made him sanguine of meeting it in the future, and he assumed it.

The learned counsel for the defendant presses another ground for concluding that this transaction was usurious. Among the provisions of the mortgage is one covenanting that in case of foreclosure of the mortgage, either under the power of sale or by an action, an attorney's fee of \$500 shall become due from the mortgagor to the mortgagee, immediately on notice of the sale in the first instance, or on service of the summons in the other. The note provides that, in case of suit, 10 per cent. on principal and interest shall be allowed as counsel fees. This will explain and control the language of the mortgage. *Montague v. Stelts*, 37 S. C. 212, 15 S. E. 968, where such a charge was sustained. The sum of \$500 is not interest or discount, nor is it to be, at all events; but the liability for it is wholly on a contingency,—a breach of the contract. It is somewhat in the nature of liquidated damages, and comes within the principle of *Norward v. Faulkner*, 22 S. C. 371, and *Williams v. Vance*, 9 S. C. 374. The fact, also, that its payment, or the right to its payment, depends wholly upon a contingency, prevents it from being usurious. Says the supreme court of the United States in *Spain v. Hamilton's Adm'r*, 1 Wall. 626: "The payment of anything additional depends upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious."

Let an order of reference be taken to ascertain the amount due under this note and mortgage, in accordance with this opinion.

WEST v. HUISKAMP et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 36.

1. CORPORATIONS—RIGHTS OF SUBSCRIBERS TO STOCK.

Complainants and defendant W. entered into an agreement by which W. was to purchase the T. newspaper, he furnishing seven-tenths and complainants three-tenths of the purchase price; and a corporation was to be organized to publish the paper, stock in which was to be issued to the parties in proportion to their contributions to the purchase price. Complainants advanced their proportion in cash, W. purchased the newspaper property, and transferred same to the corporation upon its organization, and became president and general manager. Upon a bill alleging that W. had falsely represented to complainants that he was financially able to carry out his part of the agreement, whereas he was insolvent; that the only cash used in the purchase was that furnished by complainants; that W. had obtained credit for the balance of the purchase money upon his notes, which he afterwards paid with funds of the corporation misappropriated by him as president; that he had caused stock to be illegally issued, and had appropriated stock without paying for the same; and praying for cancellation of the stock illegally issued, and for a declaration that complainants were the only purchasers of the newspaper property, and the only owners of the stock of the corporation,—*held*, that W.'s misrepresentation of the value of his property could not affect the validity or ownership of the stock; that it was no objection to W.'s title to the stock issued for the newspaper property that he had obtained the property on credit, and not paid for it; that complainants did not become the sole owners of the stock, or their shares the only valid shares, because they alone paid what was paid for the property; that there should be a reference to a master to ascertain the

exact rights of the parties, arising from W.'s issue of illegal stock or otherwise; and that upon proper findings there might be a decree canceling shares standing in W.'s name, but not upon the ground merely of his misappropriation of money or credits of the company.

2. FRAUD—SUFFICIENCY OF PROOF.

The bill also alleged that a piece of real estate bought by W. with the newspaper property, but forming no part of it, had been retained by him. No fraud, misrepresentation, mistake, concealment, or breach of trust was alleged or proved, and it appeared that complainants knew of W.'s retention of the lot. Held insufficient to sustain a decree in complainants' favor against W. for three-tenths of the value of the lot.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit by Herman J. Huiskamp, Henry C. Huiskamp, Cyrus E. Phillips, George D. Rand, John N. Irwin, and John Williamson against James J. West, Charles E. Graham, James A. Fullenwider, Chapncey W. Boucher, and the Chicago Times Company, and cross bill by James J. West against Henry C. Huiskamp, Herman J. Huiskamp, John N. Irwin, George D. Rand, Cyrus E. Phillips, Frank S. Weigley, Joseph R. Dunlop, William Henry Smith, C. W. Fairbanks, Walter N. Haldeman, and the Chicago Times Company, to determine the ownership of certain shares of corporate stock. Complainants obtained a decree, and the cross bill was dismissed at the hearing. 47 Fed. 236. Defendant West appeals.

John N. Jewett, L. H. Bisbee, and William Brown, for appellant. Trumbull Willits, Robbins & Trumbull, A. W. Bulkley, and E. E. Gray, for appellees.

Before HARLAN, Circuit Justice, and WOODS, Circuit Judge.

WOODS, Circuit Judge. This suit was brought by Herman J. Huiskamp, Henry C. Huiskamp, John N. Irwin, George D. Rand, and Cyrus E. Phillips, citizens of Iowa, and John Williamson, a citizen of New York, against the appellant, James J. West, and others, citizens of Illinois, for the purpose of obtaining a decree which should determine the ownership of the stock of the Chicago Times Company, a corporation organized under the laws of Illinois, direct the cancellation of illegal stock, and, pending the suit, enjoin the defendants against transferring or assigning stock, and against interfering with the publication or management of the newspapers known as the Chicago Times and the Chicago Mail. The averments of the bill are numerous and prolix, but the substance is that the complainants, together with E. M. Irwin and M. M. Phillips, are owners of shares of stock in the Chicago Times Company, in amounts stated, aggregating nearly 3,000 shares out of a total of 10,000 shares; that on the 1st day of December, 1887, the estate of Wilbur F. Storey, including the Chicago Times, was in the possession of Horace A. Hurlbut, as receiver, who in that capacity was conducting the publication of that paper; that about that time the complainants, with West and Clinton A. Snowden, "for the purpose of obtaining such publication, known as the Chicago Times, entered into an arrangement or agreement whereby West and Snowden were to become

the purchasers, if possible, of the various conflicting interests in the estate of Wilbur F. Storey, deceased, and thereby become the owners, for and on behalf of themselves and your orators, of all the property of said estate, * * * including said Chicago Times," it being further agreed that as soon as the purchase could be consummated a corporation should be formed for the purpose of publishing the Times newspaper, the stock of which corporation should be owned by the complainants and by West and Snowden; that the parties to the agreement, or a majority of them, were stockholders in the Chicago Mail Company, a corporation of Illinois, which was engaged in publishing the newspaper known as the Chicago Mail, the capital stock of which company was \$150,000, divided into 1,500 shares, of which West owned a majority, and, that stock being of par value, it was agreed that the property of the Chicago Mail Company should be transferred to the proposed Chicago Times Company, and stock of the new company issued, share for share, to the holders of the stock of the Mail Company; that, pursuant to the arrangement, West and Snowden did thereafter purchase from the widow and heirs the entire Storey estate, including the Chicago Times, and on or about the 24th of December, 1887, West received a conveyance thereof for himself and the other parties named, the purchase price being to the widow \$275,000, to be paid in cash, and to the heirs \$300,000, to be paid \$110,000 in cash, and the remainder, \$190,000, by the conveyance to the heirs of a portion of the landed estate which had been conveyed to West; that on the 30th of December, 1887, the organization of the Chicago Times Company was completed by the election of directors, and by the issue and recording on the next day of final articles of incorporation; that, on the ensuing 5th of January, West was elected president and treasurer of the company, Snowden was elected secretary, and by-laws were adopted, defining their duties and powers, and fixing the salary of West, as president and general business manager, at \$10,000, and of Snowden, as secretary and managing editor, at \$5,000; that on the same day, pursuant to the agreement hereinbefore set forth, the board of directors authorized the president and secretary "to purchase from West the real estate known as the 'Chicago Times Building,' together with all the personal property therein contained, and the publication known as the Chicago Times, with all its press franchises, rights, and good will, and all the property used in the printing and publication of said newspaper, for the sum of \$850,000, to be paid for in the stock of said company, to be issued, one share to Frank S. Weigley, one thousand shares to Clinton A. Snowden, and seven thousand four hundred and ninety-nine shares to James J. West, the said West receiving a portion of said shares for and on behalf of your orators, as hereinbefore more specifically set forth; that soon thereafter the said James J. West transferred, conveyed, and delivered said property to the said Chicago Times Company, and the said the Chicago Times Company issued stock therefor pursuant to said resolution;" that about the same time the Chicago Times Company purchased the property, rights, franchises, good will, and effects of the Chicago Mail Com-

pany, and the same were transferred and delivered in consideration of the issuing by the Times Company to the stockholders of the Mail Company of the stock of the Times Company, share for share, since which time the Times Company has continued the publication of the Chicago Mail; that West issued to himself 125 shares of stock in the Times Company, in exchange for Mail stock, more than he was entitled to receive, the rightful owners thereof never having surrendered their shares in the Mail Company in exchange for shares of the Times Company; that the stock owned by M. M. Phillips (321 1/7 shares) was originally issued to Cyrus E. Phillips, who transferred the same, and that the shares of the other complainants, Huiskamp, Irwin, and Rand, "were issued to them in consideration of moneys advanced and property of the Storey estate bought for and on their behalf, and transferred to the said the Chicago Times Company;" that it was then and there agreed between them and West, as promoters of the enterprise, that the sum of \$700,000 should be invested for the purpose of purchasing said Storey estate, and giving to the proposed corporation sufficient capital to transact its business, and pay its debts theretofore contracted by the receiver of the estate, of which amount the complainants agreed to furnish three-tenths and West agreed to furnish seven-tenths; that before entering into the agreement they required West to give them a statement of his assets, to enable them to determine whether he was financially able to carry his part of the burden; that West then and there made to them a statement showing that he was worth \$365,000 in good securities, bonds, etc., and relying on that statement they made the agreement, and did then and there furnish West the sum of \$150,000, and afterwards, in full performance of the contract on their part, furnished him the further sum of \$22,500, of which the complainant Williamson contributed \$7,000, and thereby became "part owner of the three-tenths interest in said Storey estate and Chicago Times Company originally agreed to be purchased by your orators other than said Williamson;" that West did not contribute any money of his own to the purchase of said paper and estate; that he had no money of his own to contribute, and was then insolvent; "and that instead of paying for the same as he agreed to do, and as he informed your orators he had done," he obtained from the Storey heirs credit for the full amount of \$110,000 which was to have been paid them, giving therefor the promissory notes of himself and Snowden; that West still owes the heirs \$10,000, and the remaining \$100,000 he paid, not with his own means, but out of moneys obtained of the complainants, and moneys belonging to the Times Company; that, of the \$275,000 which he agreed to pay Mrs. Storey, all that was paid at the time of the purchase West obtained of complainants, or borrowed from others, and repaid the loan out of the Storey estate; that he still owes the widow \$19,000, the remainder having been paid out of the proceeds of the Times property; that, before and at the time of the formation of the Chicago Times Company, West falsely represented to complainants, and caused them to believe, that his personal indebtedness was not large, and would soon be liquidated, when in

fact, as he knew, he was insolvent; that in 1889 the Times Company sold the Times building for \$220,000, which was received by West, and deposited to the credit of the company; that at that time West represented that the company was indebted to the amount of \$40,000 only, and it was then agreed that the proceeds of the sale should be used to pay all the existing debt, \$40,000 should be placed to the company's credit in bank, and the remainder applied to the individual indebtedness (of West) guarantied by any of the complainants, for which amount stock should be delivered to the company, the balance to be used by the company in the purchase of stock from West at 60 cents on the dollar; that, instead of \$40,000, the indebtedness of the company was upwards of \$250,000, a part of which was subsequently paid out of the proceeds of the sale of the building; that more than \$100,000 of the amount West, as president, checked out and applied on his individual account, when the company owed him nothing, and he was largely indebted to the company, and that only a part of the guarantied indebtedness was paid; that, of the stock issued by the Times Company to West, only that issued in exchange for his stock in the Chicago Mail Company has been paid for by him; that the purchase price of the Storey estate, less the land reconveyed to the heirs, was \$385,000; that West retained a tract of land of the value of about \$50,000, and transferred the balance of the property to the Times Company, thereby transferring to the company property which he purchased for himself and orators at the price of \$390,000, to pay which he used the money paid in by complainants, the proceeds of the sale of the building, and other funds of the Times Company; that on the 11th of July, 1889, West resigned the office of president of the company, and Herman J. Huiskamp became the president; that of the \$1,000,000 capital stock of the Times Company, excepting the shares issued to orators, all shares were issued originally to West and to Snowden, except one share to Weigley, which was afterwards canceled; that Snowden transferred his shares to West; that neither West nor Snowden paid for any stock, except that received by each in exchange for his stock in the Mail Company, nor have any of the parties holding stock through West paid any consideration to the company therefor; that West and Graham, who had succeeded Snowden as the secretary of the company, issued certificates of stock in excess of the authorized capital to the amount of 1,000 shares and upwards, of which West has pledged portions to various banks and persons as security for his personal debts, and a portion he sold to the company in pretended execution of his agreement to sell the company stock at 60 cents on the dollar; that, of the stock of the company issued to himself, West has transferred 500 shares to Chauncey W. Boucher, and the remainder of his stock he has pledged, sold, and transferred, and is not now the owner or holder of any stock in the company; that in July, 1889, West obtained of Norman B. Ream, George M. Pullman, J. J. P. Odell, and the Union National Bank of Chicago, one or more of them, on his individual account, \$100,000, for which he gave to Ream, as innocent holder

and as trustee for the other parties named, his promissory note, and, as security therefor, pledged with Ream 5,001 shares of the capital stock of the Times Company, issued by himself, as president of the company, to himself; that thereafter West assigned, transferred, and conveyed to complainants Rand and Irwin the said 5,001 shares of stock, subject to the lien of Ream, as collateral security for an indebtedness of West to Rand and Irwin of \$64,000; that the defendants Fullenwider and Graham assert some interest in some of the stock of the company, but paid nothing therefor; that West and his co-respondents have made recent threats to take possession of the Times Company and property; that some of the fraudulent stock issued by West and Graham has been transferred to parties unknown; that a portion of the stock issued to West in consideration of the transfer of the Storey estate has been transferred by West, fraudulently and without consideration, to parties unknown; that by his conduct West has brought into danger of forfeiture the Times Company's right in the franchise of the Western Associated Press Association, and the forfeiture will be insisted upon if West and his associates are permitted to control the affairs of the company.

The prayer of the bill is for a decree finding what stock is fraudulent and void, and ordering a cancellation thereof, and that complainants be declared to be the only purchasers and owners of the Storey estate and of the capital stock of the Times Company purchased by the transfer of the estate to the company, etc.

West answered, controverting largely the averments of the bill, and filed a cross bill, seeking affirmative relief, chiefly against an unauthorized sale to the complainants of the 5,001 shares of stock which had been pledged to Ream.

To the cross bill the complainants answered, reaffirming in substance the averments of the bill, and admitting the sale to themselves of the pledged stock without previous demand on West for payment of the debt. There was the usual replication to the answers to the bill and cross bill, respectively. The circuit court entered a finding for the complainants in substantial conformity with the bill, and, further, that West represented to the complainants that "the boulevard lot" was a small building lot worth only from ten to twelve thousand dollars, and plaintiffs, knowing nothing of its value, and believing the representation true, consented that West should retain the lot as compensation for his services in negotiating the purchase of the Storey estate, when in fact the lot was worth \$50,000, less an incumbrance of \$12,500; and accordingly the court decreed that the complainants and their assignees are the owners and holders of 3,000 shares of the capital stock of the Chicago Times Company; that the entire issue of 5,001 shares, represented by certificates numbered 11 and 23, was illegal, and should be canceled, subject to the rights of the purchasers of the note for which the stock was pledged, and that West has no title or interest therein; that West, by his fraudulent conduct towards the complainants and his associates in the purchase of the Storey estate, and in the organization and management of the Chicago Times Company, has

forfeited all right, in equity or justice, to any further issue of stock on the basis of \$70 per share, or upon any other basis; that the complainants do have and recover of the defendant West the sum of \$13,587.50 as and for their three-tenths interest in the boulevard lot appropriated by said defendant, together with costs in this proceeding to be taxed, and that they have execution therefor; and that the cross bill of West be dismissed, at his costs. For the finding and opinion of the court, see 47 Fed. 236.

The evidence in the record being too voluminous, and the discussions of counsel too elaborate, to admit of detailed review, or even synopsis, we shall make only a brief statement of our views and conclusions. We are of opinion that in important particulars this decree is erroneous.

If it were true, as the bill charges, that West made to the complainants a false statement of the value of his property, the fraud, upon discovery, might doubtless have been made cause for a rescission of the contract of the parties, or, after the Times Company was organized, for the winding up of the affairs of that company, but in respect to the issues of this case the alleged misrepresentation seems to be quite immaterial and irrelevant. It in no manner affects the question either of the validity or ownership of shares in the capital stock of the Chicago Times Company. It is clear, too, that the complainants were not materially deceived or misled by any representation which West is accused of having made. In order to prove the alleged representation false, it is insisted in one of the briefs for the appellees that West's letters to John N. Irwin, written on and before the 10th of November, 1887, "establish the fact that he was hard pressed for money, and could not have been worth \$365,000, as he stated to Huiskamp and Irwin, or \$200,000, as he now claims." Irwin therefore had notice of West's embarrassed condition, and his relation to his associates was such that notice to him was notice to them.

In respect to the boulevard lot, the finding of the court goes beyond the averment of the bill, which is simply that "West retained a tract of land of the value of about \$50,000." No fraud, misrepresentation, mistake, concealment, or breach of trust by West, nor lack of knowledge on the part of complainants, is alleged, and the proof is that the lot was retained by West with the consent of complainants. No cause of action in this particular is alleged in the bill, and none is proven. The complainants neither had nor expected to acquire an interest in the Storey estate, as such, or in West's contract of purchase. Their aim, from the first to the end of the negotiation, was to obtain, as they did, an interest in the proposed Chicago Times Company, owning the Times newspaper, presses, etc., and the Times building, and not other parts of the Storey estate. To enable West to complete his purchase, they advanced him money, for which they were to have, and afterwards received, credit on the price of their shares of stock in the company which was organized. They took receipts from West showing that the moneys they advanced were to be applied "on purchase of the Storey estate," "to the purchase of the Chicago Times and the Storey estate," and, in one in-

stance, "as part payment for a three-tenths interest in the contract made by Snowden and West for the Chicago Times and Storey estate, the said amount to be refunded in case the said contract is not consummated." But these expressions tend no more to prove an interest in the boulevard lot than in that part of the real estate which was reconveyed to the Storey heirs.

It remains to consider what were the rights of West in the capital stock of the Chicago Times Company. The controlling facts are few, and admit of little dispute. The contract of West and Snowden with the widow and heirs for the purchase of the Storey estate was made on the 29th of October, 1887. There had been previous negotiations between West and Irwin, looking to the taking of an interest in the purchase by the latter and his friends; but no definite or binding agreement in that direction was reached before the 17th of December ensuing, when West and Snowden signed and delivered to Henry C. Huiskamp the writing of that date, which, signatures omitted, is of the following tenor:

"We, the undersigned, owners of contracts now existing for the conveyance of the Chicago Times, hereby agree to organize a company under the name and title of the Chicago Times Company (notice of incorporation of said company having already been given) on the following basis: Seven-tenths (7/10) of the stock to be owned by James J. West and C. A. Snowden, of Chicago, and three-tenths (3/10) by the following named parties collectively: John N. Irwin, C. E. Phillips, George Rand, H. C. Huiskamp, and H. J. Huiskamp, all of Keokuk, Iowa, and John Williamson, of New York. And it is further hereby agreed by all parties herein named that the stock of the Times Company shall be issued only for the amount actually paid in by each stockholder at the rate of eighty-five dollars (\$85) per share, and that the residue of the stock of said company, if there be any, shall, after all debts have been paid by the company, be distributed and paid in the following proportion: James J. West and C. A. Snowden, seven-tenths (7/10) and John N. Irwin, C. E. Phillips, H. C. Huiskamp, H. J. Huiskamp, and George Rand, of Keokuk, Iowa, and John Williamson, of New York, three-tenths (3/10) of same."

Until accepted or acted upon by the complainants, that writing perhaps amounted to no more than a proposition on the part of the signers; but it was accepted and acted upon, as the evidence shows, except that it having been determined afterwards that a mortgage for \$145,000 upon the Times building should not be paid off, but should be carried by the Times Company, the price of the stock to be issued was reduced from \$85 to \$70 per share; and on that basis the complainants, having advanced \$172,500 cash, and owning Mail stock to the amount of \$37,500, which seems to have been treated as cash, were entitled to receive, and did receive, for the whole sum of \$210,000, 3,000 shares of stock. Deducting \$10,000, which, according to the testimony of West, was the price of the boulevard lot, the property of the Storey estate, which on December 24, 1887, was conveyed to West, and which on the ensuing January 5th he conveyed to the Chicago Times Company in consideration of 8,500 shares of stock, of which 1,000 shares were issued to Snowden and 7,499 shares to West, cost \$380,000, of which, after deducting \$172,500 furnished by complainants, there remained \$207,500, for which, by the agreement of December 17th, West was entitled to credit,

and to receive stock to the number of 2,964 $\frac{2}{7}$ shares. He also owned 1,000 shares of Mail stock, including 200 shares obtained of Snowden, worth \$100,000, which, on the basis of \$70 per share (which was allowed to complainants for their \$37,500 of Mail stock), entitled him to 1,428 $\frac{4}{7}$ shares; making a total of 4,392 $\frac{6}{7}$ shares to which he was entitled upon the completion of the organization of the company, and the turning over of the property of the Mail Company. He afterwards acquired 1,000 shares of Snowden, of which 500 shares were transferred to Boucher; but whether payment for these shares was ever made either by Snowden or West we have not determined. The total number of shares of stock was 10,000, of which 3,000 were issued to complainants, 1,000 to Snowden, one to Weigley, and West in his own right was entitled to 4,392 $\frac{6}{7}$ shares; making a total of 8,392 $\frac{6}{7}$ shares accounted for, and leaving 1,607 $\frac{1}{7}$, for which, as president of the company, and under the agreement of December 17th, West was responsible and accountable as a trustee. To these add 1,250 shares, which it is conceded were issued by West in excess of the total capital stock of the company, as limited by the articles of incorporation, and we have 2,857 $\frac{1}{7}$ shares unaccounted for; but, if these be deducted, there remain 1535 $\frac{5}{7}$ of the 4,392 $\frac{6}{7}$ shares to which West was originally entitled.

It is no objection to West's title to stock issued in consideration of the property turned over to the company that he obtained the property on a credit, and had not paid for it; and if afterwards, in breach of his trust as president and manager, he used the money of the company to pay the debts so incurred, he became thereby indebted to the company. And, by reason of the trust relation, it has been suggested that the company became entitled to a lien upon the stock for its reimbursement; but it is not true, as contended by the complainants, that they became sole owners of stock, or their shares the only valid shares, on the theory that they alone had paid what was paid for the property which was transferred by West to the company, and for which the company's stock was issued. They bargained for three-tenths of the stock, and that they got; and if, by reason of West's misappropriation of the moneys of the company during the year and a half of his management, the value of their stock has been impaired, it does not follow that West's stock, in so far as it was valid when issued, should be annulled or declared void.

We have not attempted to determine the exact rights of the parties in any particular. There should be a reference to a master for that purpose. To the extent that West has issued illegal stock, or has appropriated stock without paying for it, or has failed to surrender shares under his agreement to surrender them for cancellation at 60 cents on the dollar or otherwise, the court may, on a proper finding of the facts, decree a cancellation of shares which stand in West's name, or were issued to him, saving the rights of innocent purchasers; but there should be no such cancellation on the ground merely of misappropriation by West of the moneys or credits of the company during the term of his presidency and management.

Upon the cross bill, which shows that the complainants, or some of them, had procured an illegal sale, and had become purchasers of the stock pledged to Ream, West was entitled to have the illegality of the sale declared.

The decree below is therefore reversed, and the cause remanded for reference, on the proofs in the record, to a master, who shall report his conclusions of fact and law upon the several matters in dispute.

DIETZ v. LYMER.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 351.

APPEAL—TRIAL BY REFERENCE.

An oral consent in open court to an order of reference, made pursuant to a state statute (Code Civ. Proc. Neb. § 298) will not enable the circuit court of appeals (eighth circuit) to review the action of the circuit court on exceptions to the referee's report, where there was no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record. *Dietz v. Lymer*, 10 C. C. A. 71, 61 Fed. 792, affirmed.

On Rehearing.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. As will appear from our previous opinion in this case (10 C. C. A. 71, 61 Fed. 793, 795), we predicated our ruling that the record presented no questions which could be reviewed by this court on the ground that there was no written stipulation waiving a jury and no bill of exceptions found in the record. The petition for a rehearing does not challenge the facts last stated, on which our previous ruling was predicated. On the contrary, it is inferentially admitted that there was no written stipulation waiving a jury, and that the order of reference was made pursuant to a statute of Nebraska in obedience to an oral consent expressed in open court, that the case might be sent to a referee for trial. Such oral consent, it is said, enables this court to review the action of the circuit court on the exceptions to the referee's report, although there was no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record. We cannot assent to this view under existing decisions.

In *Boogher v. Insurance Co.*, 103 U. S. 90, 95, Mr. Chief Justice Waite intimated a serious doubt, for reasons therein fully stated, whether cases tried before a referee pursuant to state laws can be reviewed in the federal appellate courts under existing acts of congress. That doubt was left unresolved, but it was held that such cases cannot be reviewed on writ of error unless a jury is waived in the mode provided by the act of 1865 (chapter 86, § 4, 13 Stat. 501, now sections 649, 700, Rev. St.); that is to say, by a written stipulation signed by the parties. In that case it was decided that the record sufficiently showed that a written stipulation of the parties waiving a jury had been filed, because, in the state of Missouri, where

that suit originated, a reference could not be ordered without the written consent of the parties to the action. It was therefore assumed by the court that such written consent as the state statute required had been filed in that case. But in a later case, to which we particularly referred in our previous decision (*Investment Co. v. Hughes*, 124 U. S. 157, 8 Sup. Ct. 377), it affirmatively appeared that no written consent to a reference had been filed, and for that reason it was held that the case differed materially from *Boogher v. Insurance Co.*, and that it could not be reviewed on writ of error. The record in the case at bar, as heretofore stated, shows that the consent to the order of reference was given orally in open court, and that there was in fact no written stipulation waiving a jury, such as the act of congress requires to render a case reviewable on writ of error when the parties dispense with a jury. It is therefore governed by the ruling made in *Investment Co. v. Hughes*, as well as by the decision in *Boogher v. Insurance Co.*, *supra*; wherefore the petition for a rehearing must be, and it is hereby, denied.

WILE et al. v. COHN (FARMERS' STATE BANK OF CHARTER OAK, IOWA, Garnishee).

(Circuit Court, S. D. Iowa, W. D. September 17, 1894.)

1. PROCESS—WHAT CONSTITUTES—NOTICE OF GARNISHMENT.

Rev. St. § 915, gives plaintiff, in common-law causes in the United States circuit court, remedies by attachment or other process against defendant's property, similar to those provided by the state statutes. Code Iowa, § 2962, provides that the clerk shall issue the writ of attachment. Section 2967 provides that property of defendant held by a third person may be attached by giving the latter notice of attachment. Section 2975, as amended by Laws 18th Gen. Assem. c. 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property, to defendant, etc. There is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. *Held*, that a notice to the garnishee is not a "process," within Rev. St. § 911, relating to process, and that such notice in actions in the United States circuit court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States.

2. GARNISHMENT IN STATE COURT—VALIDITY.

Where, in an action pending in a United States court in Iowa, it appeared that in certain actions, aided by live writs of attachment, lately pending in an Iowa state court, the main defendant had been duly notified of pendency of such actions, and also of garnishment proceedings thereunder, and judgments had been rendered against him therein, and that the garnishee had appeared in such actions, and filed his answers therein, submitting himself and the goods in his hands to the jurisdiction of the Iowa court, and judgments were rendered, according to the form of the Iowa statutes, against said garnishee, and condemning to sale property in his hands as belonging to such main defendant, *held*, that irregularities in the garnishment notice served on the garnishee do not affect the validity of the judgments thus rendered against him.

3. SAME.

In garnishment in a United States court in Iowa, against a bank of which J. was cashier, it appeared that J. took possession of defendant's (mortgagor's) stock of goods under a mortgage to the bank, and sold

sufficient goods to pay the indebtedness held by the bank, which said mortgage had been given to secure; that, while J. was thus in possession of said goods, attachments issued out of an Iowa state court against the property of the mortgagor, and garnishment notices were served on J., and notices thereof also served on main defendant; that such garnishee appeared in the Iowa court, and filed his answers therein. *Held*, that judgments in such Iowa courts condemning to sale the property so in the garnishee's hands were not void because the notice to garnishee required him to appear at a date prior to the first day of the next term of court, instead of on such first day, as required by Code Iowa, § 2979. *Padden v. Moore*, 12 N. W. 724, 58 Iowa, 703, distinguished. *Fanning v. Railroad Co.*, 37 Iowa, 309, applied.

4. SAME—NOTICE TO CASHIER OF BANK INSTEAD OF BANK—EFFECT.

Nor do the facts that the garnishment notice in the Iowa court was served on the cashier individually, and that the judgment therein was against him, render the bank liable to a subsequent garnishment in the federal court.

Action in attachment by Wile and others against W. Cohn, in which the Farmers' State Bank of Charter Oak, Iowa, was summoned as garnishee. Garnishee discharged.

Wright & Baldwin, for plaintiffs.

Shaw & Kuehnle and Sims & Bainbridge, for garnishee.

WOOLSON, District Judge. This is a contest between plaintiffs, attaching creditors, and the Farmers' State Bank of Charter Oak, Iowa, as garnishee defendant. The parties having filed stipulation, waiving jury, the cause was tried to the court.

The following facts are by me found as proved herein: Plaintiffs are citizens and residents of the state of New York, and were at the date hereinafter named engaged as a copartnership in the city of Buffalo, N. Y., in the business of dealers in clothing, etc. Defendant W. Cohn was in December, 1893, a citizen and resident of the state of Iowa, and engaged at the town of Charter Oak, Iowa, in the business of clothing merchant. The garnishee defendant bank is a corporation organized under the laws of the state of Iowa, and doing business at the said town of Charter Oak, Iowa. Upon December 12, 1892, said Cohn was indebted to said bank in the sum of \$950. The bank cashier on that day demanded of Cohn security for this indebtedness, and thereupon Cohn executed a chattel mortgage upon all his "stock of goods and merchandise, store furniture, and fixtures, of whatever kind," then owned by him, and kept in the building which he was occupying as his clothing store. The mortgagee is named therein as "D. O. Johnson, cashier, of Charter Oak, Iowa;" and the mortgage is conditioned upon the payment "to the said D. O. Johnson, cashier, his heirs, assigns," etc., of Cohn's two promissory notes, dated December 12, 1892, and described as follows, to wit: One for \$950, payable on demand, 1892; one for \$4,000, payable on demand, 1892,—with interest, etc. The mortgage provided for public sale at auction after five days' notice. The evidence shows that this \$950 note was given for the indebtedness due from Cohn to the bank. It named as its payee "D. O. Johnson, cashier." The \$4,000 note named as payee Harry Cohen. This last named note was surrendered within a few days after its exe-

cution, and was canceled, leaving the mortgage standing as security for only the said indebtedness to the bank (\$950). This mortgage was immediately filed for record, and, on the day following (December 13, 1892), Cohn delivered to said Johnson the key to the store in which was the mortgaged property, and also delivered to Johnson a written agreement or consent that said Johnson should sell the mortgaged property at private sale. On same day, Johnson sold, at private sale, sufficient of said mortgaged property to realize, at 75 cents on the dollar of cost price, the sum of \$1,050, thus paying the bank's debt, and leaving, besides, \$100, belonging to said Cohn. In December, 1892, and before the commencement of the case at bar, Gilmore & Ruhl, Block Bros., and certain other creditors of said Cohn (including the First National Bank of Omaha) severally instituted their actions against said Cohn in the district court of Crawford county, Iowa, aided by attachment, in each of which actions said D. O. Johnson was served with notice of garnishment; some of said garnishment notices cited him to appear before said Crawford "district court, commencing the 15th day of February, 1893," while others cited him to appear before said court "on the first day thereof, which will commence on February 15, 1893." In the action by said Omaha Bank the notice summoned him to appear on February 20, 1893. On the 1st day of February, 1893, term of said Crawford district court, "to wit, February 20, 1893," said Johnson appeared in each of said actions, and filed his answer as garnishee, admitting the "possession of a remnant of a stock of goods and fixtures, situated in Charter Oak, Iowa, in the storeroom where the defendant formerly conducted business," and which answer contained the following language:

"The goods were mortgaged to me by the defendant, to secure a debt due the Farmers' State Bank of Charter Oak, Iowa, of which I am cashier. By the consent of the mortgagor, I sold goods enough out of the stock to pay the debt due the bank. It was in amount \$950. The balance of the goods I now hold, subject to the order of the court."

In each of these actions, except that brought by said bank (in which Cohn appeared by attorney), said Cohn was personally served with notice of the pendency of said action, and also with notice of the pendency of garnishment proceedings, as required by the statutes of Iowa; and, for failure to appear, his default was entered therein, and judgment duly rendered against him for the several claims sued on; and the court found that property of Cohn's, "to wit, a stock of clothing and gents' furnishing goods, situated in Charter Oak, Iowa," was in the hands of the garnishee, and adjudged that said stock be condemned and ordered sold on special execution, etc. Subsequently, these goods were sold, on special execution, issued under these judgments, by the sheriff of Crawford county, for an amount not sufficient to pay the aggregate of said judgments above described; and the proceeds were paid into said Crawford county court, for further order of court thereon. The Omaha bank judgment, condemning and ordering sale of said goods, was rendered May 2, 1893. In each of said other actions, judgment was rendered February 24, 1893.

The action of Wile et al. (case at bar) against said Cohn was commenced in this court December 19, 1892, by filing petition, aided by attachment; and on the next day (December 20th), and subsequent to the said levies in the state court, said attachment was levied by the service of the writ of attachment and notice of garnishment upon the Farmers' State Bank of Charter Oak, Iowa, the notice of garnishment being served on said bank by reading and delivering copy to D. O. Johnson, cashier of said bank. Said notice is in the form generally used in Iowa in like proceedings in the state courts, and is signed by the marshal of this court. Due notice of said garnishment having been given to said Cohn, this cause has now come on for trial upon the answer of said Farmers' State Bank, denying indebtedness to said Cohn and of possession or control of any of his property, and the pleading by plaintiffs filed, controverting said answer of said bank.

The first point to be considered is the plea of the garnishee bank, as set up in its answer, that no legal garnishment has been made herein, for the reason that the garnishment notice is signed by the marshal of this court, and was not issued under the teste of the chief justice of the supreme court of the United States, and does not have the seal of this court attached thereto; in other words, that said garnishment notice is a "process" of this court, and therefore must conform to the requirements of section 911 of the Revised Statutes, relating to process; and, because it does not so conform, it is void, and this court has no jurisdiction over said bank as garnishee herein. The reasoning by which the garnishee seeks to enforce this point is based on the assertion that "a garnishment is, in effect, a suit by the defendant, in the plaintiff's name, against the garnishee;" and *Daniels v. Clark*, 38 Iowa, 559, is cited as sustaining this position. But a reading of that case disproves the claim. *Daniels & Co.* had recovered judgment against one *Riniger*, and garnished *Clark*, as an alleged creditor of *Riniger*. Upon the trial the court found the garnishee indebted to *Riniger*, and rendered judgment accordingly. The case having been appealed to the circuit court, petitions of intervention were filed by persons claiming that the indebtedness from *Clark* to *Riniger* had been assigned to them before *Clark* was garnished; and the main contest was as to the right of the circuit court thus to permit the filings of these intervening petitions. The supreme court sustain the right to so file, and arguendo use the following language:

"The plaintiff occupies, as against the garnishees, the position of the defendant, with no more rights than the defendant had, and liable to be met by any defense which the garnishee might make against any action by the defendant."

And therefore the court conclude that, since *Clark* was garnished after the indebtedness had been assigned to interveners, *Daniels & Co.* had no stronger or better right to it, or to appropriate it, under their garnishment of *Clark*, than *Riniger*, the debtor, would have had, had he brought suit therefor. This principle, thus applied, is correct beyond question.

The claim of garnishee herein, above stated, is to be applied to the relation of the parties, and to determining the substantial rights existing between them, in a garnishment proceeding. But it cannot be thus applied to the method of proceeding. The method is to be governed by the statutes of the state, in the absence of any specific rule of the court relating thereto. Under section 915, Rev. St., the plaintiff is entitled, in common-law causes in this court, to remedies, by attachment or other process, against the property of a defendant, similar to those provided by the statutes of the state. We turn to these statutes. Section 2962, Code Iowa, provides that the clerk shall issue the writ of attachment, directing the officer to attach the property of the defendant. Section 2967 provides that property of the defendant which is held by a third person may be attached, by giving the defendant and such third person notice of attachment; and debts due to a third person are attached by garnishment thereof. Section 2975, as amended by chapter 58, Laws 18th Gen. Assem., provides how garnishment is to be effected, viz. by informing the supposed debtor or person holding the property that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due, or thereafter to become due, by him to defendant, and that he must retain possession of all property of defendant then or thereafter in his custody or under his control, etc. And section 2979 further provides that, unless exempted under other sections of the Code, the notice must also require the garnishee to appear on the first day of the next term of the court where the main action is pending; while section 2983 provides for payment to garnishees, generally, of the per diem and mileage, by statute, payable to witnesses. We must apply these Code provisions to an action instituted in this court, as required by section 915, Rev. St. The clerk of this court issues the writ of attachment,—the process of this court,—which, under section 911, Rev. St., is to bear the teste of the chief justice, and have affixed thereto the seal of this court. This writ directs the marshal of this court to “attach the property of defendant,” etc. Where goods are in the possession of a third person, the attachment is served or levy made thereunder by notice to defendant and such third person, while debts due from a third person and property in third person’s hands are attached or levied upon by garnishment; that is, by notice thereunder, as provided by section 2975, Code Iowa. Now, there is no provision of the Revised Statutes nor of the Iowa Code requiring either of these notices to proceed from the clerk. Indeed, the spirit of the Code provisions, as well as their letter, contemplates that the sheriff, or officer holding the process which the clerk has issued, shall give these notices; and the uniform practice in the state courts in Iowa conforms to this construction; and in giving such notice, the sheriff, or other officer having the writ of attachment, affixes his own signature to the garnishment notice he is thus required to give. In other words, these notices become and are simply and merely a *part of the levy* which the officer makes. When he is attaching property so sit-

uated, in accordance with and under the requirements of the process or writ of attachment which he holds, such notices are "matters pertaining to the execution of the writ." *Stove Co. v. Shedd*, 82 Iowa, 542, 48 N. W. 933. And since the notice is to be given by the officer, and, as a part of the levy he is making, why require that the officer shall have this notice signed by the clerk, and bear the teste of the chief justice? These considerations, as well as the uniform practice heretofore obtaining in this court, and which is based on the uniform practice in the state courts of Iowa, justify the conclusion that the notice of garnishment which is given by the officer who is executing a writ of attachment is not a "process," within the meaning of section 911, Rev. St.; and that the notice of garnishment herein was not required to bear the teste of the chief justice of the United States, or the seal of this court, and same was properly signed by the marshal.

Plaintiffs urge with much force that the garnishment proceedings above described, in the district court of Crawford county, Iowa, were and are of no force and effect as against these plaintiffs' garnishment herein; that in all of these cases, instead of garnishing the Farmers' State Bank of Charter Oak, Iowa, which, as plaintiffs insist, was in possession of the property under the chattel mortgage to said bank (or to "D. O. Johnson, cashier"), the attaching plaintiffs in the state court garnished "D. O. Johnson." In other words, the possession of Johnson, in so far as he was in possession, was simply the possession of the bank; and that, since the Iowa statutes require the garnishment of the person in possession of the goods, garnishment notice must be given to such person in possession, which in this case was the Farmers' State Bank; and since in none of said cases was said bank garnished, in accordance with the Iowa statutes, while in the case at bar such bank was so garnished, the garnishment herein, though at a later date than those in the state court, is the only valid garnishment. The evidence is without contradiction that the defendant Cohn (mortgagor) gave the key of the storeroom in which were his mortgaged goods to D. O. Johnson, and also gave him written consent to sell the goods at private sale; that Johnson did sell at private sale some of the goods, and whose proceeds met the debt to the bank of which he was cashier; that, after such sale, Johnson retained the key, and had the remainder of the goods in his possession and under his control, which he exercised in different ways; that he rendered to the sheriff a bill for his services as custodian of said unsold goods; and that, after garnishment, Johnson submitted these goods to the jurisdiction of the Crawford district court, in the garnishment proceedings therein pending, for its judgment thereon, which judgment said court rendered, finding said goods to be in possession of said garnishee, D. O. Johnson, and condemning same to sale as the property of said defendant Cohn.

Plaintiffs present the further point, which we may consider in connection with the point just above named, that all of said garnishment notices in the state court, except that of the Omaha bank, notify the garnishee to appear at a date prior to the first day

of the next term of said court, and are therefore not in accordance with the Iowa statutes, and are invalid, and the judgments thereunder void as to these plaintiffs, who were not parties to these actions.

Let it be here noted that the validity of the said judgments of the state court in the cases above described is not attacked, save in the particulars above just enumerated. By section 2979 of Code of Iowa it is provided, when the sheriff is not directed to take answer of garnishee (section 2980), that the notice must require the garnishee to appear on the first day of the next term of the court wherein the main cause is pending, etc. A portion of the garnishment notices complained of use this phraseology, in citing the garnishee to appear: "To appear in said Crawford district court on the first day thereof, which will commence on February 15, 1893." Without delaying to consider whether this phraseology is, in legal effect, the same as that of the other notices, which cite the garnishee "to appear at said court on February 15, 1893," without using the additional words found in the preceding quotation, I shall, for the purpose of this case, consider them as of the same effect, since the conclusion reached must be the same, whether these are of same or different effect in the particular just noted.

Counsel do not disagree in the general proposition that garnishment is in the nature of a proceeding in rem, and that in all proceedings in rem the thing against which proceedings are directed must be brought within the jurisdiction of the court by a virtual seizure thereof. *McDonald v. Moore*, 65 Iowa, 171, 21 N. W. 504; *Gage v. Maschmeyer*, 72 Iowa, 696, 34 N. W. 482. As requisite to this jurisdiction, there must exist at the time a live writ or process under which the garnishment is attempted. The authorities very generally hold that merely voluntary acceptance by the garnishee of notice of garnishment is a nullity, as against attaching creditors, in whose suits jurisdiction is regularly obtained by the service of process. 2 *Wade*, *Attachm.* § 336, and cases cited; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57; *Steen v. Norton*, 45 Wis. 417; *Desha v. Baker*, 3 Ark. 509; *Rock v. Singmaster*, 62 Iowa, 511, 17 N. W. 744. Under the Iowa statute (section 2975, Code, as amended by chapter 58, Laws 18th Gen. Assem.), the statutory notice to main defendants of the fact of garnishment proceedings having been instituted is essential to the jurisdiction of the court over the alleged indebtedness, attempted to be garnished. *Williams v. Williams*, 61 Iowa, 615, 16 N. W. 718. We must bear in mind, however, as stated by *Wade* (*Attachm.* § 336), that "the doctrine as to the voluntary service and waiving irregularities is so completely under statutory control that there is no common ground upon which conflicting authorities may be brought to the test of principle." The supreme court of Iowa has had occasion to consider some of the elements relating to irregularities, etc., in garnishment proceedings, and what effect voluntary appearance and answer by garnishee have thereon. When we attempt to consider the alleged invalidity of the garnishment proceedings in the Crawford district court, these Iowa decisions are controlling, in so far as they bear upon such pro-

ceedings. Plaintiffs contend that such proceedings are void as to garnishment attempted in case at bar. These proceedings were attempted under statutes of Iowa, wherein judgments were rendered adjudging that property of the main defendant was in possession of the person who had appeared and answered as garnishee, and condemning same to sale; and thereafter, upon proceedings had in pursuance of the statute, such property was sold on special execution, issued pursuant to said judgment. Manifestly, therefore, the decisions of the supreme court of Iowa, if such decisions exist and are applicable, ought in this court to be the test—the rule to be followed—in determining the validity of such judgments.

As to said proceedings in the state court, the evidence conclusively establishes as to each case (1) that a writ of attachment issued pursuant to the Iowa statute; (2) that under such writ garnishment notice was served upon D. O. Johnson; (3) that garnishee Johnson appeared in such suit, and filed his answer, admitting having in his possession property of the main defendant; (4) that the state court found that notice had been served, according to statute, upon defendant Cohn, of commencement of action and of pendency of garnishment proceedings (except in Omaha Bank Case, where Cohn appeared by attorney); (5) that the court adjudged the property in the hands of the garnishee to be the property of the main defendant, Cohn, and condemned same to sale, and proceeds to be applied towards satisfying judgment rendered therein against the main defendant, Cohn, on the indebtedness sued on; (6) and that, under such special execution, said goods have been sold, according to the method provided by the Iowa statutes; and the proceeds of sale have been paid into that court, in accordance with said judgments. In the cases where the notice to garnishee specially cited him to appear at a day other than when the court was in session, and at a date specified, which was prior to and was not the first day of the next term,—and this applies to all the cases except that of the Omaha Bank,—is the judgment against garnishee, and condemning the property to sale, invalid, under the facts above found as established by the evidence? *Padden v. Moore*, 58 Iowa, 703, 12 N. W. 724, was a case wherein judgment against the main defendant was rendered. Thereupon, and during the same term of court, execution was issued on said judgment, and, under same, plaintiffs were served with notice of garnishment, citing them to appear at a later day of same term and answer, etc. On the day named, the garnishees appeared, but the court was not in session. They understood that court had adjourned for the term, and so returned home. But court had merely adjourned to a subsequent day. On reconvening of court, and upon the application of judgment creditor, a commissioner was appointed to take the answers of the garnishees on a day fixed by the court therefor. The garnishees not appearing on that day, the commissioner reported that fact to the court. At the next term, default was entered against them. Subsequently, notice, under the Iowa statute, was served on garnishees, to show why execution should not issue against them. The attorney for gar-

nishees presented to the clerk of the court a showing why execution should not issue; but, instead of filing this showing, the attorney took it home with him to another town. The court ordered execution to issue, and the garnishees brought this action to enjoin the sale of garnishees' property, levied on under such execution. The reason pressed was that the court had no jurisdiction of the garnishees at time of rendition of judgment against them, and that, therefore, such judgment was void. The supreme court passed over all other objections, and decided the case on the sole point that the garnishment notices did not cite garnishees to appear on "the first day of the next term," as required by the Iowa statute (section 2979, Code, supra), and that, "this peremptory provision of law" having been disregarded, the court had no jurisdiction over the garnishees, under the facts shown, at time of rendition of judgment. The court then proceed to inquire "whether the court at any subsequent stage of the proceedings acquired jurisdiction of the garnishees;" and this they decide in the negative, and reverse the decree of the court below which had dismissed the bill brought by the garnishees. Thus far the action of the supreme court favors the contention of plaintiffs herein; but the facts in that case and in case at bar are dissimilar in many points. We turn to the argument on which the decision reached is based to ascertain the mind of the court. In deciding the first point, wherein they find that the judgment is void, because no statute of Iowa required the garnishees to appear at the date fixed in the notice served on them, the court call attention to the fact that "there was no voluntary appearance [by garnishees] on the day fixed in the notice. None of the steps necessary to make an appearance were taken [by garnishees]." And, in considering the second point,—as to whether jurisdiction was subsequently acquired over garnishees,—the court declare that the showing by garnishee why execution should not issue was not an appearance by them to the proceeding, because it did not constitute an "appearance," as defined by section 2626 of the Code. The opinion does not affirmatively declare that an appearance and answer by the garnishees would have conferred jurisdiction. The case before them did not require that point to be affirmatively passed upon. But a careful reading of the opinion can lead to only one conclusion as to how the court would have held on this point had its decision been necessary in disposing of the appeal, and as to the mind of the court in that particular. That the argument of the court in the case just considered is general may perhaps be partially accounted for by considering its action in a previous case,—*Fanning v. Railroad Co.*, 37 Iowa, 379. *Fanning* brought suit against defendant for services as its chief engineer, and recovered judgment in the circuit court of Polk county, Iowa. Upon execution issued thereunder, the sheriff served one Reddish with garnishment notice, and took his answer, as provided by the Iowa statute. Upon this answer, judgment was rendered against the garnishee. Subsequently, the main defendant filed its motion to set aside the judgment against the garnishee, for the following, among other, reasons: Because it was rendered without authority

of law, and the court had no jurisdiction to render the same. The notice to Reddish of his garnishment cited him to appear in the district court (instead of the circuit court, wherein the main judgment had been rendered, and from which the execution had issued) of Polk county, Iowa, on the first day of the term, etc.; and it was contended that this gave the circuit court no jurisdiction over the garnishee. The Iowa supreme court do not delay to state extended reasons for the decision which they reach, but dispose of the matter in these words:

"The answer of the garnishee, taken by the sheriff, was returned into the circuit court from whence the execution issued. The court found, upon that answer and the proofs offered in the case, that he was indebted to defendant in the sum of \$333.15, and rendered a judgment accordingly. The jurisdiction of the court over the garnishee was complete, and the fact that a notice was served on him to appear and answer interrogatories in the district court did not affect the power of the circuit court to enter judgment against him. For the reasons above stated, and the additional ones that the garnishee does not complain of the judgment against him, and it is not alleged that the judgment against the defendant is unjust, in whole or in part, the order of the circuit court overruling appellant's motion must be affirmed."

What were the facts which made the "jurisdiction of the court over the garnishee complete," as decided by the court? Jurisdiction against the main defendant, service of a live writ of attachment upon the garnishee (though the notice forming a part of said service was defective), and the filing of the answer of garnishee in the court where the main action—rather judgment thereunder—existed. In the cases determined in the Crawford district court, instead of an answer by the garnishee taken by the sheriff being filed in the court, the garnishee personally appeared, and, filing his answer, submitted to the jurisdiction of the court himself and the property over which he then had and exercised actual control. We have, then, in each of these cases, a live writ served, the main defendant duly notified, judgment against such defendant, attempted service on garnishee of notice of garnishment, the appearance of the garnishee in court, himself and the property submitted to the jurisdiction of the court, and judgment against garnishee under the forms required by the Iowa statutes; and, since the property over which garnishee had and exercised rightful control was submitted to the jurisdiction of the court, the irregularity, if one existed, in the garnishment notice, becomes immaterial.

Had the main defendant, Cohn, appeared in those cases in the Crawford court, and as in the Fanning Case, *supra*, moved the court to set aside the judgments rendered against the garnishee, can it be doubted that the Crawford district court, acting in the line of the above-cited decisions of the supreme court of Iowa, must have overruled the motion, and left these judgments standing in full force? And if such must have been the action of that court, with the main defendant attacking those judgments, how could its action have been different if the plaintiffs in case at bar had obtained standing in those cases, and had attacked the jurisdiction of that court over the garnishee, and the validity of the judgments rendered therein? If these plaintiffs, as garnishing

creditors of defendant Cohn, in enforcing their garnishment, are pressing a "suit which is in effect a suit by the defendant [Cohn], in plaintiff's name, against the garnishee," so far as existing relations and substantial rights of parties are concerned (*Daniels v. Clark*, supra), the state court could not have reached a different conclusion upon plaintiffs' attack from what it must have reached upon an attack by the main defendant himself; and especially if the proceedings attacked be viewed in the light of section 2528 of Code of Iowa, which provides:

"The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions, and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

The action which the state court would be required to take must be taken by this court in case at bar. Liability against a garnishee is never presumed, but must be affirmatively shown. *Letts, Fletcher & Co. v. McMaster*, 83 Iowa, 449, 49 N. W. 1035. The garnishee is not to be placed in a worse position than he would have been in had the claim for which he is garnished been enforced against him directly. *Henry v. Wilson*, 85 Iowa, 60, 51 N. W. 1157.

The views above expressed necessarily lead to the discharge of the garnishee, the Farmers' State Bank of Charter Oak, Iowa. Let judgment be entered accordingly. To which plaintiffs at the time duly excepted.

SMITH v. NEW ENGLAND MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. October 18, 1894.)

No. 26.

1. LIFE INSURANCE—NONPAYMENT OF PREMIUM.

The giving of a note for a premium to an agent, who had no power to postpone payment of the premium or to substitute anything for it, which was never accepted by the company or brought to its knowledge, will not keep alive a policy which provides that the company assumes no risk except for that portion of the year for which the premium shall have been actually paid in cash in advance.

2. SAME—PAYMENT OF PREMIUM.

The acceptance of payment of a quarterly premium and of premium notes 73 days, 50 days, 120 days, and 30 days, respectively, after they were due, in one year, does not show such a course of dealing as justifies the assured in believing that punctuality in paying premiums is not required, so as to excuse delay in paying premiums the following year.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This action was brought by Aline M. Smith against the New England Mutual Life Insurance Company on a policy of insurance for \$10,000 issued on the life of Zant McD. Smith. Another action was brought at the same time on another policy, like, in all respects, to the one in this action, and the two cases were tried together. The policies contained the following conditions:

"General agents appointed directly by the company are alone authorized to receive premiums at the day when payable, and not afterwards, but can—
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not give credit, or make, alter, or discharge contracts, or waive forfeiture; and no alteration or waiver of the conditions of this policy shall be valid unless made in writing at the office in Boston, and signed by the president or secretary." "All premiums due on this policy shall be paid in advance, but any annual premium may, at the election of the assured, be paid in cash, either in one sum, or in semiannual or quarterly installments, to be secured by the notes of the assured; it being understood that the company assumes no risk for the period covered by such deferred payments, but only for that portion of the year for which the premium shall have been actually paid in cash, in advance, and that in case of loss all such deferred payments are to be deducted from the amount payable."

The premiums due May 24, 1891, were not paid until August 5th of the same year, or 73 days after they were due, and the three installment premium notes were not paid for 50 days, 120 days, and 30 days, respectively, after they were due. When the premiums fell due May 24, 1892, the assured delivered to the local agent at Pittsburgh premium vouchers for \$46.90 on each policy, and premium notes for three quarterly installments, and an ordinary promissory note, payable in 30 days to the order of defendant, for \$86.61, with interest, for the balance of the first quarterly installments on both policies. This note and the regular premium notes were never paid. The assured died November 22, 1893, and, the company having refused to pay the amount of the policies, two suits were brought, and by agreement of counsel were tried together, and a verdict rendered in each case, under instructions of the court, for the amount of paid-up insurance due on the policies, under the Massachusetts statute, as lapsed policies. A writ of error was taken by plaintiff in only one case, counsel having agreed that the decision in this case should be treated as applicable to the other.

W. K. Jennings, for plaintiff in error.

Shiras & Dickey, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance for \$10,000, issued on the life of Zant McD. Smith, dated May 24, 1890, which recites as a condition, the payment of a premium by the assured of \$352, at its date, and the payment of like premiums on or before the 24th of May in every year thereafter until 34 such premiums have been paid, or during the term of Mr. Smith's life if he shall die within 34 years of its date. The defendant is a corporation of the state of Massachusetts, and the policy recited that it is issued "subject to the provisions of the insurance act" of that state; the 76th section of which was indorsed and provides that "no policy of life insurance thereafter issued by any domestic corporation shall become forfeited or void for nonpayment of premiums after two full annual premiums have been made, but in case of default of payment thereafter then without any further stipulation or act, such policy shall be binding on the company for the amount of paid-up insurance," to be computed and valued according to a prescribed rule. Mr. Smith paid two full annual premiums. Whether he paid or tendered another, which fell due May 24, 1892,

or was excused from doing so, is the question raised. The company, treating him as in default for failure to pay, refused payment subsequently, because, as it asserted, the policy had lapsed.

Under direction of the court, a verdict was rendered for the plaintiff in the amount of paid-up insurance under the statute, only. The plaintiff appealed and assigned the following errors:

"First: The court erred in refusing to affirm the plaintiff's first point, which was as follows:

"If the jury believe from the evidence that Z. McD. Smith, the insured, on the 24th day of May, 1892, signed and delivered to the defendant company a dividend receipt or voucher for \$46.90 in each policy, authorizing the company to apply the same on the premiums then due; that he gave his three premium notes upon the forms provided by the company, payable in three, six and nine months, in accordance with the company's custom, and also gave an ordinary promissory note for \$82.61, payable in thirty days, being for the balance of the cash payment of premium in each policy, to wit, \$1.10, with interest on the note, and that the same were accepted by the company in payment of the annual premiums due that day upon policies Nos. 88,946 and 88,947; that said policies were thereby continued in force for another year, and said company having afterwards refused payment of said ordinary note and attempted to cancel said policy, and the said Smith having subsequently died, plaintiffs are entitled to recover in each case, and the verdict should be for the full amount of the policies, with interest from the insured's death."

"Second: The court erred in refusing to affirm the plaintiff's second point, which was as follows:

"If the jury believe, from the evidence, that the previous course of dealings between the insured and the company in regard to receiving payment of overdue premiums at any time within ninety days from the date that they fell due had been such as to lead him to believe that the same course will be pursued in regard to the small portion of the annual premium due May 24, 1892, covered by the promissory note for \$82.61, mentioned in the first point, and that he tendered payment thereof within ninety days of its date in good faith, the defendant company should have accepted payment and had no right to forfeit the policy, and for that reason, in addition to the one set out in the first point, the verdict should be for the plaintiffs in each case for the full amount of the policy, with interest from the date of the decedent's death."

"Third: The court erred in affirming the first point of the defendant, which was as follows:

"That under all the evidence the verdict must be for the defendant except as to the paid up value of the policy as set forth in the defendant's third point."

"Fourth: The court erred in the general charge in stating that

"Mr. Dermitt had no authority to accept the insured's note at thirty days instead of cash; besides the evidence does not justify the finding that he did so accept the note for \$82.61. The company itself did not accept that note or authorize the acceptance thereof, and knew nothing of the transaction."

"Fifth: The court erred in the general charge in stating that

"The indulgence which Mr. Smith received in the year 1891 did not excuse his default in 1892. The evidence in the opinion of the court does not justify the finding that Mr. Smith was misled."

The only questions raised are those presented by the first and second assignments. Were the answers to the points therein recited erroneous?

To the first of these points the court said:

"This point is refused, because, in the opinion of the court, it is not warranted by the evidence in the case. Mr. Dermitt had no authority to accept the assured's note at 30 days instead of cash; besides, the evidence does not

justify the finding that he did so accept the note for \$32.61. The company itself did not accept that note or authorize the acceptance thereof, and knew nothing of the transaction."

This answer seems fully justified by the evidence. A careful examination has not discovered anything to warrant a belief that Mr. Dermitt undertook to accept the note mentioned, in payment of the premium; and besides it is clear that if he had so undertaken his act would have been unauthorized, and therefore ineffectual. He had no power to postpone payment of the premium, or to substitute anything for it. The defendant, personally neither accepted the note nor knew of its existence.

To the second point the court replied:

"Under the uncontradicted evidence this point is refused. The evidence does not warrant its affirmance. The indulgence which Mr. Smith received in the year 1891 did not excuse his default in 1892. The evidence in the opinion of the court does not justify a belief that Mr. Smith was misled."

We do not see how the point could have been answered differently. We find no evidence to warrant its submission. The dealing referred to was slight, and standing alone would not justify a belief that Mr. Smith thought himself excused from the obligation to make prompt payment. But it is clear that he did not so think—that he was not betrayed or misled into delay; for it distinctly appears that he was repeatedly warned, in ample time, of the necessity of prompt payment, and the danger of delay.

There is no room for question about the rules of law applicable. A course of dealing which justifies the assured in believing that punctuality in paying premiums is not required, or will be excused, will relieve him from the consequences of delay, as was held in *Insurance Co. v. Unsell*, 144 U. S. 439, [12 Sup. Ct. 671.] But it must be dealing which actually creates such belief, and justifies a jury in finding its existence. The assured seeking relief from the terms of his contract must prove they were waived or that he was misled. Punctuality in paying premiums is of the essence of such contracts, and the consequences of delay can only be avoided by waiver, or other sufficient excuse; *Thompson v. Insurance Co.*, 104 U. S. 252; *Statham v. Insurance Co.*, 93 U. S. 24; *Klein v. Insurance Co.*, 104 U. S. 88; *Miles v. Insurance Co.*, 147 U. S. 177, [13 Sup. Ct. 275.]

A discussion of the evidence involved would extend the opinion without serving any useful purpose. The case was well tried, and the conclusion reached the only one admissible. The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interest acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now.

The judgment is affirmed.

YARDLEY v. TRENHOLM.

(Circuit Court of Appeals, Second Circuit. October 15, 1894.)

No. 148.

BANKS—ACTION FOR OVERDRAFTS PAID—EVIDENCE.

In an action by the receiver of a bank against a customer to recover \$6,784.94, paid on alleged overdrafts, the bookkeeper of the bank testified that the ledger showed \$2,995.78 overdrafts at the close of 1888, and that the leaves in the ledger of 1889 containing defendant's account had been destroyed, before the bank suspended, by some unknown person, but that the witness' recollection was that the ledger showed overdrafts by defendant of about \$6,000. The cashier testified that checks amounting to \$3,619.16 of defendant were paid in 1889. There was no evidence of the amount of deposits in 1889 made with the receiving teller, or that none had been made. No deposit slips were produced, nor was it shown that there were no such slips. The accuracy of the ledger accounts was not proved. *Held*, that the court properly directed a verdict for defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Robert M. Yardley, receiver of the Keystone National Bank, against William Trenholm, to recover alleged overdrafts paid. The court directed a verdict for defendant, and plaintiff sued out a writ of error.

Silas W. Pettit and William F. Randel, for plaintiff in error.

John J. Crawford, for defendant in error.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Robert M. Yardley, the plaintiff, was duly appointed on May 9, 1891, receiver of the Keystone National Bank of Philadelphia, which ceased to do business on March 20, 1891, and, as receiver, brought an action at law against the defendant to recover the sum of \$6,784.94. The complaint alleged that between October 1, 1888, and September 7, 1889, the defendant's deposits in said bank amounted to \$6,058.65; and that his drafts upon the bank amounted to the sum of \$12,843.59; and that the difference had been overpaid him, and was on May 9, 1891, due to the bank and to the plaintiff. The defendant's answer was a general denial. Upon trial of the case to the jury, the plaintiff proved by one Ege, who was a bookkeeper in the bank, and kept the ledgers for 1888 and 1889, which contained the defendant's account, that his account was balanced on October 1, 1888, and showed an overdraft on that day of \$1,608.53; that the ledger showed an overdraft at the close of 1888 of \$2,995.78; that the leaves in the ledger of 1889 containing Trenholm's account were cut out, before the bank suspended, by some unknown person; and that the witness' recollection was that the ledger showed an overdraft by Trenholm of about \$6,000. It was proved by the cashier that 30 checks of Trenholm's, amounting to \$3,619.16, were paid in 1889, and that the deposits were made with the receiving teller, and not with the bookkeeper. There was no evidence of the amount of deposits in 1889, or that none had been made. The deposit slips were not produced,

or the fact that there were no such slips was not proved. Neither the accuracy with which the missing leaves in the 1889 ledger were kept, nor the accuracy of the ledger of 1888, was proved. At the close of the plaintiff's testimony, upon motion, the court directed a verdict for the defendant, upon the ground that there was not sufficient testimony to entitle the plaintiff to recover. The assignment of errors presents in various forms the correctness of the ruling of the court.

The question which was before the circuit court for decision was whether the plaintiff had made a prima facie case, which required a defense. Assuming, what was shown only by way of inference, that Trenholm's bank book was written up on October 1, 1888, and that he must be considered as having assented to the correctness of the ledger account, the sole knowledge which the jury could have of the state of the account on September 7, 1889, was the recollection of the bookkeeper that the ledger showed an overdraft of about \$6,000. This recollection amounted to nothing, in the absence of evidence that the book was accurately kept. If the ledger had been in court, it would not have proved itself. Its probable accuracy must be presented to the jury by the testimony of those who had original means of information, and whose business it was to furnish such information to the bookkeeper. Proof in regard to Trenholm's deposits was necessary, because, although payment of his checks was proved, there was no presumption that they were not drawn upon and paid from funds to his credit in the possession of the bank. *White v. Ambler*, 8 N. Y. 170. The original entries of deposits, if any there were, were not produced, and it was not shown that there were no such entries. The bookkeeper did not testify from what source he was in the habit of obtaining notice of deposits, or that he entered all of which he received notice. When the person who makes the entries has no knowledge of the correctness of the charge, but receives his information entirely from another, who was a party to the transaction, it is necessary to show by some testimony the probable accuracy of the system or course of business which was employed to make original memoranda, and to transmit information of them to the person whose sole business it is to make the entries. For example, testimony from the teller that he correctly made true reports of all deposits to the bookkeeper, or made correct memoranda in the discharge of his duty, and in the usual course of business, which were duly handed to the bookkeeper, and his testimony that he correctly entered all the reports, would, if written vouchers had been destroyed, make prima facie proof of the accuracy of the final entries. *Kent v. Garvin*, 1 Gray, 148; *Harwood v. Mulry*, 8 Gray, 250; *Mayor, etc., of New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905. In this case the counsel for the plaintiff probably presented all the evidence which was accessible. There is enough in the record to suggest that those officers who, at the time of the bad management of the bank, were privy to it, desired concealment of their conduct.

We find no error in the action of the circuit court, and the judgment is affirmed, with costs.

LITTLE ROCK & M. R. CO. v. ST. LOUIS S. W. RY. CO. (two cases. Nos. 394, 399). SAME v. ST. LOUIS, I. M. & S. RY. CO. (two cases. Nos. 395, 398). SAME v. LITTLE ROCK & FT. S. RY. CO. (two cases. Nos. 396, 397).

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

1. CARRIERS—INTERSTATE ACT—CONNECTING LINES—DISCRIMINATION—PREPAYMENT OF CHARGES.

An interstate carrier does not subject another carrier to an "undue or unreasonable disadvantage" (Interstate Commerce Act, § 3, cl. 2) by exacting the prepayment of freight on all property received from it at a given station, although it does not require charges to be paid in advance on freight received from other individuals and competing carriers at such station. 59 Fed. 400, affirmed.

2. SAME—THROUGH BILLING, RATING, AND LOADING.

An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading, and for the use of its tracks and terminals, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same. 59 Fed. 400, affirmed.

Appeals from and Writs of Error to the Circuit Court of the United States for the Eastern District of Arkansas.

These were six suits which were brought by the Little Rock & Memphis Railroad Company against the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Little Rock & Ft. Smith Railway Company, for alleged violations of the third section of the interstate commerce law (24 Stat. 379, 380). A suit at law and a bill in equity were filed against each of the defendant companies above named, in which the Little Rock & Memphis Railroad Company counted upon the same violation of the law; asking in the one case for an injunction, and in the other for damages. The six suits against the three companies involved similar questions. They have been argued as one case, and it is found most convenient to dispose of them in a single opinion. Subjoined diagrams will serve to illustrate the relations which the several railroads concerned occupy to each other. It will be seen by a glance at diagram No. 1 that the Little Rock & Memphis Railroad runs east and west from Little Rock, Ark., to Memphis, Tenn. Its total length is about 135 miles. Coming down from the north, the St. Louis Southwestern Railway crosses the Little Rock & Memphis Railroad at Brinkley, a point intermediate between Little Rock and Memphis. It also crosses a branch of the St. Louis, Iron Mountain & Southern Railway, leading from the main line of that road into Memphis, at Fair Oaks, which is a point about 20 miles north of Brinkley. Diagram No. 2 illustrates the situation further west, in and about Little Rock. It will be seen that the main line of the St. Louis, Iron Mountain & Southern Railway Company enters Little Rock from the north, and thence runs southwest through Arkansas into Texas, with a branch leading from Little Rock to the southeast. The Little Rock & Ft. Smith Railway runs west from Little Rock to Ft. Smith on the western border of the state of Arkansas, and to Ft. Gibson in the Indian Territory. Its length is said to be about 165 miles. Diagram No. 2 does not show the main line of the St. Louis Southwestern Railway, which is disclosed by the first diagram; but it is sufficient to say that, after passing through Brinkley, it runs in a southwesterly direction through Arkansas, and far into Texas. As against the St. Louis Southwestern Railway Company, complaint was made that it refused to receive freight or passengers coming over the Little Rock & Memphis Railroad except at local rates, and that it refused to honor through tickets or through bills of lading issued by the latter road, and that it required all freight to be rebilled and reloaded, and all passengers to purchase new tick-

ets, at the town of Brinkley, while at the same time it accepted through tickets and through bills of lading, and cars loaded in car-load lots, that came over the line of the St. Louis, Iron Mountain & Southern Railway Company, and that it did this although the facilities for an interchange of freight and passengers at Brinkley were in every respect equal to those existing at Fair Oaks. As against the Little Rock & Ft. Smith Railway Company, complaint was made that it refused to accept interstate freight at Little Rock under through bills of lading issued by the Little Rock & Memphis Railroad Company, while it accepted freight under through bills of lading issued by all other lines of railroad terminating at the city of Little Rock, Ark., and that it likewise refused to accept freight from the Little Rock & Memphis Railroad Company except upon prepayment of all freight charges, while at the same time it accepted freight at Little Rock from all other individuals and corporations without the prepayment of freight charges. Complaint was also made against the Little Rock & Ft. Smith Railway Company that it accepted from the St. Louis, Iron Mountain & Southern Railway Company passengers on through tickets, and with through checking of baggage, while it refused to accept passengers coming over the Little Rock & Memphis Railroad on through tickets issued by that road, and that it charged passengers coming from that road local rates from Little Rock westward, and required them to recheck their baggage at Little Rock. Complaint was also made against the Little Rock & Ft. Smith Railway Company that it exchanged freight with the St. Louis, Iron Mountain & Southern Railway upon an arrangement for through billing, and in the cars in which it was shipped, when shipped in car-load lots, and that it refused at the same time to exchange freight with the Little Rock & Memphis Railroad Company, except upon local rates, and that it refused to accept from or deliver to the latter road any loaded cars. As against the St. Louis, Iron Mountain & Southern Railway Company, complaint was made that it refused to receive any freight from the Little Rock & Memphis Railroad Company at Little Rock, except upon the prepayment of all charges thereon, while it received freight at that point from all other persons and corporations without demanding the prepayment of freight charges. It was further alleged, as against that company, that the discrimination in question was made, not because the defendant company was unwilling to extend credit to the Little Rock & Memphis Railroad Company, but from a desire to oppress that company and destroy its business. A demurrer having been filed to the several bills in equity and complaints at law, the same were sustained by the circuit court, whereupon the complainant company declined to plead further, and a final judgment dismissing the action was entered in each case. The opinion of the circuit court is reported in 59 Fed. 400.

The following is the plat referred to in the statement:

DIAGRAM NO. 1.

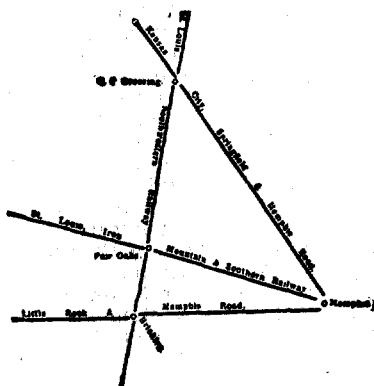
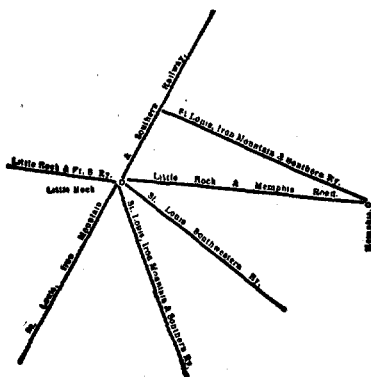


DIAGRAM NO. 2.



W. E. Hemingway (U. M. Rose and G. B. Rose, on the brief), for appellant and plaintiff in error.

George E. Dodge (B. S. Johnson, on the brief), for appellees and defendants in error Little Rock & Ft. S. Ry. Co. and St. Louis, I. M. & S. Ry. Co.

John M. Taylor (Samuel H. West and J. G. Taylor, on the brief), for appellee and defendant in error St. Louis S. W. Ry. Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common-law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not "subject any particular person, company, corporation or locality * * * to any undue or unreasonable * * * disadvantage in any respect whatever." This prohibition is very broad, it is true, but it is materially qualified and restricted by the words "undue or unreasonable." One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the

particular wrong complained of was not within the special contemplation of congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common-law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise. It is most probable that self-interest—the natural desire of all carriers to secure as much patronage as possible—will prevent this species of discrimination from becoming a public grievance so far as individual shippers are concerned; and it is desirable that the courts should interfere as little as possible with those business rivalries existing between railroad corporations themselves, which are not productive of any serious inconvenience to shippers. We think, therefore, that no error was committed in entering the judgment and decree in favor of the St. Louis, Iron Mountain & Southern Railway Company.

The complaint preferred against the other companies, to wit, the St. Louis Southwestern and the Little Rock & Ft. Smith Railway Companies, is somewhat different. It consists in the alleged refusal of those companies—First, to honor through tickets and through bills of lading issued by the complainant company, or to enter into arrangements with it for through billing or through rating; and, secondly, in the alleged refusal of these companies to accept loaded cars coming from the Little Rock & Memphis Railroad, and in their action in requiring freight to be rebilled and reloaded at the two connecting points, to wit, Brinkley and Little Rock.

Before discussing the precise issue which arises upon this record, it will be well to restate one or two propositions that are supported by high authority as well as persuasive reasons, and which do not seem to be seriously controverted even by the complainant's counsel. In the first place, the interstate commerce law does not require an interstate carrier to treat all other connecting carriers in precisely the same manner, without reference to its own interests. Some play is given by the act to self-interest. The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are "undue or unreasonable;" and even that clause which requires carriers "to afford all reasonable, proper and equal facilities for the interchange of traffic" does not require that such "equal facilities" shall be afforded under dissimilar circumstances and conditions. Moreover, the direction "to afford equal facilities for an interchange of traffic" is controlled and limited by the proviso that this clause "shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier." *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 571; *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 465, 473. In the second place, it has been held that neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceed-

ings without additional legislation. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 3 Interst. Commerce Com. R. 1, 16, 17; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559, and cases there cited by Judge Caldwell. Furthermore, it has been ruled by Mr. Justice Field in the case of the *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 465, 474, that the third section of the interstate commerce act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer. It should be remarked in this connection that the bills on file in the present cases, as well as the petitions in the law cases, fail to disclose whether the offending companies have refused to receive freight in the cars in which it was tendered to them, even when it would injure the freight to transfer it, or when they had no cars of their own that were immediately available to forward it to its destination. Neither do the bills or the petitions disclose whether, in tendering freight in cars to be forwarded, the complainant company demanded the payment of the usual wheelage on the cars, or tendered the use of the same free, for the purpose of forwarding the freight to its destination. The allegations of a refusal to receive freight in cars are exceedingly general, and convey no information on either of the points last mentioned.

As we have before remarked, the several propositions above stated do not seem to be seriously questioned. It is urged, however, in substance, that although the court may be powerless to make and enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks, and terminal facilities, yet that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend "equal facilities" to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to de-

termine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right, before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important, road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence in determining a railway company to refuse to enter into such an arrangement with any connecting carrier. In view of these considerations, we are unable to adopt a construction of the interstate commerce act which will practically compel a carrier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

In two of the cases heretofore cited (*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, and *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*), it was held that the charge of undue or unreasonable discrimination cannot be predicated on the fact that a railroad company allows one connecting carrier to make a certain use of its tracks or terminals, which it does not concede to another. This conclusion was reached as the necessary result of the final clause of the third section of the interstate commerce law, above quoted, to the effect that the second paragraph of the third section shall not be so construed as to require a carrier to give the use of its tracks or terminals to another company. Railroads are thus left by the commerce act to exercise practically as full control over their tracks and terminals with reference to other carriers as they exercised at common law. The language of Mr. Justice Field in that behalf was as follows:

"It follows from this * * * that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for

such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated." 51 Fed. 474, 475.

Furthermore, it is the settled construction of the act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have had occasion to consider the subject, and it is based on the fact that, in enacting the commerce act, congress did not see fit to adopt that provision of the English railway and canal traffic act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 3 Interst. Commerce Com. R. 1, 9, 10; *Kentucky & L. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 630, 631. See, also, the second annual report of the interstate commerce commission (2 Interst. Commerce Com. R. 510, 511). In the light of these adjudications, we are compelled to conclude that if the charge of an unreasonable discrimination cannot be successfully predicated on the ground that a railway company makes an arrangement with one connecting carrier for the use of its tracks and terminals, which it refuses to make with another, although the physical facilities for an interchange of traffic are the same, then the charge of discrimination cannot be predicated on the ground that it makes an arrangement for through billing and rating with one carrier, and does not make it with another. The interstate commerce act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort, and does not give the commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable, and when undesirable. Moreover, arrangements for through billing and rating will, as a general rule, necessarily involve an agreement for the use, to some extent, of each other's terminals and tracks; and, by the express language of the statute, such use cannot be enforced without the consent of the owner. We are unwilling, therefore, as the law now stands, to compel the defendant companies to afford the facilities which the complainant demands. As was said by Mr. Justice Jackson, then circuit judge, in the case to which we have already referred:

"The law should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of or the right asserted should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

We are also forced to conclude that if the public interest requires that interstate carriers shall be compelled to put in force arrangements for through billing and rating, and for the establish-

ment of joint through lines, the statute should be made more explicit, and that the commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case.

Some allusion was made in the argument to a provision found in the constitution of the state of Arkansas (article 17, § 1), as having some bearing on the questions discussed in these cases; but as the bills and petitions filed are plainly founded on the interstate commerce law, and thus involve a federal question arising under that act, and as there is no jurisdiction arising from diverse citizenship, we have not felt called upon to consider or decide the proposition founded upon the constitution of the state. In view of what has been said, the several decrees and judgments are hereby affirmed.

NOYES et al. v. BARNARD.¹

(Circuit Court of Appeals, Ninth Circuit. May 28, 1894.)

No. 109.

JOINT VENTURE IN PURCHASE AND SALE OF LANDS — ACTION FOR PROFITS ON REFUSAL TO SELL.

Plaintiff and another entered into an agreement with defendants in June, 1882, to purchase certain timber lands for defendants, the former to receive for their services a certain percentage of the profits arising out of the sale of the lands or timber, after deducting taxes and interest on the investment, defendants to determine the time and terms of the sale. Lands were purchased thereunder between June, 1883, and February, 1883. In August, 1883, defendants refused an offer made by a responsible person to purchase the lands at a price which would have yielded about 300 per cent. profit. *Held*, by a divided court, that plaintiff could maintain an action at law to recover his share of the profits based upon such offer.

Error to the Circuit Court for the Northern District of California.

This was an action by J. E. Barnard against Henry T. Noyes and John S. Noyes. The complaint, sworn to and filed May 22, 1891, alleged that on June 5, 1882, defendants and Delevan F. Clark and M. P. Fillmore entered into an agreement with plaintiff and one Charles G. Noyes whereby the latter agreed to purchase for the former certain redwood timber lands, and to receive therefor 15 per cent. of the net profits to be derived from the sale of such lands or from stumpage, after adding to the sum of money expended in the purchase thereof the annual taxes and 7 per cent. interest per annum; "stumpage" to mean the value of the timber scaled on the land if cut by defendants, or the amount received from the sales, defendants "to determine the times and terms of sales of either, the market value of stumpage there obtaining." That plaintiff and said Noyes, immediately after the execution of said contract, purchased at divers times from June 5, 1882, to February 17, 1883, 5,198.44 acres of redwood timber lands for defendants and their associates, the total cost of which, under the terms of the contract, amounted on August 6, 1883, to \$32,550.64. That, on such day, defendants and their associates were offered by a responsible person, willing and able to purchase said lands, the sum of \$25 per acre for all of said lands, and that such person, if such offer had been accepted, would have paid defendants therefor the sum of \$129,963.25, but that defendants declined such offer. That the net profits of the purchase of such lands amounted on August 6, 1883, to \$97,416.61, and that plaintiff, in September, 1883, demanded of defendants his commissions of 7½ per cent. upon such net profits, which

¹ Rehearing pending.

they refused to pay. That Delevan F. Clark and Millard P. Filmore, defendants' associates, owned three-eighths of all of said lands, and subsequently to August 6, 1883, sold all their interest to defendant John S. Noyes; and that John S. Noyes sold one-quarter interest to R. A. Alger, and defendants paid plaintiff his commissions on said sale of one-quarter interest. That defendants have not paid plaintiff his commissions of 7½ per cent. upon the remaining three-fourths of the net profits of said purchase, amounting to \$73,059.48. That defendants were at the date of the contract, and ever since have been, and now are, nonresidents of the state of California, and are residents of the state of New York. That defendants have been continuously absent from the state, etc. That Charles G. Noyes departed this life in San Francisco, April 1, 1890. Wherefore plaintiff demanded judgment for \$5,479.48, with interest from August 6, 1883. An attachment was issued against such timber lands and levied upon defendants' interest therein. The summons was served by publication. Defendants appeared, and had the cause removed to the circuit court for the northern district of California. Defendants demurred to the complaint, on the ground "that the said complaint and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action therefor against said defendants, and that said defendants are not bound by law to answer the same, for that said complaint does not upon its face state facts sufficient to constitute a cause of action. And, for a second and further ground of demurrer, said defendants aver that the supposed promises and undertakings mentioned in said complaint (if any were so made) were, and each of them, made, as appears upon the face of the said complaint, jointly with one Charles G. Noyes, and not by plaintiff alone. And, for a third and further ground of demurrer, said defendants aver that the said supposed promises and undertakings mentioned in said complaint (if any were so made) were, and each of them, made, as appears upon the face of said complaint, by Delevan F. Clark and one M. P. Filmore, together with defendants, and such supposed contracts or undertakings were not made by defendants alone. And defendants further say that, by reason of the facts averred as aforesaid, the defendants pray judgment (1) that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against said defendants; (2) that, by reason of the fact that the said Charles G. Noyes is not joined in said action as plaintiff, the defendants pray judgment that the said complaint herein may be dismissed; (3) that by reason of the fact that the said Delevan F. Clark and M. P. Filmore are not made parties defendant in this action, together with said defendants, they pray judgment that the said complaint herein may be dismissed, with costs." The demurrer was overruled, and an answer filed. The trial resulted in a verdict for plaintiff for \$8,000. Defendants sued out a writ of error, specifying, *inter alia*, as error, the action of the court in overruling the first ground contained in the demurrer, in that the complaint does not state facts sufficient to constitute a cause of action.

Frank M. Stone, for plaintiffs in error.

Horace L. Smith and S. M. Buck, for defendant in error.

Before GILBERT, Circuit Judge, and KNOWLES, District Judge.

KNOWLES, District Judge. The defendant in error in this case, with one Charles G. Noyes, entered into a contract with the plaintiffs in error and Delevan F. Clark and M. P. Filmore to act for them in purchasing certain redwood timber land on the Van Duzen river, in Humboldt county, state of California. The defendant in error and said Charles G. Noyes were to receive for their services 15 per cent. of the net profits to be derived from the sale of the said lands, or from stumpage, after adding to the sum of money expended in the purchase thereof the annual state, county, or other government taxes, 7 per cent. interest per annum on the purchase

price. The agreement entered into was made in the form of a letter, and the acceptance of the terms was made by the following indorsement thereon:

"We agree to the terms expressed in the within instrument and agreement, with the understanding that 'stumpage' means the value of the timber scaled on the land, if cut by us, or the amount received from sales, and that we are to determine the times and terms of sales of either, the market value of stumpage there obtaining."

Before this action was brought, Charles G. Noyes died. The defendant in error brought this action, in his own name, in the superior court in and for the county of Humboldt, state of California. The petition for removal shows that defendant in error is a citizen of the state of California, and that plaintiffs in error are citizens of the state of New York. When this suit was commenced, an attachment was issued against the property of plaintiffs in error, and levied upon their interest in the said real estate purchased on said Van Duzen river. The summons was served by publication. The plaintiffs in error voluntarily appeared in the cause, and had the same removed to the circuit court of the United States for the northern district of California, on account of the diverse citizenship of the parties to the action.

In the circuit court the plaintiffs in error interposed their demurrer to the complaint, alleging that the same was defective in not stating facts sufficient to constitute a cause of action; that it was defective in not uniting Charles G. Noyes, as a plaintiff, with defendant in error, and also in not uniting the above-named contracting parties, Clark and Filmore, as defendants. The point seems to be made in the brief of plaintiffs in error that the complaint is defective because it appears therefrom that the defendant in error brought his action to recover, in his own right, for one-half of the 15 per cent. of compensation to be allowed him and Charles G. Noyes, when the contract is a joint one, and must be sued on as such. We do not doubt but that the contract must be treated as a joint contract, and cannot be sued on as a several contract. There is nothing in the complaint which would warrant the court in holding that it was otherwise than a joint contract. The presumption of law is that when two persons enter into a contract to perform certain work together, in consideration of a certain sum of money to be paid to them jointly therefor, it is a joint contract. Pom. Rem. & Rem. Rights, § 185. If there are any facts that would show that a contract which is presumptively a joint contract is one in severalty, they should be pleaded; and if a contract which was a joint contract at its inception has been, by any additional or subsequent agreement, changed into one in severalty, the facts showing such change should be pleaded, and the contract should be declared on in its changed form. No such subsequent agreement appears in the pleadings, and the original contract is the basis of the cause of action presented by the complaint. We must therefore consider that the contract sued on is a joint one. Charles G. Noyes, the co-contractor of defendant in error, died before this action was brought. The defendant in error was a

survivor therein, and as such brought this action. It was not necessary to have stated in the complaint that he brought it as a survivor. That would have been the statement of a conclusion of law. The allegation of the death of Charles G. Noyes showed this. There is an allegation in the complaint that defendant in error has not been paid his commissions of $7\frac{1}{2}$ per cent. upon the remaining net profits of said purchase. Why defendant in error did not claim in his complaint the 15 per cent. on the net profits, to which he, as a survivor, was entitled, it is difficult to determine. Perhaps he had the purpose of claiming only the amount which on a division of the percentage on said net profits would be due him. We must, however, construe the complaint from its allegations, and from what are the known rights of defendant in error as the survivor in the contract. It was his right to maintain the action as though the contract had been made to him personally. *Id.* §§ 188-224. In the case of *Holbrook v. Lackey*, 13 Metc. (Mass.) 132, it is definitely held that a survivor held a joint claim, when a survivor therein, the same as an individual claim. In suing upon a joint contract, under such circumstances, he could join therewith one which was a separate contract made with him individually. This rule has not been changed in California by statute, although it has been so changed in some states. The fact, then, that defendant in error claimed in his complaint only one-half that was due him, does not make the complaint defective.

The point that Charles G. Noyes should have been joined as party plaintiff was obviated by an amendment to the complaint, made by agreement, stating his death.

The next point for consideration is the alleged error in failing to join in the complaint, as defendants, with the plaintiffs in error, their contracting associates, Clark and Filmore. It is held, I believe, that at common law this would have been a fatal defect in the complaint. Has this requirement been changed by the statute law of California? It should be borne in mind, in approaching a discussion of this question, that plaintiffs in error were nonresidents of the state of California; that suit was commenced, and an attachment upon the property of plaintiffs in error levied; and that service of summons was made upon them by publication. They appeared in court without having been personally served with process. It also appears from the complaint that Clark and Filmore had sold their interest in said landed property. It does not appear that they had any property in the state of California upon which an attachment could be levied. They resided in New York. It would have been an entirely vain thing to have made them parties to the suit, for any proceedings in the case against them would have been a nullity. *Pennoyer v. Neff*, 95 U. S. 714. In this case the supreme court holds that an action commenced as this was must be considered as an action in rem. In the opinion, Justice Field says:

"It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and

more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings in rem, in the broader sense which we have mentioned."

As the object of this suit was to reach the property of some of the parties to the contract, I think all that should be required should be to name as defendants the owners of said property. To require any other parties would appear to be a useless formula. The parties named as defendants were brought into court merely for the purpose of divesting their title in the land. The judgment against them could have no other bearing.

There are strong grounds, also, for believing that the legislature of California has changed by statute the rule that would require parties to a joint contract to be made parties to the action. Where no service can be had as to any parties, practically, the action is dismissed as to them. Section 414 of the Code of Civil Procedure of California provides:

"When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

It can hardly be supposed that the legislature intended that any persons should be made parties to such an action, when it was known that they could not be served with process, for the mere purpose of going through a vain proceeding. In the case of *Tay v. Hawley*, 39 Cal. 93, it is held that a judgment against a party served affects only his property, and not joint property. It is, in effect, then, a several proceeding and a several judgment. That a several judgment may be entered against a party served with summons is recognized in the following cases: *Tay v. Hawley*, supra; *People v. Frisbie*, 18 Cal. 402; *Lewis v. Clarkin*, Id. 399. In the case of *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833, an action was commenced upon a judgment obtained in Texas against Adams, Collins, Dalrymple, and Kennedy. Adams alone was made a party to the cause when the complaint was first filed. Subsequently, the complaint was amended, and the other parties made defendants, but no service had upon them. Adams claimed that this was a new action, and that the statute of limitations had run against the same. The court held, however, that it was not; that the bringing in by amendment of the other parties "was merely a more complete statement of the cause of action," as far as Adams was concerned. The court also held that, if there had been no objection to the complaint for the want of the other parties, the court could have rendered, as it finally did, judgment against Adams alone, and the Texas judgment could have been introduced in evidence over the objection of Adams. Certainly, this was not the rule at common law. It would appear that this case goes far to establish the doctrine that, when it would be useless to make certain parties de-

fendant in an action, because they could not be served, plaintiff need not join them..

I think, therefore, the case was properly brought in the state court. But, if I should be mistaken in this view, I think there are other considerations which would prevent them from urging the point in the federal court. The plaintiffs in error appeared in the state court, not for the purpose of submitting to its jurisdiction, but for the purpose of removing the cause to the circuit court. When a case is brought into a federal court from a state court, as to all subsequent proceedings, it must be treated as though originally brought there. *Suydam v. Ewing*, 2 Blatchf. 359, Fed. Cas. No. 13,655. Section 737 of the Revised Statutes is as follows:

"When there are several defendants in any suit at law, or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer, and non-joinder of parties who are not inhabitants of, nor found within, the district as aforesaid, shall not constitute matter in abatement."

In the case of *Barney v. Baltimore City*, 6 Wall. 280, it was held that under this statute a plaintiff could prosecute his suit to judgment against any one of a number of joint obligors, in the district where he was found. See, also, *Inbusch v. Farwell*, 1 Black, 566-571. The demurrer as to the parties must be considered as setting up what should be termed "matters in abatement." Perhaps the better practice in a federal court would be to set up such matters by a plea in abatement. That it would have better presented the matter for consideration in this case is evident, as we find, from the evidence of John S. Noyes, that both Clark and Filmore are dead. When they died is not stated. The demurrer for want of proper parties was not interposed until the cause was transferred to the circuit court. Whatever might have been the condition of the case in the state court, the fact that Clark and Filmore were not joined as defendants could not have been taken advantage of in the circuit court. Without them, the cause proceeded rightly to judgment.

It is urged that, by the express conditions of the contract, the times and terms of sale of the said lands were to be determined by the plaintiffs in error. There is some dispute as to whether this part of the agreement referred to the sale of the lands, as well as to the sale of stumpage. But let the contention prevail in favor of the plaintiffs in error that it referred to both. Certainly, it was contemplated that the time and terms of the sale of the land were to be fixed by them. The contract cannot be so construed as to leave it to their option to say whether or not a sale should ever take place, or as to whether the time or terms of sale should ever be fixed. It was contemplated that at some time they should be fixed. Courts, unless forced to the conclusion by the terms of a contract, will never hold that one party thereto can elect never to perform it. A promise to pay a debt when convenient has been con-

strued to be a promise to pay within a reasonable time. *Moak, Van Santv.* Pl. 410; *Terrill v. Auchauer*, 14 Ohio St. 88. In the case of *Nunez v. Dautel*, 19 Wall. 560, it appears a promise was made to pay money as soon as the crop could be sold, or the money could be raised from any other source. The court said:

"No time having been specified within which the crop should be sold, or the money raised, otherwise, the law annexes as an incident that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditioned to the extent of depending wholly and finally upon the alternatives mentioned. The stipulation secured to the defendants a reasonable amount of time within which to procure, in one mode or the other, the means necessary to meet the liability. Upon the occurrence of either of the events named, or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop was destroyed, or, from any other cause, could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

Although it was left by the contract to the plaintiffs in error to fix a time for the sale of the land, the law steps in, and says that must have been a reasonable time, and the price must be a reasonable one. If said plaintiffs did not determine that the sale should take place within a reasonable time, for a reasonable price, then they committed a breach of their contract with said defendant.

Again, it is urged that this action should have been brought in a court of equity. As a survivor, the defendant in error had a plain, speedy, and adequate remedy at law; and the circuit court would have had no jurisdiction of the cause, sitting as a court of equity. The case of *Agard v. Valencia*, 39 Cal. 303, was a case for specific performance, and properly brought in a court of equity. The case of *Grain v. Aldrich*, 38 Cal. 514, was one where a part of an indebtedness had been assigned. The assignee sought to recover the amount due it by the assignment. Under the rule established in California, the assignee could not make the parties who owned the other part of the indebtedness parties defendant. That rule only applies, in that state, to actions in equity. So as to have a complete settlement of the indebtedness, the assignee had to resort to a court of equity. That is not a case like this, where the defendant in error was the sole plaintiff at the institution of the action.

It is maintained that the court should have left it to the jury to have determined whether the offer made by Evans was to bond or purchase the land. I am satisfied that the evidence shows that the last offer made by Evans was to purchase, and not bond, the land, and the court was right in not submitting that issue to the jury. Many questions were raised as to this offer of Evans. It is urged that it should have been in writing, and that it should have been such an offer as would be binding under the statute of frauds. I do not think there is any merit in these contentions. As I look upon this offer, it was only a means of ascertaining the value of the land at the time defendant in error requested plaintiffs in error to sell the same, and as fixing the compensation to which

defendant in error was entitled. If the offer was a valid one,—that is, made in good faith,—it had a tendency to fix the value of the land at that time. There was no dispute as to whether or not the land was of the market value of \$25 per acre at that time. This was the main thing sought, but plaintiffs in error contented themselves in assailing the good faith of this offer. There was no question raised but a reasonable time for making the sale had elapsed when the offer was made. As there was no motion for a new trial in this cause, we cannot examine into the question as to whether the verdict was or was not supported by the evidence.

It may be that under the evidence in this case the question of reasonable time was, according to the rule established by the supreme court, one for the court; but plaintiffs in error do not complain that it was submitted to the jury. As we view the case, the jury probably decided the matter correctly, and hence the case ought not to be reversed on this account.

There are many assignments of error which were not presented in the briefs of counsel, and which we have not thought best to discuss. Taking the case as a whole, we think it was correctly decided, although, if the court had been called upon to dictate the pleadings, in the light of the evidence presented in the case, the issues presented by them might have been different. As some of the points which have occurred to us have not been presented by the arguments of counsel, we shall not review them. Perhaps they were cured by verdict in the cause. *Lincoln v. Iron Co.*, 103 U. S. 412. It is ordered that judgment be, and the same hereby is, affirmed.

GILBERT, Circuit Judge (dissenting). I am unable to concur in that portion of the opinion which holds that the pleadings state facts upon which a cause of action may be predicated. The agreement sued upon in this case shows that the parties to this action were engaged in a joint venture, the object of which was to purchase timber lands with a view to realizing profits, either by the sale of the lands, or by the sale of the timber. The defendant in error and his associate were to contribute to this venture their services in purchasing the lands, and were to receive a certain fixed percentage of the profits. The other parties to the agreement were to furnish the purchase money, were to take the title to the lands, and were to receive the remainder of the profits. They reserved to themselves also the power to determine the time and terms of the sale, whether of lands or of timber, with the option to cut and use the timber for themselves, in which event they were to be charged the market value of the timber. In arriving at the profits the purchase money was to draw interest at 7 per cent., and the plaintiffs in error were to be allowed all sums paid for taxes on the lands. The contract was made in June, 1882. The lands were subsequently purchased thereunder. The complaint then proceeds to show that on August 6, 1883, an offer was made by a responsible person to purchase the lands at a price which, if accepted, would have yielded a net profit of \$97,412.61, and on the basis of that profit the plaintiff

in this action demanded judgment. It is not alleged that any of the lands, or timber have been sold, and there is no averment of the present value thereof; but it is assumed that because, in 1883, an opportunity was afforded to sell at a certain price, the right accrued to the defendant in error to sue for and recover his proportionate amount of the profits that would have resulted, had that offer been accepted. The parties to this contract did not agree that the lands should be sold to the highest bidder, or at the first offer that might be received. It was left to the discretion of the plaintiffs in error to sell at such times and terms as they might deem advisable. They could not abuse that discretion, however; and no doubt the contract imposed upon them the obligation to sell within a reasonable time, and at a reasonable price. But, clearly, they were under no obligation to accept the offer of August 6, 1883. They had the right to exercise their judgment concerning its acceptance or rejection. That power had been voluntarily conferred upon them, and the contract had been entered into with that understanding. It is within common knowledge that the value of such lands is fluctuating. It does not follow that because, in 1883, an offer was made, which, if accepted, would have insured a profit of \$97,412.61, that profits to that amount have been earned. The property may have greatly decreased in value since that date. In declining that offer the plaintiffs in error may, it is true, have lost an excellent opportunity to sell the lands at a profit, and they may have failed to exercise ordinary prudence; but the relation they sustained to the defendant in error was not such that the fact of that offer, and its refusal, amounted to a breach of their contract or caused their liability to him to become fixed and determined in a definite sum recoverable in an action at law. This view of the contract relation between the parties does not deny to the defendant in error the power to protect his interests, or to sue for his proportion of the profits, if any there were. If, after the lapse of a reasonable time within which to dispose of the lands, they still remained unsold, he undoubtedly had his remedy. If the profits had in any manner been ascertained, as by an accounting, or by the agreement or admission of the parties, he could have brought an action at law to recover the ascertained amount; but if, as in this case, nothing had occurred to determine the profits, I hold that his only remedy was by a suit for an accounting. In such a suit, he must either prove an increase in the value of the lands, or such failure of contract duty upon the part of the other parties to the agreement that they would be held liable for profits which they might have earned, but did not. In such a suit, account would be taken of the amount of the purchase money expended, with the interest on the same, and the taxes paid since the purchase. In the case before the court, no mention has been made of the taxes.

CHICAGO, B. & Q. R. CO. v. IVES et al.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 416.

TRIAL—PROVINCE OF COURT AND JURY—RELEASE AND DISCHARGE — BILLS OF EXCEPTIONS.

In an action for damages, the exclusion of a release which was pleaded, and which plaintiffs alleged was obtained by fraud, *held* error, which was not cured by the court's suggesting that defendant incorporate into its bill of exceptions evidence admitted at a former trial on the issue as to the validity of the release, defendant having declined to adopt the suggestion.

In Error to the Circuit Court of the United States for the District of Colorado.

Edward O. Wolcott, Joel F. Vaile, and Henry F. May, for plaintiff in error.

No brief filed for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The judgment in this case must be reversed for the following reasons: The suit was brought by Charles W. and Alice Ives, who were husband and wife, under the Colorado damage act, for the negligent killing of their minor child, who was run over on May 20, 1892, in the city of Denver, by a car owned, and at the time operated, by the plaintiff in error, the Chicago, Burlington & Quincy Railroad Company. For a defense to the suit the defendant company pleaded, among other defenses, that it had been released from all liability for the wrong and injury complained of by a release duly signed and executed by the plaintiffs on the 21st day of May, 1892, for a consideration expressed therein of \$50, which sum had been duly paid to the plaintiffs. To this defense the plaintiffs replied, in substance, that their signatures to the release pleaded had been obtained by fraud, and that the release was not binding upon them; that the money paid to them thereunder had been tendered back to the company, and that the release had been repudiated and revoked as soon as they discovered the fraud and the true nature of the instrument by them signed. The record now before us recites that:

"The case was tried to a jury at the November term, 1892, which was a mistrial, the jury failing to agree. At that trial the issue as to the release * * * was submitted to the jury. The court, being of the opinion that such submission was improperly made, the facts disclosed showing that the release was not properly obtained, declined to allow counsel to present the issue at this trial. This ruling was made when plaintiff's counsel was opening the case to the jury, and defendant's counsel then and there excepted to the ruling. The court suggested to counsel for defendant that the evidence relating to the release at the first trial be put into this bill, to enable the court of appeals to decide on the sufficiency of such evidence. Defendant's counsel declined to proceed in that manner."

The record further shows that after the plaintiffs had concluded their testimony in chief the defendant's attorney, among other proof, offered a release signed by the plaintiffs, Charles W. and Alice

Ives, which conformed in every respect to the release pleaded in the defendant's answer, and was, on its face at least, a good and sufficient discharge of the cause of action stated in the petition. The court rejected the offer of the release, declined to allow it to be read to the jury, and the defendant's attorney thereupon duly excepted. This was a clear error, in consequence of which the judgment against the defendant company must be reversed. By the ruling in question the defendant was obviously deprived of the right to prove one of the defenses pleaded in its answer, which it was entitled to make good if it could do so, and the reading of the release to the jury was a necessary step in that direction. The suggestion of the trial judge that the issue as to the validity of the release be submitted to an appellate court, if found necessary, on the testimony in relation thereto adduced at the first trial, was doubtless a very reasonable suggestion, and made for the purpose of saving time and expense; but the difficulty is that it rested with the defendant to assent or dissent to the proposal, and it appears to have dissented. The court had no power to enforce the suggestion in question in opposition to the wishes of the parties to the suit or either of them. The judgment is therefore reversed, and the cause remanded, with directions to grant a new trial.

AHLHAUSER v. BUTLER et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 154.

REVIEW ON APPEAL—ATTORNEY AND CLIENT—NEGLIGENCE.

Whether an attorney is guilty of negligence in his management of a suit is a question of fact, not reviewable on appeal.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by William Ahlhauser against William Allen Butler, Thomas E. Stillman, Thomas H. Hubbard, John Notman, Adrian H. Joline, Wilhelmus Mynderse, and William Allen Butler, Jr. Defendants obtained judgment. 57 Fed. 121. Plaintiff brings error.

F. W. Von Cotzhausen, for plaintiff in error.

Frank M. Hoyt and Quarles, Spence & Quarles, for defendants in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. The court is satisfied to affirm the judgment of the circuit court in this case, upon the opinion of the judge before whom the case was tried, reported in 57 Fed. 121, with this observation: That the case does not present itself here, as in the court below, upon the facts and the law together. The court below has found the facts, and that finding has the effect of the verdict of a jury. Appellees' liability turned upon the ques-

tion of negligence in their practice as attorneys in the cases. That question is one essentially of fact, which has been found by the court in favor of the appellees (defendants below), and cannot be reviewed here. That court found that the defendants were not guilty of any negligence or unskillfulness, either in the commencement or subsequent management of the cases. This court cannot go behind that finding to review the evidence. That is the settled law of this court and of the United States supreme court. We have no power to review the finding of a trial court upon questions of fact. We can only inquire whether the facts found are sufficient to support the judgment. We are satisfied that the findings of fact are supported by the evidence, and that the court has properly applied the law. *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837; *Reed v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641, and cases cited; *Skinner v. Franklin Co.*, 6 C. C. A. 118, 56 Fed. 783, and cases cited. The judgment of the circuit court is affirmed.

ATCHISON, T. & S. F. R. CO. v. MYERS.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1894.)

No. 120.

1. REVIEW ON APPEAL—MOTION FOR PEREMPTORY INSTRUCTION—WAIVER.
A defendant who introduces evidence in defense thereby waives his motion to instruct the jury at the close of plaintiff's case to find for the defendant.
2. SAME—BILL OF EXCEPTIONS—PRESUMPTION AS TO COMPLETENESS.
In the absence of a statement to that effect a bill of exceptions is presumed not to contain all the evidence.
3. EXPERT EVIDENCE—COUPLING CARS.
Expert evidence is not competent to prove that a particular mode of coupling cars is specially dangerous.
4. MASTER AND SERVANT—RAILROAD COMPANY—INSPECTION OF FOREIGN CARS.
A railroad company is not responsible to its switchman for injuries caused by defects in a foreign car, if it has inspected the car, and warned him of its defects.
5. SAME—RISKS OF EMPLOYMENT—INSTRUCTIONS.
Where a switchman sues for injuries caused by a defective foreign car, the jury should be instructed as to his assumption of the usual hazards of the service.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This was an action on the case by William Myers against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff obtained judgment. Defendant brings error.

This action was begun by William Myers in the circuit court of Hancock county, Ill., and was removed by the plaintiff in error into the circuit court of the United States for the southern district of Illinois on account of the diverse citizenship of the parties. It was brought to recover damages for the loss of his arm, which was crushed between the deadwoods of two foreign cars which Myers was attempting to couple in the railroad yards at Streator, where he was employed as a switchman. The declaration contained three

counts. The defect complained of was alleged to consist in the unsafe and dangerous condition of the deadwoods on the moving car, which was unknown to plaintiff, in that one of the bolts which fastened the deadwood to the car was broken, or its nut had come off, so that the outer end of the bolt was loose, and projected about four inches, making the same extremely dangerous. That, in making the coupling in the usual and ordinary manner, it was necessary to step between the cars, and lift the link in the standing car, and enter it in the drawbar of the moving car as it came against the standing car, and then quickly raise the arm up so as to avoid injury from the contact of the deadwoods. That in making the coupling the plaintiff placed himself in the proper position, and held the link until the moving car came close enough to allow the entrance of the link into the drawbar, and then attempted quickly to raise his arm out of danger; but his arm and sleeve were caught by the broken bolt in the deadwood, and held until the deadwoods, coming together, forced the bolt entirely through his arm, and crushed it so it had to be twice amputated. He alleged that he used due care to avoid injury. He avers that it was the duty of the defendant to have and keep the car in safe repair, which it negligently failed to do. In the third count he alleges that he believed the car was in safe condition and good repair, and that he acted on such belief in making the coupling.

It was shown on the trial that the defendant in error was injured a few minutes after 4 o'clock p. m. of February 22, 1890, while it was yet broad daylight. He had worked as a railroad brakeman and switchman for three years, and began switching in the Streator yards in January, 1890. His duty as switchman was to go on and about the cars in the yard; to assist in transferring them; to couple and uncouple cars, and do all such work in connection with the trains, cars, and yard as might be required, and, as such, that it became his duty to make the coupling in which he was engaged when injured. A Delaware, Lackawanna & Western car had the loose bolt. The deadwoods on it came out even with the drawbar, and were 12 to 18 inches wide and about 18 inches up and down. They were fastened to the car with four or six bolts. He first saw this car in the Santa Fé yard on the morning of the day of the accident. He heard the car inspector make a statement that morning in relation to this car. It was about 7 o'clock in the morning, and he was close to it. The foreman, Branz, and the yard master, Case, were present. The car inspector said the car was in bad order. He told Mr. Case: "Case, this car is in bad order, and we have no right to fix the car." The yard master had charge of the switching, and Branz, foreman of the switch engine, acted under him, and plaintiff received his orders from the foreman. The car inspector marked both sides of the car, with chalk: "Bad order. Return to 'Three I.'" Myers saw the car in the yard two or three times during the day. The accident occurred on the "Three I" Y, which connects the Santa Fé with the Wabash Railroad. The car came from the "Three I" Railroad. He knew the car was to be taken back where it came from, and that it was set out for that purpose. Mr. Whalen was car inspector at Streator. He had been car inspector of the Santa Fé 12 years. He saw this car in the Santa Fé yards on the morning of February 22, 1890. He inspected the car, and marked it: "Bad order. Return to 'Three I.'" The brake connections were defective. That was all that he found wrong. He looked this car over when inspecting it, and found no other defect. The plaintiff testified that his sleeve and arm were caught, while attempting to couple the cars, by a bolt which projected about two or three inches from the deadwood of this foreign car, and in consequence he could not remove his arm in time to avoid the injury. He claimed that he did not know of the defect, and that the coupling was required to be made so quickly that he had no opportunity to discover it. His arm was crushed between the elbow and wrist, and was twice amputated above the elbow. On the trial the plaintiff in error called William Reilly, a yard master of the Wabash railroad, who had had 30 years' experience as switchman and yard master, and asked him what his duties as yard master were with relation to coupling and uncoupling cars, and the manner of doing the same; and, upon objection thereto, counsel stated that he offered to prove in answer to the question the following: "I offer to prove by the witness that, in coupling cars such as these two

were, it was both unusual and unnecessary, and especially dangerous, for a person to attempt to make the coupling by placing his arm between the deadwoods, and that the usual and proper way to make it would be to lift the link by reaching over and above the deadwood, or under and around the deadwood." Leave to prove facts as above stated was denied by the court, to which ruling the plaintiff in error excepted. When the defendant in error rested his case the plaintiff in error moved the court to take the case from the jury, on the ground that a prima facie case for recovery had not been made out. The court overruled the motion, and an exception was reserved. At the conclusion of the evidence the plaintiff in error again moved the court to give the jury a binding instruction to return a verdict in its favor, which motion was overruled and an exception taken.

During the closing argument to the jury, counsel for defendant in error said: "Even if they had no report [referring to the Santa Fé road], they can, by their books, trace that car from that moment to the present day. They can go to that other company, and find out where that car was every hour from the time this injury occurred up to the present time. They can show where it was repaired, if it was repaired, and, if it was not repaired, they can show that fact by competent evidence. They have not done it. They can go to the Wabash, or the road it belongs to, where every number of the cars is kept in a book, and every time it is inspected is recorded, and they can bring that report here, and show whether there was a bolt loose there at that time. If there was no bolt loose there at that time, and no bolt loose since that time, they can show that fact, and it would be pretty strong evidence that this man was mistaken." Specific objection was made to the foregoing statement on the ground that there were no such facts in evidence before the jury, but the court declined to interfere, to which the plaintiff in error excepted.

Among the instructions given by the court, and excepted to by the plaintiff in error, was the following: "It is the duty of the defendant to furnish its employes with proper machinery or instrumentalities for their use in the work assigned them, and to see to it that they are kept in a reasonably safe condition, or in reasonable repair. And when an employe, in the proper and diligent discharge of his duty, is injured from the negligent failure of the company to perform this duty, it is liable." At the proper time the plaintiff in error asked the court to give three written instructions to the jury. The third instruction is the only one which it is necessary to set out. It is as follows: (3) "The plaintiff was employed by the defendant as a switchman in its railroad yards at Streator, and as such it became and was his duty to couple and uncouple the cars handled by the defendant there. By accepting such employment, he assumed its natural and usual risks and hazards, and, if you believe from the evidence in this case that the injury which the plaintiff received was due to the natural and usual hazards and risks of his employment there as switchman, then the plaintiff cannot recover in this action, and your verdict should be for the defendant." The court refused to give the above instruction, and a proper exception was reserved.

Edgar A. Bancroft and Eldon J. Cassoday, for plaintiff in error.

A. W. O'Hara, Timothy J. Scofield, M. J. Wade, and Burns & Sullivan, for defendant in error.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

After making the foregoing statement the opinion of the court was delivered by

BAKER, District Judge. No available error is presented by the refusal of the court, at the conclusion of the evidence of the defendant in error in opening his case, to instruct the jury to return a verdict for the plaintiff in error. The plaintiff in error did not stand upon the ruling of the court, but having elected to proceed with the

case and introduce its evidence, and take the chances of a verdict in its favor, it has waived its right, if any it had, to avail itself of the alleged error in the ruling of the court. *Railroad Co. v. Charles*, 2 C. C. A. 380, 51 Fed. 562; *Elmore v. Grymes*, 1 Pet. 469; *De Wolf v. Rabaud*, Id. 476; *Crane v. Morris' Lessee*, 6 Pet. 598; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534; *Bogk v. Gussert*, 149 U. S. 17, 13 Sup. Ct. 738; *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591.

And, if the plaintiff in error had elected to stand upon the ruling of the court in refusing to instruct the jury to return a verdict in its favor, no available error would be presented, because the bill of exceptions does not affirmatively show that the evidence embodied in the record is all the evidence that the plaintiff had introduced at the close of his opening of the case. If the alleged error was otherwise available, it could not be considered by us, unless it is made to appear that the entire evidence which had been introduced by the plaintiff at the close of his opening of the case was brought here by a proper bill of exceptions. No principle of law and no rule of court requires the entire evidence to be embodied in a bill of exceptions, and hence the presumption is that the bill of exceptions does not contain all the evidence before the court at the time the motion was made. To overcome this presumption the bill of exceptions should contain a statement, at the close of the plaintiff's evidence in opening, to the effect that the above and foregoing is all the evidence given by the plaintiff at the time the motion was made.

At the close of the evidence the plaintiff in error asked the court to give a binding instruction to the jury to return a verdict in its favor. The defendant in error insists that this alleged error is waived because the plaintiff in error asked the court to give a number of instructions upon other points upon which it relied for defense, and took its chances of securing a favorable verdict from the jury. It is not necessary to determine whether or not a prayer for a binding instruction is waived by the defendant for the reasons above stated, and we decline to express any opinion on the question. The assignment is unavailing, for the reason that the bill of exceptions before us does not affirmatively show that it contains all the evidence given on the trial of the cause, and without that we cannot say that the court erred in its ruling.

It is insisted that the court erred in refusing to permit the plaintiff in error to prove that in coupling the cars it was both unusual and unnecessary, and especially dangerous, for a person to attempt to make the coupling by placing his arm between the deadwoods, and that the usual and proper way to make it was to lift the link by reaching over and above, or under and around, them. The witness Reilly was an expert, and was called to testify as such. His knowledge and experience fairly entitled him to that position, if the subject on which he was called to testify was a proper one for expert testimony. It is no objection that the expert is asked a question involving the one to be decided by the jury. It is upon sub-

jects requiring special knowledge or experience, on which the jury are not as well able to judge for themselves as is the witness, that an expert is permitted to testify. Evidence of this character is most frequently given upon matters requiring medical skill or scientific knowledge, but it is by no means limited to that class of subjects. It is competent upon the question of the value of land (*Bearss v. Copley*, 10 N. Y. 93); or in regard to the value of a particular breed of horses (*Harris v. Railroad Co.*, 36 N. Y. Super. Ct. 373); or upon the value of professional services (*Jackson v. Railroad Co.*, 2 Thomp. & C. 653); or on questions involving nautical skill (*Moore v. Westervelt*, 9 Bosw. 558); or on the necessity of a jettison (*Price v. Hartshorn*, 44 N. Y. 94); or in regard to the proper and usual way of removing paint (*First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572); or to show that it was good seamanship and prudent, under the circumstances, to have a vessel towed (*Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534); or to show the usual manner of making the coupling of cars (*Hamilton v. Railway Co.*, 36 Iowa, 36, on page 37; *Railway Co. v. Husson*, 101 Pa. St. 1; *Railway Co. v. Johnson*, 38 Ga. 409, 435; *O'Malley v. Railway Co.*, 43 Minn. 289, 45 N. W. 440; *Simms v. Railway Co.*, 26 S. C. 490, 2 S. E. 486; *Railroad Co. v. Smith*, 22 Ohio St. 227; *Crutchfield v. Railway Co.*, 78 N. C. 300; *Doyle v. Railway Co.* [Minn.] 43 N. W. 787).

But conceding that it was competent for the witness to have testified in regard to the usual, or the usual and proper, way of making a coupling with a car having deadwoods, still we do not think any available error was committed in rejecting the offered testimony. The offer must be treated as an entirety, and if any part of it was inadmissible the court committed no error in rejecting the entire offer. The court was under no obligation to separate that which was admissible from that which was inadmissible. It was not competent for the witness to testify that it was unnecessary, and especially dangerous, to make the coupling in the manner in which it was made. When the jury were informed in regard to the manner in which the coupling in question was made, and also in regard to the usual and proper way in which to make it, they could determine as well as the expert whether or not the method adopted was unnecessary, and especially dangerous. It was a question for the jury alone to determine, when the circumstances attending the coupling, and the usual manner of making it, were in evidence, whether or not the defendant in error adopted a method of coupling which was unnecessary, and especially dangerous.

It is the duty of the court to control and direct the argument of counsel in the interest of justice, and whenever counsel, especially in the closing argument, overpass the limits of fair debate, either by stating as facts matters not in evidence, or by making unwarranted charges against parties or witnesses, to the manifest perversion of justice, the court ought unhesitatingly to interfere, and see to it that the guilty party takes no advantage from his wrong. When the party who is injured by the wrong invokes the protection of the court by an objection, it will not do for the court to remain silent,

leaving the matter of misconduct with the offending party and the jury. The court is bound to interpose when called upon, and, if an improper and injurious statement has been made without excuse, the effect of it should be erased from the minds of the jury, at the time, by a clear and emphatic admonition from the court. Manifestly, this court can lay down no definite rule on the subject. It will not in any case be presumed that the discretion over this subject committed to the trial court has been abused. Upon a careful consideration, we are unable to say that the court abused its discretion in refusing to interpose in consequence of the statements of counsel appearing in the record.

Touching the company's duty to furnish its employes with cars fit for use and in proper repair, the court said:

"It is the duty of the defendant to furnish its employes with proper machinery or instrumentalities for their use in the work assigned them, and to see to it that they are kept in a reasonably safe condition, or in reasonable repair. And when an employe, in the proper and diligent discharge of his duty, is injured from negligent failure of the company to perform this duty, it is liable."

The master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair. He is under no absolute obligation to furnish safe instrumentalities and working places, nor is his duty an absolute one to keep them in a safe condition of repair. He is not an insurer of their safety. Referring to the cases of *Hough v. Railway Co.*, 100 U. S. 213, 217; *Railroad Co. v. Herbert*, 116 U. S. 642, 647, 648, 6 Sup. Ct. 590; *Kane v. Railway Co.*, 128 U. S. 91, 94, 9 Sup. Ct. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118,—the supreme court, in *Railroad Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, say:

"The general principles of law by which the liability of an employer for injuries to an employe, growing out of defective machinery, is tested, are well settled by those decisions. Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant. But if the employe knew of the defect in the machinery from which the injury happened, and yet remained in the service, and continued to use the machinery, without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery."

The rule of duty embodied in the charge will be found stated in substantially the form employed by the court in numerous decisions, and while, as an abstract proposition, in cases to which it is ap-

plicable, it is not erroneous, it is a form of expression from which a jury might well understand that the employer was bound in every case to furnish safe machinery to the employé. The instruction, however, does not state the law applicable to the facts of the present case correctly, and hence it is misleading and erroneous. The car which occasioned the injury having been received by the plaintiff in error, in the regular course of business, from another company, for transportation over its lines, the receiving company owed to its employés the duty of making proper inspection, and giving notice of its defects, if any were found. *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287. If the car came to it with defects visible, or discoverable by ordinary inspection, its duty was either to return the car to the company from which it came, or to repair it sufficiently to make it reasonably safe. The inspection which the company is required to make of a foreign car tendered to it by another company for transportation over its lines is not merely a formal one, but it should be made with reasonable diligence, so that its employés will not be exposed to perils which reasonable care would have guarded against. The company receiving a foreign car can be held responsible, by an employé who sustains an injury from its defects, only for failure to furnish a competent inspector, or for failure of the inspector to exercise due care in making the inspection. It is not, however, to be held responsible for hidden defects, which could not be discovered by such an inspection as the exigencies of traffic will permit. *Railway Co. v. Fry*, 131 Ind. 319, 28 N. E. 989. The duty of the plaintiff in error, therefore, is not that of furnishing proper machinery and instrumentalities for service, and seeing that the same are kept in safe repair, but its duty is one of inspection; and this duty is performed by the employment of sufficient competent and suitable inspectors, who are to act under proper instructions, rules, and superintendence. If it has furnished such inspectors, and if a proper inspection is made, and due notice of defects have been given to the employé, its measure of duty is satisfied. It is held by courts of high authority that it has performed its whole duty in respect to foreign cars when it has furnished sufficient competent and suitable inspectors, acting under proper instructions, rules, and superintendence, and that such inspectors must be deemed fellow servants engaged in a common employment with brakemen and switchmen. *Mackin v. Railroad Co.*, 135 Mass. 201; *Keith v. Railroad Co.*, 140 Mass. 175, 3 N. E. 28. The true rule, however, is stated in the case of *Railroad Co. v. Herbert*, 116 U. S. 642, 652, 6 Sup. Ct. 590. It is there said:

"If no one was appointed by the company to look after the condition of the cars, and to see that the machinery and appliances used to move and to stop them were kept in good repair and working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been, in the highest degree, culpable. If, however, one was appointed by it, charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence, and imposed a liability upon it."

At the proper time the plaintiff in error asked the court to instruct the jury as follows:

"The plaintiff was employed by the defendant as a switchman in its railroad yards at Streator, and as such it became and was his duty to couple and uncouple the cars handled by the defendant there. By accepting such employment, he assumed its natural and usual risks and hazards, and, if you believe from the evidence in this case that the injury which the plaintiff received was due to the natural and usual hazards and risks of his employment there as a switchman, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The court refused to give this instruction, and an exception was duly reserved, and this ruling has been properly assigned here. The evidence showed that the defendant in error was employed as a switchman in the yards of the plaintiff in error at Streator at and prior to his injury, and that it was his duty to couple and uncouple the cars handled by it in such yard. According to the usual course of business, well known to the defendant in error, and notorious, the plaintiff in error was in the habit of receiving many foreign cars daily for transportation over its lines. He well knew that it was the practice of the railroad company to cause all such cars to be inspected when offered, and if they were found to be defective they were returned to the connecting carrier from which they came. The plaintiff in error was therefore entitled to have the court instruct the jury in regard to the rights and responsibilities of the parties, if they believed that the injury was due to the natural and usual hazards and risks of the service. The cases in support of the doctrine that an employé assumes all the natural and usual risks and hazards of the service which he undertakes are so numerous, and the principle is so elementary, that we will not incur the opinion with citations.

Some other questions have been presented by the assignment of errors, and argued by counsel; but as the case will have to be reversed for the errors above pointed out, and as the alleged errors may not occur upon another trial, we do not deem it necessary to express any opinion upon them. The judgment of the court below is reversed, at the costs of the defendant in error, and the case remanded to the court below, with instructions to grant a new trial.

UNION PAC. RY. CO. v. HARRIS.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 439.

1. APPEAL—OBJECTIONS NOT RAISED BELOW.

The objection that an action, or any material issue therein raised by the pleadings, is cognizable at law, instead of in equity, or vice versa, is waived by a failure to interpose it in apt time in the court of original jurisdiction.

2. RELEASE—EVIDENCE OF FRAUDULENT PROCUREMENT.

A finding in an action for personal injuries that a release was procured by fraud will not be disturbed on error, where it appears that plaintiff was unconscious for many hours after the accident, and, because of the severity of the pain, was kept under narcotics for two

weeks or more, and three days after the accident, while all others save his nurses were denied access to him, defendant's agents procured his signature to the release, which there was evidence tending to show he could not read and did not read, and which was not read to him, and was signed in reliance upon the representations that the accident was caused by another company, which was alone responsible, and that the release was only a receipt for the estimated amount of plaintiff's medical expenses and loss of time.

3. APPEAL—ESTOPPEL TO ALLEGE DEFECT IN EVIDENCE.

Where plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence.

4. SAME—REVIEW OF EVIDENCE.

A bill of exceptions stating only that certain of plaintiff's witnesses "gave evidence tending to show" is unavailing for the purpose of showing that the evidence was not sufficient to warrant a verdict for plaintiff.

In Error to the Circuit Court of the United States for the District of Colorado.

Willard Teller (Harper M. Orahoad, E. B. Morgan, and John M. Thurston, on the brief), for plaintiff in error.

William B. Felker (William L. Dayton, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the circuit court of the United States for the district of Colorado by Robert E. Harris against the Union Pacific Railway Company, to recover for personal injuries received by him while he was a passenger on defendant's train. The plaintiff recovered judgment in the circuit court, and the defendant sued out this writ of error.

The complaint alleged, in substance, that the company ran one or more of its freight cars out on its side track, known as the "Silver Age Mill Siding," and negligently left the same in such a position that they obstructed the main track, or that they were left in an insecure and unsafe position on the side track, and negligently permitted to run upon the main track, so that, when the train upon which the plaintiff was a passenger came along, it ran into these freight cars, derailing and breaking to pieces the car in which the plaintiff was riding, and inflicting upon him serious and permanent injuries to his mind and body. In its original answer the defendant denies generally all negligence, but "admits that it had standing upon its side track, at about the place mentioned in said complaint, one or more freight cars, but denies that the said freight cars were left insecure or unsafe, or in such a position as to interfere with the passage of the train of cars upon which the plaintiff was riding." The proof is plenary that the accident was caused by the passenger train coming in collision with the freight cars on this siding, in the manner set out in the complaint. The defendant, in its answer, admits "that it had standing upon its side track" the freight cars in question, and rests its defense on the issue of negligence solely upon a denial of the charge that the freight cars

were left on the side track in an insecure or unsafe position, or in such a position as to interfere with the passenger train. The answer contains no allegation or suggestion that any other company had any control over this side track or these freight cars, or that any other company was in any manner responsible for the negligence which resulted in the collision. Upon this state of the pleadings and proofs, it was not error for the lower court to tell the jury there was no room for controversy over the question of the defendant's negligence. The remark of the learned judge who tried the case at circuit, that "the act of negligence of the servants of the mining company is to be ascribed to the defendant," must be read in connection with that portion of the charge which precedes and follows it; and, when so read, it means that, if the defendant committed the management and control of its cars on its side track to the servants of the mining company, their negligence was to be ascribed to the defendant. Further consideration of this issue is unnecessary, as we understand the learned counsel for the plaintiff in error, upon the argument, to concede that defendant's negligence was sufficiently established.

The defendant filed a supplemental answer, in which it pleaded in bar of the action a release executed by the plaintiff four or five days after the accident, by the terms of which he acknowledged the receipt of \$250 in full settlement of the injuries he received and the property he lost by the accident, "and in full of all claims and demands of whatsoever character." To this defense the plaintiff replied—First, that at the time he executed the release he was not mentally capable of making a contract; and, second, that the release was obtained from him by fraud; that the defendant's agents represented to him that the defendant was not liable to the plaintiff for the injuries he had sustained, because, as they asserted, the accident was caused by the negligence of another company, that had charge of the side track and freight cars, and which was alone responsible for the injury sustained by the plaintiff; that the defendant's agents further represented to the plaintiff that the paper he was asked to sign was only a receipt for the amount of what it was estimated the medical services rendered him would cost, and for the expenses of sickness and loss of time for two weeks, and for nothing else; and that he signed the paper relying on the truth of these representations, being unable to read it himself, and no one reading it to him.

The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower court. The defendant did not demur to the plaintiff's replication upon the ground that a court of law could not try the issues it presented. These issues were tried to the jury without objection, and it is now too late to object for the first time in the appellate

court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, *Insley v. U. S.*, 150 U. S. 512, 14 Sup. Ct. 158; *Preteca v. Land-Grant Co.*, 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486. If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the appellate court. The general principle is now well established that an appellate court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived. *Elliott*, App. Proc. §§ 658, 679, 690, and citations; *Brown v. Lawler*, 21 Minn. 327; *Brown v. Nagel*, Id. 415; *Weaver v. Kintzley*, 58 Iowa, 191, 12 N. W. 262; *Town of Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.* (N. Y. App.) 29 N. E. 121; *Sexton v. Pike*, 13 Ark. 193; *Creely v. Brick Co.*, 103 Mass. 514. In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower court to try the issues presented by the replication, the objection would have been of any avail. We express no opinion upon that question.

A further contention of the plaintiff in error is that there was not sufficient evidence to warrant the court in submitting to the jury the issue as to whether the release was procured from the plaintiff by fraud. The injuries to the plaintiff were of the most serious character, and are permanent. He was unconscious for many hours after the accident, and when he recovered consciousness the pain from his injuries was so severe that he was compelled to take narcotics, which had their customary effect. While they deadened the sensibilities for the time being, they also deadened or dulled his senses. This treatment continued for two weeks or more. Three or four days after the accident, while this treatment was going on, and while his arms were suspended over a rope stretched across his bed in order to relieve the pressure upon his injured spine, and when he was tortured and racked with physical pain (when not under the influence of opiates), the defendant's agents found their way into his sickroom, from which his friends and all others, save his nurses, had been excluded, by order of his physician, on account of the serious character of his injuries, and procured his signature to the release. There is evidence tending to prove the averments of the replication, and to show that he did not and could not read the release, and that it was not read to him, and that he signed it relying upon the truth of the representations as to its contents made by the defendant's agents, which are set

out in the replication, and which need not be repeated. The issue as to whether the release was procured by fraud was therefore properly submitted to the jury, and, upon the evidence in the record, we cannot disturb their finding upon that issue.

It is next contended that there was not sufficient evidence to justify the court in submitting to the jury the issue as to the plaintiff's mental capacity to make a binding contract at the time he signed the release. The plaintiff in error is clearly estopped by the record from making this contention. After the defendant had introduced the release, and rested, the record shows that the following proceedings took place:

"The plaintiff was then recalled in rebuttal. Plaintiff's counsel then made the following offer: 'The plaintiff offers to prove by witnesses, Dr. Eskridge and Dr. Hughes, Dr. Kimball and Dr. Pershing, that for the space of ten to fifteen days the plaintiff had not recovered from his injuries, and that his mind was weakened, and that he was unable, from that source alone, to do any business; that in connection with the shock, with the administration of opiates in sufficient amount to cause unconsciousness, that, at the time when defendant claims this agreement was signed, his mind was not in a condition to fully understand or comprehend the terms and conditions of the agreement that was presented to him; and that, had it been read to him, or he had read it himself, he would not have been able to appreciate the force and effect of it.' (Objected to. Objection sustained by the court, and Mr. Felker excepted.) Mr. Felker: I offer to prove by Dr. Kimball that two weeks after the injury he called upon the plaintiff, to examine him in regard to the extent of his injuries, for the United States Accident Insurance Company; that he examined at that time the plaintiff, and found him to be in a mental condition unfit to do any business, or to comprehend and appreciate the force and effect of any business transaction that he might enter into. Mr. Teller: I want to enter my objections—First, on the ground that it would not be admissible anyhow, under any circumstances; and, second, it is specifically inadmissible on account of the state of the pleadings. The Court: I will sustain it. I do not go upon that ground. I think these physicians have testified as fully as they can as to his condition. I do not care to hear anything more from them."

The witnesses were in court, and ready to be called to the witness stand. The offered evidence was competent and material to the issue. It tended strongly to prove the plaintiff's case on the issue we are considering, and it was erroneously rejected by the court on the defendant's objection. The rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence. *Big. Estop.* (5th Ed.) 720; *Thompson v. McKay*, 41 Cal. 221; *Jobbins v. Gray*, 34 Ill. App. 208, 218, 219; *Insurance Co. v. O'Connell*, Id. 357, 362; *Elliott*, App. Proc. § 630. The defendant will not be allowed to thus take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the plaintiff to suffer the consequences. Such a proceeding would be the merest trifling with the court. *Jobbins v. Gray*, *supra*. If the rule were otherwise it would encourage and reward unfounded and groundless objections to the plaintiff's evidence, and tend to promote sharp practice and chicanery.

Upon the question of the sufficiency of the evidence to support

the verdict on the several issues in the case, we may further observe that the bill of exceptions does not show that it contains all the evidence. There is no statement in the bill to that effect. On the contrary, it affirmatively appears that it does not contain all the evidence. The plaintiff, in his testimony in chief, examined several witnesses, touching whose testimony the bill of exceptions states only that they "gave evidence tending to show," or "gave evidence tending to show substantially * * *." The opinion of counsel, who drafted, and of the judge, who signed, the bill of exceptions, as to what the testimony of the witness "tended to show," or "tended to show substantially," cannot be accepted by the appellate court as the equivalent of the testimony of the witness. *Gulf, C. & S. F. Ry. Co. v. Washington*, 4 U. S. App. 121, 131, 1 C. C. A. 286, 49 Fed. 349; *Railway Co. v. Shelton*, 57 Ark. 459, 21 S. W. 876. Such a mode of stating the evidence is proper enough when its only purpose is to show there was sufficient evidence upon which to predicate the instructions given or refused, but it is unavailing for the purpose of showing that the evidence was not sufficient to warrant the verdict of the jury.

The remaining assignments of error relate to the rulings of the court in admitting evidence. A separate statement and consideration of these exceptions is not necessary, as none of them is of any general importance. They have all been considered carefully, and we are satisfied none of them has any merit. The judgment of the circuit court is affirmed.

SIoux NAT. BANK v. CUDAHY PACKING CO.

(Circuit Court, N. D. Iowa, W. D. October 11, 1894.)

1. NEGOTIABLE INSTRUMENTS—DRAFTS.

Where a trust company, by agreement with a packing company, pays the tickets issued by the packing company in payment of purchases at a branch establishment, and the packing company daily issues to the trust company vouchers for such payments, which provide that, when approved and signed, they shall become drafts on the packing company, payable through certain banks, such vouchers, approved and signed, are not negotiable, though assignable under Code Iowa, § 2084.

2. MONEY PAID AND ADVANCED.

A trust company, located at a place where a packing company had a branch, agreed with the packing company to pay its tickets issued for purchases by the branch. Under the agreement there was issued daily to the trust company a voucher for such payments, which provided that, when approved and signed, it should be a draft on the packing company, payable through certain banks. The packing company had a deposit with the trust company, but by their agreement this was not to be a payment of the tickets, being subject only to the draft of the home office of the packing company. The trust company, being insolvent, and not having money to pay the tickets, arranged with plaintiff to pay them, and assigned the packing company's voucher to plaintiff to induce it to make the payment. *Held* that, though the voucher was not negotiable, plaintiff could recover for money paid and advanced for the benefit of the packing company.

Action by the Sioux National Bank against the Cudahy Packing Company on a voucher.

This action was tried to the court, a jury being waived, and the facts developed in the evidence were as follows:

The Cudahy Packing Company had established a branch establishment at Sioux City, Iowa. For the purpose of providing for the payment of stock purchased and packed at Sioux City, the packing company made an arrangement with the Union Loan & Trust Company of Sioux City to pay the tickets issued by the packing company to the persons from whom stock was bought, and, to cover the advances thus made, each day a voucher or draft in the form hereinafter set forth was executed and delivered to the Union Loan & Trust Company, by whom it was forwarded to Chicago for collection. As it would require two or three days to obtain returns from these so-called drafts, it was further agreed that the packing company should keep on deposit with the trust company a sum about equal to the daily advances made to cover the stock tickets; but it was further agreed that this deposit could not be drawn upon by the officers of the packing company residing at Sioux City, but only by the officers at the Chicago office. These arrangements were carried out until about April 24, 1893, when the Union Loan & Trust Company, being in failing circumstances, was unable to take up the tickets issued by the packing company, and thereupon it applied to the Sioux National Bank to advance the amounts needed to cover the outstanding tickets, which the bank agreed to do, and thereupon the voucher or draft held by the trust company was indorsed and transferred to the bank, the same being in the form following:

Exhibit A.

Live-Stock Voucher.

The Cudahy Packing Co.,		Sioux City, Iowa, Apl. 22, 1893.
Sioux City, No. 413.		Debtor to the Union Loan & Trust Co. Treasurer's No. _____
For purchase of live stock this day as follows: 836-190-370-800-226-814-7.12 518		13,509.52
Protested for nonpayment April 25th -93. James J. Barboux, Notary Public.		13,509.52
When approved, dated, and signed, this voucher becomes a draft on the Cudahy Packing Co., of South Omaha, Neb., payable through the Union Stock Yards National Bank, of South Omaha, or the Bankers' National Bank, of Chicago. For 13,509.52		
Noted _____ "_____ (So. Omaha.)	I have compared the record of above purchases, and hereby certify to the correctness of above number, average price, and weight. W. J. Wallace, Buyer.	I have compared the record of above purchases with buyer's report, & checked extensions, and hereby certify to the correctness of above. Chas. E. Morris, Cashier.
Approved for payment. Maurice J. Barrow, Superintendent.	Paid _____ Entered cash _____ Asst. Treasurer.	Sioux City, Iowa, Apl. 24, 1893. Received of the Cudahy Packing Co. thirteen thousand five hundred nine & 52-100 dollars for deposit to your credit in live-stock acct. E. R. Smith, Secy.
Registered Apl. 24th, 1893. Chas. E. Morris (Sioux City.)	Registered 18- (South Omaha.)	

The Sioux National Bank paid all checks drawn on it by the Union Loan & Trust Company for an aggregate amount in excess of the sum of \$13,509.52, there being included therein checks to the amount of \$11,513.62 to cover tickets

issued by the packing company. When the trust company closed its doors, it had on deposit, of money belonging to the packing company, a sum of about \$14,000; but, under the arrangement with that company, this deposit was not to be drawn on to meet the daily advances for stock purchased at Sioux City. The packing company refused to pay the voucher or draft assigned to the Sioux National Bank, and thereupon the bank brought suit to enforce payment; claiming that the instrument was in effect a negotiable draft, and that the bank was entitled to collect the whole amount thereof. The packing company, in its answer, denied that the instrument was negotiable, either under the law merchant or under the statute of Iowa, and set up a counterclaim for the sum due it from the Union Loan & Trust Company.

Joy, Call & Joy, for plaintiff.

Lewis, Holmes & Beardsley, for defendant.

SHIRAS, District Judge. I hold, under the facts of this case, that the draft described and set forth in the petition is not a negotiable instrument under either the rules of the commercial law or the provisions of the statute of Iowa. The fifteenth finding of facts shows that the voucher or draft sued upon was the only one that had been transferred to any third party; and it is clear that it was not the purpose of the defendant company, in issuing these vouchers, that they should be sold or transferred to banks or other parties as a means of raising money on its behalf. I further hold that the voucher or draft is one assignable under the provisions of section 2084 of the Code of Iowa.

The findings of fact show the situation to be as follows: By contract between the Union Loan & Trust Company and the Cudahy Packing Company, the former company agreed to pay the tickets issued by the latter company at Sioux City, Iowa, in payment of stock purchased at that place. Vouchers were issued to cover daily transactions, and were the means by which the Union Loan & Trust Company procured from the Cudahy Packing Company the money used in the daily transactions. The deposit account known as the "Current Account" was not to be used in payment of tickets. Under this arrangement it was the duty of the Union Loan & Trust Company to pay the tickets issued by the defendant company, and upon payment it was entitled to the proper draft or voucher therefor. On the 24th of April, 1893, the Union Loan & Trust Company was insolvent, and had not the money to pay the tickets issued by the Cudahy Packing Company. If it had taken no steps to provide for the payment of these tickets, the result would have been that the Cudahy Company would have had to pay the same, and it would then have been a creditor of the Union Loan & Trust Company for the amount of the current or deposit account. The Union Loan & Trust Company, however, arranged with the plaintiff bank to pay the tickets issued by the defendant company, and for the money to be thus advanced it assigned the voucher or draft sued on, as security. The money advanced by the bank to pay the tickets issued by the Cudahy Company was paid for its benefit; was in fact received by it, in that, if these tickets had not thus been provided for, the defendant company would have been compelled to pay them. Taking into consideration the fact that the Union Loan & Trust

Company was the agency employed by the defendant company to make payment of the tickets issued by it at Sioux City; that the loan and trust company, through its insolvency, became unable to pay the tickets issued by the defendant company; that in order to provide for the payment thereof the trust company arranged with the plaintiff bank to pay these tickets; that the bank in fact paid the tickets, and thereby relieved the defendant company from the payment thereof; that the draft or voucher issued by the defendant was assigned to the bank in order to induce it to advance the money needed to pay the tickets,—it seems to me this condition of affairs will sustain an action for money paid and advanced for the benefit of defendant, under the ruling of the supreme court in *White v. Bank*, 102 U. S. 658. To enable plaintiff to recover, upon this view of the case, the petition should be amended so as to include a count of the nature indicated, and leave is granted to plaintiff to amend in that particular. Assuming that such amendment will be made, I then hold that plaintiff is entitled to recover the sums of money by it actually advanced and used in the payment of tickets issued by the defendant company, which, as I understand the finding of fact, amount in the aggregate to the sum of \$11,513.62, for which sum, with interest at 6 per cent. from April 24, 1893, plaintiff will be entitled to judgment.

WERCKMEISTER v. SPRINGER LITHOGRAPHING CO.

(Circuit Court, S. D. New York. October 4, 1894.)

1. COPYRIGHT—NOTICE—NAME OF PARTY.

The name "Photographische Gesellschaft" (Photographic Company), being the trade-name created by the owner of a copyright, and extensively used by him for many years in his business, is a sufficient designation of the party by whom the copyright is taken out.

2. SAME—RESIDENCE.

The residence of the party taking out a copyright, though a foreigner, need not be stated in the notice.

3. SAME—SALE OF PAINTING—RESERVING COPYRIGHT.

A sale by an author of his painting, reserving the right of reproduction, does not destroy his right of copyright. The purchaser in such case is not a "proprietor," within the copyright law.

4. SAME—PUBLICATION—SALE OF REPLICA.

The right of copyright of a painting is not destroyed by a sale of a replica, or original study or model, differing from the painting in size and style, especially where the right of reproduction is reserved on such sale.

5. SAME—CATALOGUE COPY.

The printing in a salon catalogue, without notice of copyright, of a mere crayon sketch of a painting exhibited in the salon, not intended in any way to serve as a copy of the painting, is not a publication which will work a forfeiture of the right to copyright.

6. SAME—PUBLIC EXHIBIT.

An exhibition of a painting in a public salon is not a publication working a forfeiture of the right of copyright unless the general public is permitted to make copies at pleasure, and such permission will not be assumed in the absence of direct evidence.

This was a suit by Emil Werckmeister against the Springer Lithographing Company for infringement of copyright.

Goepel & Raegener, for complainant.
Boothby & Warren, for defendant.

TOWNSEND, District Judge. This is a bill in equity for the infringement of a copyright. The complainant is a resident of Germany, and has been for many years engaged in the business, under the name of "Photographische Gesellschaft," of publishing copies of paintings after obtaining the rights of publication from the authors. The name "Photographische Gesellschaft" has existed since 1862, and complainant has been the sole proprietor of the business carried on under that name since 1872. It is implied in the testimony that others were associated with him before 1872, but there is no direct evidence on that point. It is not claimed that any other person or persons have done business under said name since 1872. Prior to May, 1892, Edouard Bisson, an artist, made a painting called "Floreal." The painting is an original, artistic representation of the half-length figure of a girl, with flowers falling on her head and lap. In May, 1892, he exhibited the painting in the salon at the Palais de l'Industrie, in the Champs-Elysees, in Paris. While there, he sold the painting, reserving all rights of reproduction. Afterwards, he verbally assigned the exclusive right of reproduction, publication, and copyright, of said painting to the complainant, and confirmed the same by written instrument on July 13, 1892. In June, 1892, he sold to another person the replica or original study or model, which was not in the same style or size as the finished painting, telling the purchaser that all rights of reproduction were reserved. The price paid by complainant for the rights purchased by him was 1,500 francs. Defendant is a lithographic company, and has infringed the copyright by making lithographs of the painting. The points made by defendant's counsel will be considered in their order.

The first objection urged is that the copyright notice, "Copyright, 1882, by Photographische Gesellschaft," is insufficient, because it does not contain the name of the person taking out the copyright. The statute (Act June 18, 1874, c. 301) provides as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a photograph, * * * by inscribing upon some visible portion thereof the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out."

The earlier statutes, which provided for the use of the words "Entered according to act of congress," etc., did not contain the above limitation, "the name of the party by whom it was taken out." This clause seems to have been added for the purpose of preventing any ambiguity as to the character of the notice which should accompany the use of the word "Copyright." The object of the statute was to notify the public of the claim of copyright, and to enable it to ascertain the "party" by whom it was taken out. In this case the party was the Photographische Gesellschaft, or Photographic Company, said name being the trade-name created by complainant, and extensively used by him in his business for many

years. In *Scribner v. Henry G. Allen Co.*, 49 Fed. 854, it appeared that Charles Scribner was at one time doing business under the name of Charles Scribner's Sons, and that during this period he bought the right to obtain a copyright upon a certain book, and did the various acts required to copyright said book, in the name of "Charles Scribner's Sons." Judge Shipman held the notice sufficient. He says:

"At common law, individuals are permitted to carry on business under any name or style which they may choose to adopt; and, if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used."

The principle there stated is applicable to the present case. I think said notice is sufficient.

The residence of the party is not required to be stated, and, if any person in America desires to ascertain who claims the copyright of this painting, he will much more readily succeed if informed that the owner is Photographische Gesellschaft, than if he is informed that it is Emil Werckmeister. *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279; *Black v. Henry G. Allen Co.*, 42 Fed. 618; *Carte v. Evans*, 27 Fed. 861.

Defendant next insists that complainant is neither the author, inventor, designer, or proprietor of the painting, nor the assign of any such person, within the meaning of the statute. The objection presents the novel question whether, under the statute, the artist could sell the painting to one person, and the right to obtain the copyright to another. It is claimed by the defendant that a copyright can only be obtained by the proprietor of the painting, and that, after the author had parted with the right of property in the painting, he could have no right of copyright remaining; that, until the copyright is actually taken out, the right of property in the painting and the right of copyright are inseparable; that, after the sale of the painting, the purchaser was the only person who had the right to copyright it, or to transfer any right of reproduction or copyright. This raises a question as to the meaning of the word "proprietor" in the statute. The intellectual conceptions of an author are his absolute property. He may hold them captive in his brain, or he may release them, and express them by outward signs. In the latter case the common law protects him against duplication or publication by any other parties without his consent; but, if he sets them free by unrestricted publication, he abandons his property in them to the public. The law undertakes to encourage the publication of works of this character by providing that upon certain conditions no one but the author, or one deriving the right from him, shall have the liberty of publishing or copying his works for a certain time. The copyright thus secured to an author by statute is an incorporeal right, not a corporeal thing. At the same time it is property capable of being assigned by the author at his pleasure. It cannot, like tangible property, be made the subject of seizure and sale on execution. The sale of this painting on execution, for instance, would not pass the title to the copyright, even if the copyright had been taken out before

such sale. *Ager v. Murray*, 105 U. S. 126; *Stephens v. Cady*, 14 How. 531. It will not be denied that either the author or any unconditional purchaser of the painting might have originally copyrighted the painting, and then sold it, either retaining the copyright or selling it to another purchaser. The statute manifestly does not intend to vest the right to a copyright in two persons. When there is a "proprietor" of a painting, within the meaning of the statute, the right of the author must cease. Did the purchaser in this case become the "proprietor," within the meaning of the statute? I think not. I think by "proprietor," in this statute, is intended the person who not only obtains the right to physical possession of the painting, but the common-law rights of publication or preventing publication which belong to the author. I do not think that these common-law rights absolutely and of necessity accompany the title to the canvas and coloring matter which constitute the painting. In *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784, it is said that "the author or proprietor of a manuscript or picture possesses that right [to sell and transfer the same] as fully and to the same extent as the owner of any other personal property. The sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions." And this case throughout implies that there may be a transfer of the painting itself without the common-law rights of publishing or restricting publication. The opinion in *Stephens v. Cady*, 14 How. 529, strongly sustains this view. *Drone*, Copyr. 240. "No disposition—no transfer—of paper upon which the composition was written or impressed (though it gives the power to print and publish) can be construed a conveyance of the copy without the author's express consent to print or publish, much less against his will." *Millar v. Taylor*, 4 Burrows, 2396. "Copy," in above quotation, seems to signify the common-law rights of the author. The case of *Yuengling v. Schile*, 12 Fed. 97, implies throughout that the ownership of the painting itself does not necessarily carry with it the right to copyright. If, then, the purchaser of this painting, without the right of reproduction, did not become the owner of the right to copyright, the right was destroyed or remained in the author. According to the literal words of the statute, he still had this right. He was the author of the painting, and there was no proprietor or assign. He retained the common-law right to prevent publication, or he could give it to the public. He, and he only, could furnish the consideration—the publication—in return for which the public confers the right of copyright. Unless he could have a copyright, the right was destroyed, and the benefit the public might receive from a duplication of the painting was lost. Such a limitation of the right of copyright would tend to defeat the liberal purposes of the statute. The purchaser of a work of art is not ordinarily the one who cares to make or sell copies thereof. The purchaser of a drama may not care to engage in the publication of the manuscript, and yet, if the author may not dispose of his separate and distinctive rights to separate persons, both he and the public will be deprived of the benefit which arises from the exchange of his common-law rights for the

rights given by the statute. I can see no inconvenience and no violation of principle in allowing the author to sell his painting, and retain the right to copyright, any more than in allowing an inventor to sell his model, or to make his first machine for another person, and still retain the right to patent his invention.

Defendant claims, thirdly, that the sale of the replica was a publication by the author which destroyed the right to copyright. The sale of the replica was made subsequent to the oral transfer of the rights of reduplication which gave the right to a copyright. But, if it be necessary that these rights be assigned by writing (which was not done in this case until later), the replica was not a copy of the painting, but was made before the painting, for assistance to the author in producing the painting. It differed from the painting in size and style, and was itself an original painting, of which the author had the common-law right to prevent a reproduction. It was sold by him, reserving any right of reduplication, and such a sale was not a publication even of the replica, and certainly not of the painting.

Defendant next says that there was a publication of a copy of the painting in the salon catalogue, without a copyright notice, and before the taking out of a copyright. This was an illustration not taken from the painting, but from a very superficial crayon sketch printed in the catalogue of the salon where the painting was exhibited prior to the assignment to the complainant. It was not intended to be a copy of the painting. The purpose of the catalogue was merely to furnish to the holder of the catalogue information regarding the paintings, or to enable him to find the paintings desired, and perhaps to recall the paintings to the memory afterwards. It was not intended to serve in any way as a copy of the painting. No one would think of considering it as a work of art. Such a printing would at most be a qualified or limited publication, which would not work a forfeiture of the right of copyright. Such use of catalogue is under the implied qualification that the privilege shall not be extended beyond the purpose for which it was granted. In *Falk v. Engraving Co.*, 4 C. C. A. 648, 54 Fed. 890, a publisher sent to retail dealers an exhibition card containing copies, in very reduced sizes, of photographs, from which the dealers were requested to make their orders. The card did not contain the copyright notice in the language prescribed by statute. Judge Shipman says:

"This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which it contained, within the meaning of this section. The statute refers to a published edition, which is an edition offered to the public for sale or circulation."

Defendant has not claimed that the exhibition of the painting in the salon at Paris was a publication, so that it is unnecessary to decide that point. It would seem that such an exhibition would not be a publication unless the general public was permitted to make copies at pleasure. In the absence of direct evidence, such permission will not be assumed. It would seem that such exhibition of the painting and use of the catalogue were under an implied quali-

fication that the use should not be extended beyond the purpose for which it was granted, and that such special use did not constitute publication. See *Parton v. Prang*, 3 Cliff. 549, Fed. Cas. No. 10,784; *Abernethy v. Hutchinson*, 1 Hall & T. 28; *Drone*, Copyr. 287; *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Kiernan v. Telegraph Co.*, 50 How. Pr. 201; *Tompkins v. Halleck*, 133 Mass. 32.

Lastly, defendant says that there is no direct evidence that their lithographs were copied from the painting. In the absence of any evidence whatever on the part of the defendant, the proof offered by the complainant is sufficient.

Let there be the usual decree for an injunction and an accounting.

In re BODEK.

(Circuit Court, E. D. Pennsylvania. October 11, 1894.)

1. ALIENS—NATURALIZATION PROCEEDINGS.

An applicant for naturalization is a suitor who, by his petition, institutes a proceeding in a court of justice for the judicial determination of an asserted right, and such petition must allege the existence of all the facts, and the fulfillment of all the conditions upon which the statutes (Rev. St. §§ 2165, 2167) make the right dependent, and must be supported by legal proofs of the facts on which the petition rests.

2. SAME—EXAMINATION.

The applicant's oath to support the constitution of the United States will not be accepted if, upon examination, it appear that he does not understand its significance, or is without such knowledge of the constitution as is essential to the rational assumption of an undertaking to support it; and the court will not admit the applicant to citizenship without being satisfied that he has at least some general comprehension of what the constitution is, and of the principles which it affirms.

3. SAME—MORAL CHARACTER—EVIDENCE.

The requirements as to moral character and a disposition to good order must be shown by competent evidence.

4. SAME—DECLARATION OF INTENTION—MINORS.

Where the oath declaring the previous intention in the case of an alien coming to this country before majority is made under Rev. St. § 2167, it must be supplemented by proof that the applicant has, for the designated period, actually intended to become a citizen.

5. SAME—TIME OF FILING PETITIONS—ADJUDICATION.

Petitions for naturalizations must be filed at or before the time of their presentation, and judgments upon them, whether adverse or favorable to the petitioners, should be formally entered.

This was a petition by Wolf Bodek to be admitted to become a citizen of the United States.

DALLAS, Circuit Judge. In pursuance of its power to "establish a uniform rule of naturalization" (Const. art. 1, § 8), congress has prescribed the conditions on which an alien may become a citizen of the United States, and the manner in which, "and not otherwise," he may be admitted to citizenship. By section 2165 of the Revised Statutes the following requirements, among others, are imposed upon every applicant under that section: (1) He shall have made the declaration which is there set forth "two years, at least,

prior to his admission;" (2) he shall, at the time of his application to be admitted, declare on oath "that he will support the constitution of the United States;" (3) he shall make it appear to the satisfaction of the court (his oath not being allowable to prove residence) that he has resided within the United States five years, and within the state where the court is held one year, at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. By section 2167 especial provision is made for the admission, "without having made the declaration required in the first condition of section 2165," of aliens coming to this country during their minority; but to entitle any applicant to the benefit of this exemption it is exacted that (1) he shall have resided in the United States three years next preceding his arrival at the age of 21 years, and for the period of 5 years, including the 3 years of his minority, and shall have continued to reside therein to the time of making his application, and shall then have attained his majority; (2) he shall make the declaration required in the first condition of section 2165 at the time of his admission; (3) he shall declare on oath, and prove to the satisfaction of the court, that for two years next preceding it has been his bona fide intention to become a citizen of the United States; (4) he shall in all other respects comply with the laws in regard to naturalization. The acts of congress from which the foregoing statement of their more generally important provisions has been compiled enjoin the terms on which, and on which only, an alien may acquire citizenship; and the courts to which is confided the duty to see that these terms are complied with "are to receive testimony, to compare it with the law, and to judge on both law and fact." Marshall, C. J., in *Spratt v. Spratt*, *infra*. Their function is judicial. The courts have so held. The executive department of the government has so declared. The statutes themselves show that congress so intended. There can be no doubt about it. *Campbell v. Gordon*, 6 Cranch, 176; *Stark v. Insurance Co.*, 7 Cranch, 420; *Spratt v. Spratt*, 4 Pet. 393; *Green v. Salas*, 31 Fed. 106; *U. S. v. Norsch*, 42 Fed. 417. See, also, *Whart. Int. Law*, § 174a, where, among other pertinent documents, a letter, dated March 7, 1879, is referred to, in which Mr. Evarts, then secretary of state, used this language: "It certainly is not competent for the department of state * * * to go behind a judicial decision of a court of law, such as is a certificate of naturalization." An applicant for naturalization, then, is a suitor, who, by his petition, institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts, and the fulfillment of all conditions, upon the existence and fulfillment of which the statutes which confer the right asserted have made it dependent, and I believe that the petitions usually presented conform to this rule. But the presentation of the petition merely brings the matter before the court, and the burden then rests upon the petitioner to establish its material allegations by such evidence as the law has made requisite, and

"which ought, indeed, to be required to satisfy the judgment of the court." *Spratt v. Spratt*, supra. Without this there can be "no such judicial inquiry into the case as the act of congress contemplates." *U. S. v. Norsch*, supra. In short, as was said in *Re An Alien*, 7 Hill, 137, cited in *Green v. Salas*, supra: "The application must be supported by legal proof of the facts on which it rests. The proceedings are strictly judicial. The alien who applies for admission asserts a compliance on his part with the prescribed conditions, and he must furnish the requisite proof of what he so alleges, or he establishes no right." Proof that the declaration required in the first condition of section 2165 has been duly made is, of course, necessary in all cases to which that section applies; but, as such proof is ordinarily supplied by the production of a sufficient certificate, nothing need be said under this head. Of the fact of making the declaration to support the constitution of the United States no extrinsic evidence is necessary, for it is made in the presence of the judge; but it by no means follows that the court is charged with no duty with respect to this declaration. It may safely be assumed, I think, that congress, in requiring it to be made before the court, meant to assure its being made with decent solemnity; but, more than this, it is expressly provided that it shall be made "on oath," and therefore, in my opinion, it should not be accepted in any case in which, upon examination, it appears that the applicant does not understand its significance, or is without such knowledge of the constitution as is essential to the rational assumption of an undertaking, avouched by oath, to support it. In many instances these declarations are made by men who have no counsel to inform or restrain them, and who themselves have no adequate appreciation of their purport, or of the sacredness of the accompanying oath, which, in order to accomplish the object in view, they are often quite willing to take as a matter of course. I cannot shut my eyes to the existence of this abuse (see *Shars. Leg. Eth.* p. 111), nor regard as sufficient under the statutes any oath which relevant questioning results in showing is not intelligently and conscientiously tendered. Furthermore, the law requires that "it shall be made to appear to the satisfaction of the court" that the applicant has behaved as a man attached to the principles of the constitution; and, bearing this in mind in connection with what has already been said, the conclusion seems to be inevitable that the court ought not to admit any alien to citizenship without being satisfied that he has at least some general comprehension of what the constitution is, and of the principles which it affirms. As to the requirements with respect to the applicant's residence, moral character, and disposition to good order, it is enough to say that their fulfillment must all be competently established; and that as to the first of them the petitioner's own testimony is not admissible, and as to the others is of little or no weight. With especial reference to the class of cases commonly distinguished as "minority applications" but little need be added. The provision that in these cases the laws in regard to naturalization, except as modified by section 2167, must be complied with, makes the preceding observations

applicable, in great part, as well to them as to cases under section 2165. In addition, however, to the proof heretofore discussed, applicants under section 2167 must prove the particular facts in respect to residence and age which that section requires to be established; and, inasmuch as a declaration of intention two years prior to admission is dispensed with only on condition that a like declaration shall be made at the time of admission, and that the applicant shall then further declare on oath, and prove to the satisfaction of the court, that for two years next preceding it has been his bona fide intention to become a citizen of the United States, it is necessary, not only that these declarations shall be made under oath, but also that they shall be supplemented by proof that the applicant has, for the designated period, actually purposed to become a citizen of this country.

In this district it has been the practice to interrogate applicants and their witnesses after the manner which has been indicated, and increased experience confirms me in thinking that this practice should be inflexibly and rigorously adhered to. I am aware that judges of the highest character have not felt themselves called upon to scrutinize the declarations, oaths, and testimony made and adduced in support of petitions for naturalization further than is necessary to ascertain whether the terms of the statutes have been prima facie complied with; but this course of procedure had its inception at a time when its inadequacy was not apparent. Eighteen years after the passage of the act from which section 2165 of the Revised Statutes is derived, the number of passengers who arrived in the United States by sea from foreign countries during a period of 12 months, viz. during the year ending September 30, 1820, was still only 10,311, and of these at least 3,000 were women and more than 1,000 were minors. Bromwell's History of Immigration, pp. 21, 22. Probably not more than 5,000 of these immigrants ever applied for admission to citizenship, and when it is remembered that the applications of those who did apply were distributed among the then existing courts, state and federal, it becomes evident that their attention was not likely to have been drawn, as that of this court imperatively is, to the absolute necessity for caution in the administration of this peculiar jurisdiction, which brings to its bar (especially as the day of any general election approaches) a multitude of suitors, claiming the award of a privilege to which, as the slightest investigation discloses, very many of them are not entitled. At all events, but with unfeigned respect for those who inaugurated and for those who have adopted the more tolerant practice which has been referred to, I will not pursue it. My own judgment does not approve it, and I have been unable to find any considered judicial opinion in support of it, while those which are embodied in the reports of the cases previously cited seem to be in palpable conflict with it.

I have dealt with this subject at greater length than I otherwise would have done, because I deem it to be desirable that the views I have expressed should be better understood than they appear to be; and with like object—not in censure of this particular

applicant—I take this occasion to further remark that naturalization petitions must be filed at or before the time of their presentation, and that judgment upon them will be formally entered, as well in cases where it is adverse as in those in which it is favorable to the petitioner. I see no sufficient reason for waiving in these proceedings the incidents which regularly pertain to all others of similar character, and I have found that omission of those I have mentioned tends to facilitate the reprehensible repetition of identical applications, without disclosure of the fact of prior adjudication. The jurisdiction of the court is derived from the statutes. It does not depend upon the facts of a particular case (*U. S. v. Walsh*, 22 Fed. 644-649), and no one who invokes its exercise can be allowed to withdraw his cause after the judgment of the court has been rendered against him.

The present petition contains several objectionable erasures and interlineations in material parts. Apart, however, from this defect, it has not been supported in accordance with this opinion, and therefore, October 1, 1894, it is ordered that the said petition be filed, and that thereupon judgment be entered refusing the prayer thereof.

HALLETT v. UNITED STATES.

(Circuit Court, District of Massachusetts. October 8, 1894.)

Nos. 3,442-3,444.

1. UNITED STATES COMMISSIONERS—FEES—RECOGNIZANCE OF WITNESSES.

A commissioner of the United States courts has no authority, under Rev. St. § 879, to charge for taking recognizances of witnesses to appear at an adjourned hearing before him, as the power given by it "to any judge or other officer" to take recognizances of any witness produced against the prisoner "for his appearance to testify in the case" refers only to taking recognizances of witnesses to appear before the court having cognizance of the offense.

2. SAME.

The authority of a commissioner to charge for taking recognizances of witnesses to appear at an adjourned hearing before him depends on whether the laws of the state where the proceedings take place authorize a committing magistrate to take such recognizances, Rev. St. § 1014, requiring proceedings for holding accused persons to answer before a federal court to be "agreeably to the usual mode of process against offenders in such state."

3. SAME.

A commissioner cannot make such charges in Massachusetts except when defendant is charged with a crime punishable by death or life imprisonment, as in no case do the statutes of that state expressly authorize a committing magistrate to take such recognizances, and no authority is to be implied from his power to adjourn hearings.

4. SAME—APPROVAL OF ACCOUNT BY COURT.

The approval by the court of a commissioner's accounts, while prima facie evidence of their correctness, and conclusive as to matters within the discretion of the commissioner, and where there is no clear proof of mistake by the court, is unavailing where the commissioner clearly acted without authority.

5. **SAME—RETURN OF PROCEEDINGS.**

A commissioner can charge for copies of process and return of proceedings to the court where defendants were not arrested or were discharged, the court having, at the request of the attorney general, entered an order directing commissioners, after final disposition of each case, to return copies of all papers, with recognizances taken, and transcript of the proceedings, though such requirement was conditioned on provision being made for compensating the commissioner therefor.

6. **SAME—ENTERING RETURNS OF WARRANTS AND SUBPOENAS.**

A commissioner can charge for entering returns of warrants and subpoenas, Rev. St. § 847, giving him the same compensation as is allowed to clerks for like service, and section 828 allowing clerks "for entering any returns" 15 cents.

7. **SAME—ENTERING ORDERS OF CONTINUANCE.**

A commissioner is also entitled to the same fees as a clerk for entering orders of continuance.

8. **SAME—SUSPENSION BY COMPTROLLER.**

Accounts of a commissioner, which have long been suspended by the comptroller, will be held not to be still pending in the treasury department, but to have been rejected by it.

9. **SAME—ACKNOWLEDGMENTS OF RECOGNIZANCE.**

A commissioner cannot charge for more than one acknowledgment to a recognizance.

10. **SAME—RECOGNIZANCE OF WITNESS.**

A commissioner cannot charge for more than one final recognizance of all the witnesses in a case, without its being shown that they could not conveniently be recognized together.

11. **SAME.**

It is in the discretion of the commissioner to take recognizances of defendants and witnesses recognized in previous cases for the same grand jury.

12. **SAME—ORDER TO PAY WITNESSES.**

The commissioner has discretion to make more than one order to pay witnesses in a case.

Actions by Henry L. Hallett against the United States for fees as commissioner.

These cases were heard upon the following agreed statement of facts:

It is hereby agreed by and between the parties to the above-entitled cases, which, by a previous agreement duly filed in said court, are to be consolidated and heard and tried together, that said cases may be and hereby are submitted to said court for its decision upon the following facts, which are to be taken as true:

First. During the whole time when the services mentioned in the petitions in said cases were performed there was entered upon the docket of said court an order of court of the tenor following, to wit:

"Circuit Court of the United States, District of Massachusetts.

"Order of Court.

"January 11, 1882.

"1. Each commissioner of this court acting in criminal cases shall keep a docket, in which he shall enter all applications for warrants granted by him, stating briefly the nature of the offense, the name of the complainant, the date of issuing of the warrant, and all subsequent proceedings thereunder; also the names of witnesses present and examined. At the foot of the docket in each case, the commissioner shall enter a statement of all fees and expenses accruing in the case, including his own fees.

"2. No warrant shall be issued by a commissioner for the arrest of a person charged with having violated any of the laws of the United States,

upon the complaint of any person, unless a collector of customs, or of internal revenue, or a deputy collector, or a treasury, revenue, or postal agent, or the district attorney for this district, or one of his assistants, shall have certified as to such complaint that in his opinion it is such an offense as should be prosecuted, and shall have requested that a warrant for the arrest of the accused be issued.

"3. After the final disposition of each case before him, the commissioner shall forward to the clerk of the court of the United States for this district having cognizance of the offense charged copies of all the papers, together with all recognizances taken by him, in the case, with a proper transcript of the proceedings, in which he shall schedule the papers forwarded, and to which he shall add a statement of all the fees accruing in the case, including his own fees.

"4. At the end of each quarter, or within ten days thereafter, each commissioner shall make out and deliver, or cause to be delivered, to the clerk of this court, a report in duplicate of all cases brought before him and disposed of during the quarter, one to be retained by the clerk, and the other to be forwarded by him to the attorney general; and a separate report of internal revenue causes so brought to be forwarded by the clerk to the commissioner of internal revenue. These reports shall be made upon such forms as shall be prescribed and furnished by the department of justice.

"5. Sections 3 and 4 of this order are conditional upon suitable provision being made for compensation to commissioners for performing the services therein required of them.

"6. The clerk of this court is instructed to furnish each of the commissioners for this district with a copy of this order, to distribute such blanks for commissioners as may be sent to him by the department of justice, and to forward to the attorney general and to the commissioner of internal revenue the reports delivered to him for these officers under the fourth section of this order.

By the Court, John G. Stetson, Clerk.

"A true copy.

"Attest: Alex. H. Trowbridge, Clerk.

"Nov. 6, 1893."

Second. That the total amounts claimed by the petitioner in said cases for the several classes of services alleged to have been performed by him and disallowed or suspended by the comptroller of the treasury are as follows:

1. For taking recognizances of witnesses to appear before the commissioner at continued hearings.....	\$1,424 20
2. For commitments of witnesses for appearance before the commissioner at continued hearings, and entering returns thereof	189 70
3. For more than one warrant of commitment of the defendant and all the witnesses in the same case to secure their appearance before the circuit or district court.....	6 90
4. For filing temporary warrants of commitments of defendants for their appearance before the commissioner at continued hearings	7 80
5. For filing temporary recognizances of witnesses for their appearance before the commissioner at continued hearings..	7 80
6. For copies of process and return of proceedings in cases where the defendants were discharged by the commissioner	1,023 80
7. For entering returns of warrants and subpoenas.....	130 05
8. For entering orders of continuance.....	180 30
9. All charges in certain cases not joined with certain other cases	151 20

These charges are suspended by the comptroller to know why the cases were not joined with certain other cases; and no information on the subject has ever been furnished by the petitioner or any one representing him to the comptroller.

10. Charges in certain cases not tried in other cities than the city of Boston.....	56 20
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These charges were suspended by the comptroller to know why the said cases were not tried in other cities; and no information on the subject has ever been furnished to the comptroller by the petitioner, or by any one representing him.

11. Charges for filing certain papers.....	\$ 76 00
These charges were suspended by the comptroller for information as to what papers were filed by the commissioner, and the necessity for filing so many papers. No information on the subject has ever been furnished to the comptroller by the commissioner, or by any person representing him.	
12. For administering oaths and issuing certificates to supervisors of elections and deputy marshals.....	1,241 75
13. For recognizances of defendants to appear before the commissioner	30 00
14. For certain portions of complaints and recognizances alleged by the comptroller to be unnecessary and to render excessive the length of the documents of which they were a part	1,718 40
15. For acknowledgments of defendants and witnesses to recognizances	282 20
16. For affidavits of justification of sureties to bail bonds....	9 20
17. For commitments of defendants for their appearance before the commissioner at continued hearings, and entering returns thereof	204 70
18. For drawing complaints.....	310 55
19. For drawing complaints in excess of four folios for each complaint	47 05
20. For drawing complaints in excess of three folios for each complaint	36 60
21. For drawing complaints in excess of two folios for each complaint	50 95
22. For taking jurats to complaints.....	55 65
23. For swearing defendants or their witnesses.....	47 00
24. For certain internal revenue cases alleged not to have been approved by the United States attorney for the district of Massachusetts	108 80
25. For copies of process and return of proceedings alleged to be of excessive length.....	535 75
26. For copies of process and return of proceedings in excess of 20 cents per folio for copies of warrants of arrest, and 15 cents per folio for certificates thereto.....	321 50
27. For more than one acknowledgment to each recognizance..	223 75
28. For more than one final recognizance of all the witnesses in each case.....	762 25
29. For recognizances of defendants or witnesses where the same defendants or witnesses were recognized in previous cases for the same grand jury.....	35 10
30. For copies of process and return of proceedings in cases where no arrest of the defendant was made.....	10 00
31. For more than one order to pay witnesses in each case....	28 45

It is further agreed that all of the above charges not expressly stated to have been suspended were absolutely disallowed. It is further agreed that the complaints in the internal revenue cases mentioned in item 24 were as a matter of fact approved by the United States attorney for the district of Massachusetts before warrants were issued thereon by the petitioner. It is further agreed that reference may be made to the pleadings and other papers properly filed in said case, and to the certified transcript to be filed herewith of such extracts from the books and proceedings of the treasury department as bear upon the charges sued for by the petitioner in the three consolidated cases aforesaid, so far as such pleadings, papers, and treasury transcript are not inconsistent with any of the facts herein agreed upon. And it is further agreed that the court may draw such inferences as a jury might draw from the facts herein stated. It is further agreed that during

the whole period when the services mentioned in the three petitions were performed, said Hallett was a duly-appointed commissioner of the circuit court of the United States for the district of Massachusetts. It is further agreed that the accounts of said Hallett containing the items mentioned in said three petitions were duly approved by the district court as required by law. And it is further agreed that said Hallett actually performed all the services mentioned in his three petitions. It is further agreed that in the case of the United States v. John C. Cook, at the October term of the circuit court of the United States for the district of Massachusetts of the year 1862, an opinion was rendered by the court in the words following, to wit: "This was a motion made by T. K. Lothrop, Esq., Assistant U. S. Attorney, for an order to William S. Dexter, Esq., one of the commissioners of the court, requiring him to make return to the court of his doings with respect to a complaint made before him on behalf of the United States against said Cook on the 18th day of July, A. D. 1862. And thereupon the said commissioner informed the court that the said Cook was, after hearing testimony in that behalf, discharged by the said commissioner, and that the said commissioner had been instructed by the treasury department at Washington that all charges for returns to court in cases where defendants were not arrested, or were discharged upon hearing, are unauthorized, and prayed the direction of the court in the premises; and thereupon it was ordered by the court that the return moved for be made by the commissioner. And the court was further of opinion, and instructed the commissioner, that return should be made of the doings of commissioners in all cases where the defendants were not arrested or were discharged upon hearing, and that the commissioners were authorized to charge therefor." It is further agreed that the order of court of January 11, 1882, mentioned above, was passed by said circuit court of the United States at the request of the attorney general of the United States.

John Lowell, for petitioner.
 Sherman Hoar, U. S. Atty.

COLT, Circuit Judge (after stating the facts). These three cases, by agreement of parties, were consolidated and heard together. They relate to claims of Henry L. Hallett, commissioner, against the United States, for certain charges in his accounts which were disallowed by the comptroller of the treasury. Item 1 is for taking recognizances of witnesses to appear before the commissioner at adjourned hearings. The authority for making these charges rests upon sections 879 and 1014 of the Revised Statutes. The power given "to any judge or other officer" in section 879 to take the recognizances of any witness produced against the prisoner "for his appearance to testify in the case" plainly refers to the taking of recognizances of witnesses to appear before the proper court having cognizance of the offense, and does not have reference to the taking of recognizances of witnesses to appear before a commissioner at adjourned hearings before himself. The authority of the commissioner to make these charges must rest upon section 1014. This section declares that—

"For any crime or offence against the United States the offender may * * * by any commissioner of a circuit court to take bail, * * * of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case."

It was the purpose of this statute to assimilate all proceedings for holding accused persons to answer before a United States court to the laws of the state where the proceedings shall take place.

In *U. S. v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16,208, Judge Curtis says:

"My opinion is that it was the intention of congress by these words, 'agreeably to the usual mode of process against offenders in such state,' to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them, in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power."

In *U. S. v. Case*, 8 Blatchf. 250, Fed. Cas. No. 14,742, Judge Woodruff says:

"Congress having seen fit to direct that a party accused may, 'agreeably to the usual mode of process against offenders' in the state 'where he may be found,' 'be arrested and imprisoned, or bailed,' the court cannot say that a recognizance not warranted by the laws of the state, nor by any other act of congress, is of any validity."

In *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743, Mr. Justice Brown, speaking for the court, says:

"As this section requires proceedings to be taken 'agreeably to the usual mode of process against offenders in such state,' it is proper to look at the law of the state in which the services in such case are rendered to determine what is necessary and proper to be done, and inferentially for what services the commissioner is entitled to payment. *U. S. v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16,208; *U. S. v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393."

See, also, *Hallett's Case*, 5 Lawr. Dec. 281.

It appears, therefore, that the warrant for making these charges, if any, must be found in the statutes of Massachusetts. These statutes provide: That a court or justice may adjourn an examination or trial from time to time, as occasion requires, not exceeding 10 days at one time, without the consent of the defendant, and that in the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized in a sum, and with sureties, to the satisfaction of the court or justice, for his appearance for such further examination, and for want of such recognizance he shall be committed to prison. When the prisoner is admitted to bail or committed, the court or justice shall bind by recognizance the material witnesses against the prisoner to appear and testify at the next court having cognizance of the offense, and in which the prisoner shall be held to answer. For good cause the witness may be required to enter into a recognizance with sureties for his appearance at court. If a witness shall refuse to recognize with or without sureties, he may be committed to prison. Where a defendant is charged with an offense punishable with death or imprisonment for life, the court or justice may bind by recognizance the material witnesses against the prisoner to appear and testify at the time and place to which the trial or examination is adjourned. Pub. St. Mass. c. 212, §§ 26, 36-39; Acts Mass. 1885, c. 136, pp. 594,

595. There is no express power in these statutes authorizing a committing magistrate to take the recognizances of witnesses to appear before himself at adjourned hearings, except when a defendant is charged with an offense punishable with death or imprisonment for life. Nor do I think this power should be implied as incidental to his power to adjourn hearings from time to time, for the following reasons: The Massachusetts courts have declared that no presumption lies in favor of the jurisdiction of an inferior magistrate, as the jurisdiction conferred is not general, but limited by particular statutes. *Bridge v. Ford*, 4 Mass. 641. As a ministerial officer, he can do no valid act not expressly or by necessary implication authorized by law. *Vose v. Deane*, 7 Mass. 280. A justice of the peace has no right to take a recognizance except under the statutes giving that magistrate jurisdiction. *Com. v. Otis*, 16 Mass. 198. The statutes of Massachusetts specifically provide in what cases a committing magistrate may take recognizances, and therefore by implication exclude his power to take them in other cases.

But it is urged that these accounts were approved by the court as required by law, and that this is *prima facie* evidence of their correctness, which, in the absence of clear and unequivocal proof of mistake on the part of the court, should be conclusive. *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615; *U. S. v. Barber*, 140 U. S. 177, 11 Sup. Ct. 751; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743. Giving due weight to this rule as applicable to matters within the discretion of the commissioner, or to questions of fact, or even to cases where the law may be doubtful, it certainly does not apply to cases where the commissioner clearly acted without authority of law. Nor does it seem to me that the rule laid down in *U. S. v. Hill*, 25 Fed. 375, *Id.*, 120 U. S. 169, 7 Sup. Ct. 510, can be invoked in this case, for the reason that the statute is not of doubtful construction, and for the further reason that the practice of allowing these fees has not been uniform with the treasury department. *Hallett's Case*, 5 Lawr. Dec. 281. The case of *U. S. v. Rand*, 3 C. C. A. 556, 53 Fed. 348, 351, is cited in favor of the petitioner. An examination of the record in that case shows that the commissioner withdrew any claim for this charge by amendment to his petition, and that this item was not included in the judgment entered in the circuit court. This fact was set out in his printed argument submitted to the circuit court of appeals. That case, therefore, can hardly be considered as a binding authority in this case. For these reasons I think this item was properly disallowed.

Items 2 and 5 are governed by the same considerations which apply to item 1, and therefore were rightly disallowed.

Items 3 and 4 are for small amounts. The question raised is one of discretion, and hence these items should be allowed, on the principle that the accounts are *prima facie* correct, and therefore conclusive in the absence of clear proof of mistake on the part of the court which approved them. *U. S. v. Jones*, *U. S. v. Barber*, *U. S. v. Ewing*, before cited.

Item 6 is important, and raises the question whether a commissioner can charge for copies of process and return of proceedings

sent to the proper court, where the defendants were discharged. In 1862 this court held that a commissioner should return all such papers. *U. S. v. Cook* (unreported). On January 11, 1882, by an order entered on that day, at the request of the attorney general, the court directed the commissioner, after the final disposition of each case, to return copies of all papers, together with all recognizances taken by him in the case, with a proper transcript of the proceedings. The part of the order which speaks of compensation was only intended to give the commissioners a right to refuse to perform the duty if it should turn out that they were not to be paid for it. I think this item should be allowed. It was allowed in the case of *Strong v. U. S.*, 34 Fed. 17, and it comes within the principles laid down by the supreme court in *U. S. v. Barber*, 140 U. S. 164, 11 Sup. Ct. 749; *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758; and *U. S. v. Jones*, 147 U. S. 672, 674, 675, 13 Sup. Ct. 437. In the last-cited case, Mr. Justice Brown says:

"Supposing it [the account], however, to be a question of doubt, if the court assumed jurisdiction to make such order, and the clerk obeyed it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity for such order being made. In fact, he would be guilty of contempt in refusing to make such entry. The government cannot, in this collateral proceeding, attack the power of the court to make this order."

Item 7 relates to charges for entering returns of warrants and subpoenas, and should be allowed. In *U. S. v. Ewing*, a similar charge was held to be unobjectionable. Section 847 provides: "For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services." Section 828 allows clerks "for entering any return" 15 cents. This charge comes under this paragraph in section 828, and not under the paragraph "for making docketts," etc., for which the commissioners are not entitled to charge any fee under the act of August 4, 1886 (24 Stat. 256, 274, c. 903); *U. S. v. Ewing*, *ubi supra*. What the docket fee in section 828 was intended to cover is defined in *U. S. v. Van Duzee*, 140 U. S. 199, 11 Sup. Ct. 941, and it does not include the charge made "for entering any return." This ruling also applies to item 8 for entering orders of continuance.

Items 9, 10, and 11 were suspended, not disallowed. I think these charges were within the discretion of the commissioner, and should have been allowed. It is undoubtedly true that the comptroller may suspend an account of a commissioner or other officer for a reasonable time pending an examination. *U. S. v. Fletcher*, 147 U. S. 664, 13 Sup. Ct. 434; *New Orleans v. Paine*, 147 U. S. 261, 13 Sup. Ct. 303. But it can hardly be contended in this case that Mr. Hallett's accounts are still pending in the treasury department. The accounts may be considered as long since rejected by the department, and the sole question presented to the court is the legal right of Mr. Hallett to make these charges.

With respect to items 12 to 25, inclusive, the government has no suggestions to offer; in view of the decision in *U. S. v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327, and they are allowed.

Item 26, which covers charges for copies of process in excess of the amount allowed by section 828, Rev. St., was properly rejected.

Item 27 is for charges for more than one acknowledgment to each recognizance, and was rightly disallowed. *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743.

Item 28 is for charges for more than one final recognizance of all the witnesses in each case, and these charges were properly disallowed upon the present state of proof. *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439.

Items 29 and 31 relate to matters which may be fairly said to be within the discretion of the commissioner, and should therefore be allowed.

Item 30 comes under the same ruling as item 6, and should be allowed.

It results from the foregoing conclusions that judgment should be entered for the petitioner in the sum of \$6,385, and it is so ordered.

In re MALDONADO et al.

(Circuit Court, S. D. California. October 19, 1894.

No. 26.

HABEAS CORPUS—DUE PROCESS OF LAW.

An error of the state court in imposing a judgment on the theory that a statute defining an offense was not affected by a later statute defining a higher offense, and that an information charging the higher offense also embraced the lesser offense, and that a verdict thereon was a conviction of the lesser offense, cannot be corrected by habeas corpus in the circuit court of the United States on the ground that defendants were deprived of their liberty without due process of law, where all the proceedings in the state court down to the rendition of the judgment were duly had and taken.

This was a petition by Victor Maldonado and Francisco Maldonado for a writ of habeas corpus, alleging that they were unlawfully restrained of their liberty by the sheriff of Los Angeles county, in the state of California, on a judgment based upon a verdict of acquittal.

Horace Bell and H. H. Appel, for petitioners.

ROSS, District Judge. A petition has been presented to me in the circuit court by Victor and Francisco Maldonado for a writ of habeas corpus, in which it is alleged that they are unlawfully restrained of their liberty, in violation of those provisions of the constitution of the United States which declare that no person shall be deprived of his liberty without due process of law. The petition sets forth the grounds of their imprisonment in substance as follows: That after an examination duly had before a committing magistrate an information was duly filed against the petitioners in the superior court of the county of Los Angeles, state of California, by which information the petitioners were accused of the crime of having, on the 14th day of October, 1893, at the county of Los Angeles, with the intent to derail a passenger train running from the town of Pasadena, in said county, to the city of Los Angeles, unlawfully placed

obstructions on the track and roadway of the Los Angeles Terminal Railway Company, over which said train was then running. That the petitioners were duly tried upon that charge, and that the jury duly returned a verdict against the petitioners in these words: "We, the jury in the above-entitled action, find the defendants guilty of having maliciously placed an obstruction upon the track of the railroad mentioned in the information, but that they did not intend thereby to derail a train." That the verdict was duly recorded, and that thereafter a motion on behalf of the petitioners for a judgment of acquittal was denied by the trial court, as was also a motion on their behalf for a new trial, and that subsequently each of the petitioners was by the court in which the verdict was returned sentenced to imprisonment in the state prison for the term of five years. That the petitioners duly appealed from the judgment against them to the supreme court of the state, but, through some misunderstanding of their counsel in respect to the rules of that court, failed to file the required points and authorities on their behalf, for which reason the supreme court of the state affirmed the judgment appealed from. That the supreme court of the state subsequently denied a motion to reinstate the appeal, and thereafter denied an application on behalf of the petitioners for a writ of habeas corpus. The petitioners allege that they are now in the custody of the sheriff of Los Angeles county, under process issued upon the judgment so rendered against them. That the prosecution against them was had under and by virtue of a statute of the state, passed March 31, 1891, in the words following. to wit:

"Every person who shall unlawfully throw out a switch, remove a rail, or place any obstruction on any railroad in the state of California, with the intention of derailing any passenger, freight, or other train, or who shall unlawfully board any passenger train with the intention of robbing the same, or who shall unlawfully place any dynamite or other explosive material, or any other obstruction, on the track of any railroad in the state of California, with the intention of blowing up or derailing any passenger, freight, or other train, or who shall unlawfully set fire to any railroad bridge or trestle over which any passenger, freight, or other train must pass, with the intent of wrecking said train, upon conviction, shall be adjudged guilty of felony, and shall be punished with death or imprisonment in the state prison for life, at the option of the jury trying the case." Pen. Code, § 218.

The theory upon which the petition for the writ proceeds is that, inasmuch as the jury found that the petitioners did not intend, by the placing of the obstructions upon the track of the railroad mentioned in the information, to derail a train, they, in effect, acquitted the petitioners of the offense with which they stood charged, and that, therefore, the judgment against them was based upon a verdict of acquittal, and void. But section 587 of the Penal Code of California, of which judicial notice must be taken, provides:

"Every person who maliciously, either: (1) Removes, displaces, injures, or destroys any part of any railroad, whether for steam or horse cars, or any track of any railroad, or any branch or branch-way, switch, turnout, bridge, viaduct, culvert, embankment, station-house, or other structure or fixture, or any part thereof, attached to or connected with any railroad; or, (2) places

any obstruction upon the rails or track of any railroad, or of any switch, branch, branch-way, or turnout connected with any railroad;—is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not less than six months."

The theory upon which the superior court of the state proceeded in imposing its judgment evidently was that the second subdivision of section 587 was unaffected by the act of March 31, 1891, and that, while the information against the petitioners charged them with the higher offense denounced by the act of March 31, 1891, it also embraced the lesser offense, included within the provisions of section 587 of the Penal Code, and that the verdict was a conviction of the petitioners of the lesser offense. If the state court was wrong in that view (and of course I intimate nothing of the sort), still it was merely an error, to be corrected, if at all, by subsequent proceedings in the same action. The petition itself alleges that all of the proceedings in the superior court of the state, down to the rendition of the judgment, were duly had and taken. The superior court of the state, therefore, had jurisdiction of the parties, as well as of the offense with which the petitioners were charged. Under such circumstances, even if the judgment be void, and the petitioners can be held to be deprived of their liberty without due process of law, I am of opinion that they should be put to their writ of error to the supreme court of the state, by which, the petition alleges, the judgment of the superior court was affirmed. In *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, the supreme court said:

"Where a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty, in violation of the constitution of the United States."

Writ denied, and petition dismissed.

LANG et al. v. BAXTER et al. (three cases).

(Circuit Court, D. Maine. August 4, 1894.)

Nos. 14, 15, and 16.

1. PATENTS—ANTICIPATION—SOLDERING IRONS.

Neither the Barker reissue, No. 8,781, for improvements in soldering irons, nor the Bostwick reissue, No. 10,672, which is for an improved form of the Barker iron, were anticipated by the Stone application, or the so-called "Frazier irons," for these efforts do not seem to have passed beyond the experimental stage, or at least not to have resulted in a practical iron.

2. SAME—LIMITATION—INFRINGEMENT.

Both reissues, however, are for combinations in which form is of the essence of the invention, and the patents are therefore limited to substantially the forms described in the specifications and drawings, and are not infringed by irons which lack several of the features described. *McMurray v. Mallory*, 5 Fed. 593, followed.

3. SAME—INVENTION.

The *McMurray* and *Hollingsworth* patent, No. 115,760, for improvements in soldering irons, is void for want of invention. *McMurray v. Miller*, 16 Fed. 471, followed.

These were three actions at law brought by Edward M. Lang and others, surviving partners of the firm of *McMurray, Lang & Burnham*, against *Clinton L. Baxter* and others, to recover damages for alleged infringement of certain patents. A jury was waived, and the cases tried to the court without a jury.

Price & Steward and *George E. Bird*, for plaintiffs.

James A. Allen and *Symonds, Snow & Cook*, for defendants.

COLT, Circuit Judge. These are three actions at law, and, by agreement of parties, the cases were heard together, jury trial having been waived. The suits are brought for infringement of three patents for improvements in soldering irons,—the *Barker* reissue patent, No. 8,781, dated July 1, 1879; *Bostwick* reissue patent, No. 10,672, dated December 15, 1885; and the *McMurray* and *Hollingsworth* patent, No. 115,760, dated June 6, 1871. The *Barker* and *Bostwick* patents were before the supreme court in *McMurray v. Mallory*, 111 U. S. 97, 4 Sup. Ct. 375, and in that case it was decided that the first three claims of the *Barker* reissue were void on the ground that they were broader than the claim of the original patent. The first claim of the *Bostwick* reissue No. 8,466 was declared invalid for the same reason. The *Bostwick* patent was then reissued for the second time in identically the same language as the original patent, and the present suit is brought on this second reissue. Soldering irons were old at the date of the *Barker* patent. What *Barker* did was to add a supporting rod which passes through the disk of the iron, and which holds the cap of a can in place during the process of sealing or unsealing. This was undoubtedly an improvement on previously existing soldering irons. The *Bostwick* patent is for an improved form of the *Barker* iron. I do not think that either the *Barker* or *Bostwick* patents were anticipated by the prior *Stone* application, or the so-called “*Frazier* irons,” because none of these efforts seem to have passed beyond the experimental stage, or at least to have resulted in the production of a practical iron of this type. To my mind, the range of invention in both these patents is narrow. It may be that *Barker* would have been entitled to a broader claim than is found in his original patent, such as a general claim for the combination of a soldering iron with a rod adapted to hold the lid or cap in place during the process of soldering; but the supreme court has said that he cannot expand his claims beyond what is described and claimed in his original patent. As I view both the *Barker* and

Bostwick patents, they must be limited to substantially the form of construction set out in the specifications and shown in the drawings. I agree with Judge Morris in his opinion in the circuit court in the Mallory Case, 5 Fed. 593, 598, which was affirmed by the supreme court, in which he says:

"The conclusion to which I have come is that the two patents [Barker and Bostwick] on which the complainants base their claims are for combinations in which the form of the instrument is of the essence of the invention, and that the complainants are entitled only to substantially that form of instrument which, in his specifications and drawings, the patentee under whom they claim has shown."

If counsel should contend that, in the subsequent case of *McMurray v. Miller* (unreported), Judge Morris gave these patents a broader construction, I still think his conclusion, as above expressed, was correct, and in harmony with the decision of the supreme court. In the Barker device the soldering iron is described as a disk with a recess in its under side, in combination with a movable rod to hold the lid while resealing. The rod passes through the disk, and is set parallel with the handle of the iron, to which it is attached by a loop. The disk is made of sufficient thickness to retain the heat, and of suitable size to cover the lid of the can, and the recess on the under side of the disk affords room for the convex lid of the can. In the sealing process, after the cover is laid in place on the can, the rod is pushed down through the disk, and the heated disk is then pushed down in contact with the solder, which is thus melted and spread evenly around the lid. The disk is then withdrawn, and the rod remains pressed upon the lid until the solder has become hardened. In opening or unsealing a can, the disk is heated sufficiently to melt the solder, and placed over the cover until the solder is melted, when it is taken off, and the cover removed by any sharp-pointed instrument. In the Bostwick patent the soldering iron consists of a cylinder of metal made thick to retain the heat, and hollow to fit over and inclose the cap of the can, and it is provided with a handle near its upper end. The lower rim of the iron is beveled so as to present a narrow edge to hold the solder, and its diameter at its upper end is made smaller than that of its lower end, so as to form a shoulder. The guiding rod which passes through the iron has a diameter at its lower end about equal to that of the cap, but the diameter is reduced above the lower end so as to form a shoulder or projecting offset, which acts as a counterpart to the shoulder within the cylinder. The specification says:

"After the iron has been properly heated, it is slipped over this rod, and the rod, being then placed upon the cap, is held thereon firmly, while the lower rim of the heated iron, duly supplied with solder, bearing upon the joint of the cap with the vessel, will instantly solder and secure the same about its entire circumference. By lifting the rod, its shoulder, engaging with the offset within the iron, will take up the latter with it in readiness to be placed upon another cap, and thus a number of caps may be quickly and thoroughly soldered at one heat of the iron. I contemplate making the soldering-iron, A, and its guiding rod, C, of any form in transverse section which may be required to cause it to fit upon any form of cap or other projection, whether round, square, oval, or of any other curved or polygonal shape. Its lower rim or edge need not be made continuous, but may be

broken or slotted. I claim as my invention: The hollow soldering-iron, A, having a handle, B, and bevelled rim, a, a, in combination with the rod C, substantially as herein described and set forth."

In my opinion, the defendants' iron does not infringe either the Barker or Bostwick patents, upon the construction which I feel bound to give to those patents. It has neither the annular disk nor the rod described in the Barker patent; neither has it the guiding rod with a diameter about equal to the cap, and provided with a shoulder, nor the hollow cylinder of iron with a smaller diameter above its lower end, of the Bostwick patent. In the defendants' iron a small rod runs through the center of the cylinder and handle, and it has a knob attached to the rod above the handle. This rod is pressed down upon the lid of the can, and serves to guide the soldering iron to and from the lid.

As to the McMurray and Hollingsworth patent, I shall follow the decision of Chief Justice Waite in holding the patent void for want of invention. *McMurray v. Miller*, 16 Fed. 471.

The conclusion I have reached is that the defendants' iron does not infringe either the Barker or Bostwick patents, and that the McMurray and Hollingsworth patent is void for want of invention. It follows that judgment must be entered in each case for defendants.

CALLAWAY v. ORIENT INS. CO.

(District Court, N. D. Ohio, W. D. July 18, 1894.)

No. 171.

1. MARINE INSURANCE—OPEN POLICY.

A literal compliance with a clause in an open policy that "no shipment is to be considered as insured until approved and indorsed hereon by this company" will not be required where it appears that it was a physical impossibility to make such indorsements, no space being left therefor; and, under the settled method of doing such business, blank books were furnished by the company in which the insurer entered the shipment, etc., which were examined and adjusted each month by the local agents.

2. SAME.

A provision in an open policy, "Shipments to be reported to the agents of said company at T.," will not be construed to mean all shipments, where it was well known to the insurer's agents that the insured did not make it a practice to insure all shipments, and previous policies contained an express agreement to report all shipments.

This was a libel in admiralty.

Brown & Geddes and Clarence Brown, for libelant.

Butler, Stillman & Hubbard and Wilhelmus Mynderse, for respondent.

RICKS, District Judge. This is a proceeding in admiralty, instituted by Samuel R. Callaway, receiver of the Toledo, St. Louis & Kansas City Railroad Company, for himself and on behalf of all others whom it may concern, against the Orient Insurance Company, a corporation organized and existing under the laws of

the state of Connecticut. The bill, after averring the appointing of the receiver, and the making of an order by the circuit court for this district, empowering him to operate said road, and to operate a line of steamboats between Toledo, Ohio, and Buffalo, N. Y., known as the Toledo, St. Louis & Kansas City Railroad Company Steamboat Line, proceeds to aver that on or about the 1st day of April, 1893, the respondent, the Orient Insurance Company, duly executed and delivered to the said Toledo, St. Louis & Kansas City Railroad Company its policy of insurance, in writing, a copy of which is attached to the libel, and marked "Exhibit A," whereby, in consideration of the premium agreed to be paid, it covenanted and agreed to insure the said Toledo, St. Louis & Kansas City Railroad Company, doing business under the name of the Toledo, St. Louis & Kansas City Railroad Company Steamboat Line, for account of whom it might concern, against all loss and damage by reason of the perils of the lakes, etc. The libellant seeks to recover upon this policy of insurance for package freight, freight lists, and freight charges of goods shipped on the steamer Dean Richmond on the 13th of October, 1893, from the port of Toledo to the port of Buffalo, the invoice value of which, with 10 per cent. added for package freight, was \$42,781.61; for freight list, \$2,256.60; and for freight charges, \$317.51. The issuance of the policy is admitted as averred in the libel. The proof shows that the application for this policy was filed, by the authority of the general freight agent of the receiver, with Barker & Frost, the local agents of the insurance company at Toledo. It appears from the proof that this firm are agents for several companies, both for fire and marine insurance; that, when the application for this insurance was filed with them, they forwarded the same to Smith, Davis & Co., who are the general agents of the Orient Insurance Company, and several other companies at Buffalo, N. Y. The said firm of general agents placed the risk in this case with the respondents, and sent back a policy duly executed and signed.

The proof shows that the railroad company, of which Mr. Callaway is receiver, had taken out, for the years 1890 and 1891, similar policies in the same company, through the same agencies, to cover package freight by the line of steamers operated by the railroad between Toledo and Buffalo. The policy is what is known as an "open policy," and insures package freight, freight lists, and freight charges belonging to the said steamboat line at risk and reported as herein stipulated. The provision as to reports reads as follows: "Shipments to be reported to the agents of said company at Toledo, Ohio." Another clause in the policy provides: "No shipment to be considered as insured until approved and indorsed hereon by this company." As the construction claimed for this policy by the respondent renders it void, because the agents of the receiver did not report all shipments for insurance to be accepted and indorsed, it becomes important to ascertain from the proof how the business was conducted between the insurer and the insured, for the clause quoted evidently was intended to give some authority to the agent to whom the shipments are to

be reported. The policy does not say all shipments shall be reported. It does not say how they shall be reported. In this respect the policy is quite different from that issued by the same insurance company to the Toledo, St. Louis & Kansas City Railroad Company in 1892. The provision in that policy read: "The assured agrees to report all shipments to this company, and a failure to report the full value of each and every shipment shall render this insurance null and void." This policy was allowed to be offered in evidence for the purpose of showing the previous agreement and understanding between the insured and the insurer, and especially to show the change in the practice of reporting shipments as directed by the agents of the insurance company. This policy of 1892 was issued by the same general agents, Smith, Davis & Co., at Buffalo, N. Y., who issued to the same railroad company the policy of 1893 and the policies of 1890 and 1891. The omission in the policy of 1893 of the clause just above quoted, when taken in connection with the instructions and practice established by the agents of the insurance company with reference to reports made of shipments, is very significant, and throws a great deal of light upon the true nature of this insurance contract. The clause in the policy of 1893 upon which this action is based, which provides, "No shipment to be considered as insured until approved and indorsed hereon by this company," could not have been intended to be literally complied with, for it was a physical impossibility, in fact, to have made such indorsements upon the policy. No space was provided for such indorsements. No blanks were provided for such indorsements. The mode of reporting was otherwise provided through the general agents of the insurer. Blank books were furnished to the general agents, and by them furnished to the local agents of the insurance company, who, in turn, furnished the same to the agents of the insured; and in these books were certain printed directions, which, with the oral instructions given by the agents of the insurance company, and a custom which was prescribed and carried out by these agents, made and established a certain fixed method for doing this business, which must have been well known to the general agents of the insurance company and to the company itself. The printed indorsement on these blank books so furnished by the insurance company read as follows: "This book is made part of Orient policy No. 156, and all risks entered herein are subject to all its terms and conditions." The instructions contained in the books and directions given by the respondent's agents were that the agents of the receiver at Toledo and Buffalo were to enter in the forms prescribed in the books such package freight as the insured desired to be covered by the risk. These entries were made as each boat was loaded. The values were placed in the proper column, and the amount of premium to be paid was entered in its proper place. At the end of each month, these books, with their entries, were examined by the local agents, and compared, and the premiums then paid. The local agents of the respondent had the right, under the policy, to examine all the

books and bills of lading, and all papers of the insured by which to test the correctness of the entries made in the books. The latter were a part of the policy. As no space was left on the policy for the indorsements required, the books supplied the want. They were therefore a part of the contract, and the manner of their use was to be prescribed by the local agents of the insurance company. It appears from the testimony that these books were furnished to the agent of the receiver at Buffalo by Smith, Davis & Co., the general agents of the company, conspicuously advertised in the company's policy as its "General Agents." The mode of making the entries in the books was known to them. As these methods were not in violation of any provision of the insurance policy, and did not vary or contradict the terms thereof, it was entirely proper that the instructions of the general and local agents of the company should be shown by testimony, and the custom for doing this part of the business prescribed by them was clearly within the scope of their authority. The practice for three seasons, followed by the agents of both parties, was in perfect accord with the forms, blanks, and books furnished by the company. We may justly conclude the practice was prescribed by the company, and known to and ratified by it.

I am clearly of the opinion that the company has no pretext whatever for refusing to recognize the act of its agents and the mode in which they carried on business with the receiver. It must have been known that the same mode of carrying on business had been recognized in the two preceding seasons of 1890 and 1891, when its same general agents, executed the same kind of a policy. I do not find in the proof, or in any provision of the policy of insurance, any basis for the claim that, because some freight was shipped in cargoes where most of the package freight was reported and insured, such failure to insure all shipments avoided the policy. The receiver's agents made no secrecy of the fact that they did not insure freight which the consignors themselves had insured. That would have been double insurance. The practice was well known to the agents of the insurance company, for they insured such freight in their own offices for the benefit of other insurance companies. It seems plain to me, therefore, that this policy provided for future insurance, and that each indorsement of shipment made in the books provided and furnished by the insurance company for that purpose was a contract of insurance under the policy. This was what the practice and custom prescribed by the books furnished by the company itself, and by the instructions of its agents, clearly contemplated. They also understood it, and I think the contract was binding, and was supported by the consideration provided by the policy. The libellant may therefore have a decree for the amount of shipments indorsed in the books for the cargo of the *Dean Richmond* for October 13, 1893. The loss of this cargo was proven, and the fact not controverted by the company. If counsel can agree on the amount, it may be so entered; otherwise there may be a reference to a master in the usual way.

TRAVER v. BROWN.

(Circuit Court, D. Vermont. October 2, 1894.)

PATENTS—STITCH-BREAKING MACHINE—ANTICIPATION.

The Traver patent, No. 431,957, for a "stitch-breaking and raveling attachment for machines for sewing looped fabrics," which operates by wedging the threads apart, was not anticipated by the prior Congdon invention, which operated by seizing and pulling the threads; and defendant's machine, which operates in part, at least, by wedging the threads apart, is an infringement.

This was a rehearing upon new evidence in a suit by Adelbert Lee Traver against Eugene H. Brown for infringement of a patent. The case on the first hearing is reported in 62 Fed. 933.

Odin B. Roberts, for plaintiff.

Franklin Scott, for defendant.

WHEELER, District Judge. This case has been opened, and a copy of the file wrapper and contents of an application of Oliver J. Congdon, dated December 8, 1887, serial No. 257,297, for a patent "for an improvement in method for removing surplus material from machines for uniting knit or looped fabrics," put in evidence, with a stipulation that a machine was made, used, and broken up embodying the invention described. It has been further heard and considered upon this and the former evidence. In that machine, as understood, a point projecting from the corner of a square plate moving across the fabric entered the first stitch of a row, engaged the first thread of the stitch, with another plate clamped it, and, moving further, broke it; then, returning across the fabric, and releasing the loose end of the thread, another point projecting from another corner of the square plate entered the next stitch, with the other plate clamped the next thread, and, moving further, broke that; and so proceeded breaking the threads and removing the pieces till the thread of that row of stitches was all removed. It appears to have broken the threads of the stitches by seizing and pulling them, and is not shown to have done so at all by wedging them apart. Still it is argued to have so limited the field for invention which the plaintiff's patent might cover as to leave the defendant's machine outside. That machine is said to have pulled the threads apart, where the defendant's cuts them; and the defendant is said to have taken that invention by making the parts cut, rather than to have taken the plaintiff's invention as it is patented in this patent. This argument would be better founded if the defendant's machine divided the threads wholly without wedging, and the machine of the patent wholly excluded cutting. But the edges of the wedge of the patent are described as blunt or rounded only, "so as not to cut the fabric immediately on coming in contact with it," and are left so they may help division by abrasion, or cutting even, as well as by strain on further pressure. The defendant's machine appears to operate by wedging, according to the patent, even if it does cut, and cut more than the patent describes. Let there be a decree as before.

BONSACK MACH. CO. v. ELLIOT.

(Circuit Court, S. D. New York. April 4, 1894.)

PATENTS—VALIDITY AND INFRINGEMENT—CIGARETTE MACHINES.

The following patents for cigarette machines *held* valid and infringed as to the claims mentioned, namely: The Hook patent, No. 184,207, as to claim 2; the Emery patent, No. 216,164, as to claims 10, 12, 14, and 15; the Bonsack patent, No. 238,640, as to claims 6 and 7; and the Emery patent, No. 308,556, as to claims 1 and 2.

This was a suit in equity by the Bonsack Machine Company against Henry C. Elliot for infringement of certain patents for cigarette machines.

Samuel A. Duncan and M. B. Philipp, for orator.

Edwin H. Brown, for defendant.

WHEELER, District Judge. This suit is brought upon letters patent No. 184,207, dated November 7, 1876, and granted to Albert H. Hook; No. 216,164, dated June 3, 1879, and granted to Charles G. Emery and William H. Emery; No. 238,640, dated March 8, 1881, and granted to James A. Bonsack; and No. 308,556, dated November 25, 1884, and granted to William H. Emery,—all for cigarette machines, and owned by the orator. The only invention shown of a cigarette machine proper prior to the date of Hook's application, April 3, 1876, is that described in French patent, No. 104,164, antedated July 8, and issued October 5, 1874, to Abadie & Co., for such a machine. Hook's invention is claimed to have been made prior to the issuing of that patent; and upon this point the testimony of witnesses in another case, among others that of C. A. Brown, has been stipulated into this case, upon condition that they should be produced for cross-examination. Brown died without being so produced, and a motion to suppress his testimony for that cause has been made, and is granted. The other evidence, however, shows clearly the priority of Hook's invention over the issuing of the patent to Abadie & Co., and leaves the field of invention of such a machine, at the time of his invention, open to him. In all of these machines a continuous ribbon of paper for a wrapper, coming from a spool flat, is drawn past a wheel which gums one edge, through a tapering former, which gradually raises the edges, and folds them over one under the other with the gum between around the filler, and through a tube which presses the gummed edges together, causing them to adhere, making a continuous cigarette, to be cut into suitable lengths, for smoking. In Hook's invention the paper ribbon was drawn past the gumming wheel before entering the former, and granulated or otherwise prepared. Tobacco was delivered from a bucket wheel, having an intermittent motion, into the hollow formed by the rising edges of the paper as it passed into the former. In practice, suitable paper was found to be too delicate to bear the strain of being filled and pulled through the machine; and an endless belt of common ribbon was put in, and drawn through with the paper ribbon, to support it. In the patent

of the two Emerys the filler is continuously formed in an endless traveling belt, curved about it by the walls of a chamber through which it passes, and carried forward separate from the belt, which receives a paper ribbon coming from a spool below for a wrapper, and returns to it again, and takes them through a former which wraps the paper about the filler, past a pasting disk and tube, keeping them in form, to devices cutting them into suitable lengths. In Bonsack's patent the machine has an open trough for receiving the tobacco for forming the continuous filler in a belt with side guides, and a former wrapping the paper about the filler, with a spiral groove, for carrying the narrower belt to one side of the paper out of the way of the paste. In the patent of William H. Emery the machine has a packing bar, pressing with intermittent motion upon, and moving forward with, the tobacco in the filler-forming chamber, and more completely forming a continuous filler.

The claims in question of the patent to Hook are:

"(1) The method herein described of forming cigarette cylinders, consisting in drawing a ribbon through a tube-forming die, and simultaneously feeding the tobacco upon the ribbon, the same being previously gummed and finally pasted, as herein described.

"(2) The combination of spool, A, gumming wheel, B, trough, C, cylinder, D, with a mechanism for charging with tobacco and drawing the ribbon, a, through the trough and cylinder, as set forth."

Of the patent to the two Emerys are:

"(10) In combination with an endless belt, a filler-forming chamber, and a guide for applying a wrapper around a filler, a conductor or chamber through which the continuous filler and wrapper are conveyed to a suitable pasting device, whereby the swelling of the filler is prevented, and the wrapper is held in form while the edges are secured by pasting, substantially as described."

"(12) The combination of a gage or former for uniting the edges of the wrapper with a paste supplying and distributing disk, and mechanism for operating the same, a guide for wrapping a wrapper around the filler, a filler-forming chamber, and an endless flexible belt, all to operate in a manner substantially as described.

"(13) In combination with devices for forming a continuous cigarette, an endless belt and a guide tube, whereby a continuous filler in a sealed wrapper is inclosed and carried forward, substantially as described.

"(14) In combination with devices for forming a continuous cigarette of any desired size, an endless belt, a guide tube, and a delivery tube, whereby a continuous cigarette is presented to the action of suitable cutting mechanism for division into desired lengths, substantially as described.

"(15) The combination of an endless belt and guide tube with a delivery tube and suitable cutting devices, whereby a continuous cigarette of any desired diameter can be advanced and severed into desired lengths, substantially as described."

Of the patent to Bonsack are:

"(6) In a cigarette machine which rolls a continuous cigarette in an endless belt, by passing through a tapering tube, the combination of an open trough having side guides for the belt, a tapering tube having a spiral groove extending from one of said side guides, and a terminal section to the tapering tube, having its edges lapped, past each other, but not united, so as to form a flange continuous with the spiral groove, substantially as and for the purpose described.

"(7) In a cigarette machine which rolls a continuous cigarette in an endless belt by passing through a tapering tube, the combination of an open-

ing trough having side guides for the belt, a tapering tube having a spiral groove extending from one of the side guides of the trough, and a terminal section having its edges separated to form a flange, b', to give access to the paste wheel, and then closed again, as and for the purpose described."

And of the patent to William H. Emery are:

"(1) In a cigarette machine, the combination, with a traveling filler-carrying belt and a packing chamber, of a tamping, packing, and compressing bar, and mechanism, substantially as described, for giving said bar intermittent action upon the tobacco, substantially as and for the purpose set forth.

"(2) In a cigarette machine, the combination, with a filler-carrying belt and a packing chamber, of a tamping, packing, and compressing bar, and mechanism, substantially as described, for giving said bar motion towards and with the belt at intervals, substantially as and for the purpose set forth."

Many patents for inventions of various machines for enveloping hemp or flax waste in a sliver of longer staple for spinning into yarn for weaving, for making rubber belting and rubber tubing, for covering hoop-skirt wires, and for making fuse, have been pleaded and proved as anticipations or as narrowing part or all of these inventions. But wrapping granulated or otherwise properly prepared tobacco with suitably delicate paper into cigarettes is very different in accomplishment from making the things for which the machines of those patents were adapted. Many of them have parts similar to like parts of the machines of these patents, but none of them are adapted, and could not be without great changes, to making cigarettes; and none of them have any of the combinations of these claims doing the same thing in substantially the same way. The first claim of Hook is sought to be upheld as for a process. It mentions an operation as a method; but the operation so mentioned is of mechanical parts, producing only mechanical changes in the form and relations of the tobacco and paper operated upon, resulting in nothing new. The process of making cigarettes by wrapping paper about tobacco was old. These means of doing it only were new. This claim as for the process appears to be without foundation and invalid. *Corning v. Burden*, 15 How. 452; *Tilghman v. Proctor*, 102 U. S. 722. The second claim of Hook seems to be valid for the mechanism described. The addition of the belt to the machine of the Hook patent is argued to have been a mere abandoned experiment. The machine appears, however, to have been operated, with the belt in it as a part of it, in making cigarettes. So the combination of the belt with the parts of that machine was known to and used by those putting in the belt and operating the machine. Those who came after that machine with the belt could invent only improvements upon that combination in machines having those parts. That part of the invention of the patent to the Emerys brought into their twelfth claim seems to add a filler-forming chamber; that brought into their tenth claim, a filler-forming chamber and conductor to such a machine; and that brought into their fourteenth and fifteenth claims, to combine a delivery tube and cutting devices with parts of such a machine. These claims appear to be valid. The thirteenth claim does not

appear to be for anything new, nor in any way to be valid. That part of the invention of the patent to Bonsack brought into his sixth and seventh claims seems to add side guides, a spiral groove, and flange to such machines, for keeping the belt to one side of the paper ribbon, away from the paste. These claims appear to be valid. And that part of the patent to William H. Emery brought into his first and second claims seems to add the intermittently moving packing bar, and these claims appear to be valid.

The alleged infringement consists in making and using cigarette machines constructed according to the specifications of re-issued patent No. 11,104, dated August 19, 1890, and granted to Robert Hardie, assignor to the defendant. In this machine, as there specified, the stock for the filler is first deposited in a thin layer upon a feed table, provided with a traveling feed belt. A blade then carries a row of the stock along the table towards jaws, between which the mass is clamped. A tongue then compresses the material between the jaws into a solid block or rod against a support, the material being thus molded in a four-part mold, so that it forms a rod or section of the filler in its fully-compressed state before the application of the wrapper, thereby rendering unnecessary any further compression after the application of the wrapper. Meanwhile the wrapper in the form of a continuous strip is bent to a U shape transversely, and is then conducted with a traveling belt through a grooved support guide or receiving chamber, and the jaws then convey the rod to a position above the curved wrapper, and the tongue descends and moves the rod from between the jaws, discharging it into the wrapper, where in some cases it will expand slightly, the end of the rod overlapping that previously deposited, and the tongue pressing the overlapped portions together to form a continuous filler. The belt travels continuously, so that, while the tongue is in contact with the rod, the tongue and the receiving chamber travel longitudinally, together with the belt, wrapper, and rod; but, as soon as the tongue rises, the chamber and tongue move longitudinally back to their former positions. The wrapper and filler are then carried by the belt from the reciprocating chamber to a folding chamber, where one edge of the paper is turned in, the paste applied to the standing edge, and the latter is then turned down and secured, the belt conducting the wrapper and rod until these operations are accomplished, after which it is deflected, and the filled wrapper passes through a holder, which serves as a support and as an edge against which a revolving cutter shears the same into short sections or cigarettes. The tongue is given two principal motions,—an up and down reciprocating motion between the jaws, and a longitudinal reciprocating motion with the receiving channel. The up and down motion serves to compress the tobacco into a rod, to clean the jaws, and force or deliver the rod of tobacco stock down into the receiving channel. The longitudinal motion is applied, and the tongue carried forward simultaneously with the receiving channel at the same time that such tongue is being forced between the grippers down into the receiving channel, "giving it sufficient pressure at the lapping end to form

with that portion which has passed forward in the channel a continuous cigarette rod." The peculiar shape and arrangement of the former in relation to the receiving channel and the paper ribbon as it is fed off from the reel, and passes below an adjusting roller, causes the paper ribbon to be evenly and neatly folded up in the U-shaped form shown in the receiving channel. It travels through the receiving channel with its edges under hooks or turned-down flanges of guides, and the ribbon is maintained in such shape with the tobacco rod resting in it throughout the length of the receiving channel, and until it is acted upon by beveled folding rollers above the folding channel. The tape is also folded into a U shape by the former, and travels through the receiving channel below the paper ribbon, so as to protect it, and to assist in carrying it forward. After leaving the receiving channel, the paper ribbon is folded over first at one edge, while the other edge is pasted, and then the pasted edge is folded over to form a complete wrapper for the filler rod, as heretofore described with reference to the folding channel and its beveled rollers. As the wrapped and completed rod passes forward through a tubular holder in the cutter carriage, it is cut into cigarette lengths by a rotating cutter blade. The machines show this peculiar shape of the former more fully than the patent, and that it is the same, and causes the paper ribbon to be folded in the same manner, as the trough of the Hook patent; and the shape of the trough as a folding device is continued throughout the folding devices of these machines, and, as such, it folds the paper ribbon about the filler in the same way. These machines have also the general arrangement of the machine of the Hook patent, with the belt and mechanism for making a continuous filler and cutting device added, and the wrapping device separated into two parts with the paste wheel between, and provided with guiding grooves for the belt. In operation the tongue presses the stock into sections of a filler between the jaws on the belt bringing the stock to place, and carries them into the receiving channel, lapping the forward end upon the end of the preceding one, and pressing them into a continuous filler, and moves forward in the receiving channel with it towards the grooved wrapping device, where it is wrapped, the wrapper being pasted and pressed down, and carried forward to the cutting device, and cut into suitable lengths. The tongue has a motion, in forming sections of the filler between the jaws, and bringing them over the receiving channel, which the tamping, packing, and compressing bar of the Emery patent does not have, but also has the same motion which that bar has, in completing the continuous filler in the receiving channel, and following it along; and the receiving channel does the same thing about completing the continuous filler and guiding it along that the filler-forming chamber and conductor of the Emerys patent do, although it comes to them in sections so far completed in form. The order in which the pasting is done is wholly immaterial. The wrapping devices, although separated, wrap the filler in substantially the same way that the trough of the Hook patent, as improved by the guides and grooves of the sixth and seventh claims of the Bonsack patent,

does. The guide rollers do the same thing as the cylinder of the Hook patent and the guide tube of the Emerys patent do, in substantially the same way; and the continuous cigarette is carried by a delivery tube to cutting devices in substantially the same way as in the Emerys patent. The machine, therefore, seems to embody the combinations of the second claim of Hook, of the tenth, twelfth, fourteenth, and fifteenth claims of the Emerys, of the sixth and seventh claims of Bonsack, and of the first and second claims of Emery.

The foundation patent of Hook expired November 7, 1893. This freed all done afterwards from that monopoly. The claim of the other patents, as mentioned, remain valid for what they cover as improvements upon that, which are the filler-forming chamber and conductor, the guides and grooves of the former, and the packing bar in their respective combinations. Against further infringement of these by the use of the tongue-receiving channel and guides and flanges in the former of the defendant's machine, the orator seems to have a right to an injunction. Let a decree be entered for the orator that the second claim of the Hook patent was, and the tenth, twelfth, fourteenth, and fifteenth claims of the Emerys, the sixth and seventh claims of the Bonsack, and the first and second claims of the Emery patent are, valid, and have been infringed, and for an injunction against further infringement of these claims of the last three patents, and for an account of the whole.

MAITLAND v. GIBSON.

(Circuit Court of Appeals, Third Circuit. October 22, 1894.)

No. 17.

1. PATENTS—COMBINATION—ELECTRIC LIGHT FIXTURES.

In view of the prior state of the art, there is no invention in a combination comprising an electric light fixture supported from the piping of a house, and electrically insulated therefrom by an insulating joint. 63 Fed. 126, affirmed.

2. SAME.

The Stieringer patent, No. 259,235, for an "electrical fixture," held to be without patentable combination, as respects claims 1, 7, 8, and 9. 63 Fed. 126, affirmed.

3. SAME—MECHANICAL UNION OF PARTS.

The Stieringer patent, No. 294,697, for a combined gas and electric light fixture, held void as to claims 1, 2, 8, and 9, as showing a mere mechanical union of parts, without patentable combination. 63 Fed. 126, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill in equity by George Maitland against Alfred C. Gibson for infringement of certain patents for electric light fixtures. On final hearing the bill was dismissed, with costs. 63 Fed. 126. Complainant appeals.

Richard N. Dyer, for appellant.

Hector T. Fenton, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

ACHESON, Circuit Judge. After a thorough examination of this record, we fail to discover any ground for disturbing the decree dismissing the bill of complaint. We all concur in the conclusions of the circuit court, and in the reasons therefor expressed in its opinion. That opinion is so full and satisfactory that any further discussion of the case is needless. We therefore adopt the opinion of the court below as our own, and upon it we affirm the decree. Decree affirmed.

PETER WHITE SANITARY CO. v. N. O. NELSON MANUF'G CO.

(Circuit Court, E. D. Missouri, E. D. April 14, 1894.)

This was a suit in equity by the Peter White Sanitary Company against the N. O. Nelson Manufacturing Company for infringement of three patents granted to Peter White for inventions relating to tank water-closets. The patents were No. 354,285, dated December 14, 1886; 363,566, dated May 24, 1877; and No. 425,921, dated April 15, 1890.

C. H. Krum, for complainant.

F. P. Fish, W. K. Richardson, and B. F. Rex, for defendant.

THAYER, District Judge. After due consideration of this case the court is of the opinion that the only novel feature of construction disclosed by White's first and second patents, Nos. 354,285 and 363,566, consists in the respective devices shown in those patents for discharging the air from the chamber of the float-valve into the surrounding water in the tank in lieu of discharging it, as in the older tank-valve patented by Scott, into the atmosphere, through a pipe leading to the surface of the water. Barring this one feature, White's first and second patents were destitute of patentable novelty in view of the prior art. The evidence does not satisfy the court that the defendant has either made or sold tank-valves which embody the novel feature aforesaid of White's tank-valve; therefore it is not guilty of an infringement of either his first or his second patent. It is conceded by counsel that the proof does not show an infringement of White's third patent, No. 425,921. A decree must accordingly be entered for the defendant, dismissing the complainant's bill.

McCLERY v. BAKER et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 133.

PATENTS FOR INVENTIONS—NOVELTY—ORDER HOLDER.

Letters patent No. 273,301, issued March 6, 1883, to James B. McClery and Edward C. Page, for an order holder, consisting of four rigid boards,

connected by pliable hinges, and a stiff steel clamp, pressed tightly over the back of the cover, so that the holder will hold a single sheet of paper, are void for want of novelty.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Suit by James B. McClery against George E. Baker, William A. Vawter, and Frank M. Vawter to restrain the alleged infringement of a patent. Defendants obtained a decree. Complainant appeals.

John H. Whipple, for appellant.

Munday, Evarts & Adcock (John W. Munday, of counsel), for appellees.

Before JENKINS, Circuit Judge, and BUNN, District Judge.

BUNN, District Judge. This suit is for the infringement of letters patent No. 273,301, issued March 6, 1883, to the complainant and one Page, who transferred his interest to the complainant. The claim of the patent is:

"An order holder, consisting of four rigid boards, connected by three pliable connections, or hinges, and a clamp, adapted to fit over the outside of the central boards when folded together."

The decision of the circuit court dismissing the bill, though brief, covers the whole case. The court says:

"In view of similar devices in common use for similar purposes before this patent was applied for, it is impossible to find in this claim such novelty as is necessary to constitute invention, and the bill must be dismissed for want of equity."

This court has come to the same conclusion, and it may be unnecessary to add anything to this brief opinion of the circuit court. It seems quite apparent, on looking into the testimony and exhibits, that substantially the same device has been patented over and over again, and in use for various purposes for nearly a generation. There are but two points in which this patent seems to differ at all from several patents of prior dates, introduced in evidence. The main difference is in the method of pressing the papers or other things to be held between the boards used for covers so as to prevent their falling out until released for use. The complainant uses a steel clamp, five or six inches long, and slightly flexible, which is pressed tightly over the back of the cover. In the various other patents other devices are used, but all serving the same purpose of holding the sheets of paper, or photographs, pictures, handkerchiefs, or other things, by means of friction, until the owner chooses to release them. In the Keech patent, which was prior to that in suit, being issued in 1872, the clamp is composed of two elastic bands, one at the top and the other at the bottom of the cover, passed over the adjacent ends of the two middle pieces so as to draw them together. In the Archer patent, issued in 1876, there are the same four stiff covers united by flexible material, which makes the joints flexible, as in complainant's patent and in several others. For the purpose of clasping the covers together, screws are inserted through the middle pieces, with nuts which

screw down over the covers, pressing them together; the sheets of paper where they would come against the screws being notched at their edges. The papers are held between the covers by means of friction applied in this manner instead of by a clamp. In the Covert patent, issued in 1869, there are the same stiff boards, connected by flexible material, and making the same flexible joints as in the complainant's device. The paper or papers are inserted between the covers and held by means of a "rivet," as it is called in the patent, but which, in fact, is very similar to other paper fasteners in common use. This is passed through the two middle pieces of the cover and through the papers lying between, and the ends turned over and pressed down to hold them. The Billings patent, issued in 1867, was an invention of an automatic blotter, arranged in book form for convenient use upon a table or desk; and the invention consisted in the combination of the covers, the blotting paper, and a spring, or its equivalent, used to bring the paper and blotter together. But the spring, instead of holding the covers together, holds them apart. The covers, being lined with blotting paper, are held open for convenience for the insertion of other written sheets to take up the superfluous ink. The device is very similar to the complainant's, except that the action is of an opposite character, the spring pressing the sheets apart instead of together, but it would apparently require only a very ordinary degree of mechanical skill to change the device into that of the complainant's. And so with several other patents. The principal and only material difference is in the manner of pressing the boards together to hold the papers. In the Eastman patent, issued in 1876, there is a spring clamp which squeezes the covers together to hold the sheets, much like complainant's, though different in form. The one which the defendant is using varies from that of the complainant's no more in principle than many of the devices shown in the previous patents. He presses his covers together by a steel-wire spring extending the entire length of the back, constituting the middle boards. If this is substantially the complainant's device,—as no doubt it is,—it is scarcely any more so than those of the other previous patents referred to. The difference is merely a mechanical one, involving no invention. Any ordinary mechanic, or a person of common sense not a mechanic, and without the inventive faculty, would be fully equal to suggesting the change. They are all very old devices, and it is a mere question of which operates most conveniently.

The language of the United States supreme court in *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, seems applicable to this case.

"The design of the patent law is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention."

The other difference between the complainant's device and those of previous patents relates solely to the particular use to which it is put. Much stress is laid upon the fact that it is the only order holder *eo nomine*, and is intended to hold but one order, either on a single sheet or on several, and that it has introduced a better system of bookkeeping. This claim is founded upon the following statement in the patent:

"The holder is not intended to hold a volume, but only a single order at a time, on one or more, but not a great many, sheets of paper. The order is put in either by taking off the clasp, which can readily be detached from the cover, and replacing it when the order is in, or by pressing the backs together on a small fulcrum placed temporarily on the rear edge of the clasp."

It is apparent from the testimony and exhibits that one of the differences between complainant's device and the ones previously in use is that the latter have a much greater degree of adjustability. The complainant's rather stiff steel clamp in a single piece seems well adapted to holding a single sheet or any small number of sheets between the covers. From the sample in evidence it would appear that it is well adapted to hold, say, from one to ten sheets of paper of ordinary thickness, but not much more, though, of course, it would only require a thicker clamp to give the boards a greater capacity, in which case it could not be used for a single sheet. The other devices seem better adapted to holding a greater volume of sheets, having a wider adjustability. The only limit on the screw device is the length of screw, which may be longer or shorter, and so with the ordinary paper-holder device. The elastic clamp made of silk ribbon also admits of a high degree of adjustability, but after a time loses its holding power. But while these previous devices seem better adapted to holding a larger volume of paper, it is difficult to see why they are not as well, or nearly as well, adapted to holding a smaller volume, or even a single sheet. And what invention is there, when so many devices are in existence adapted to hold many sheets of paper, in making another to hold fewer sheets, or a single sheet? If this constituted a material difference amounting to invention, it would be difficult to find any infringement in the case, because the defendant's device in this particular of adjustability is more like the former devices; the steel-wire spring claspings the back of the covers being much more elastic and therefore better adapted to holding a large number of sheets than the complainant's device. We cannot think that these slight differences suggest any invention, being such as any ordinary mechanic, or any person not given to invention, would readily suggest. Nor does it constitute invention, when so many devices are in use for holding sheets of music, photographs, pictures, and sheets of paper generally, to make another, operating upon similar principles, for the particular purpose of holding commercial orders. Any device that will hold another sheet of paper will hold an order. The decree of the circuit court dismissing the bill of complaint is affirmed.

HOMER RAMSDELL TRANSP. CO. v. COMPAGNIE GENERALE
TRANSATLANTIQUE.

(Circuit Court, S. D. New York. May, 1894.)

1. PILOTS—NEGLIGENCE—KNOWLEDGE OF CURRENTS.

Delay of the pilot of a steamship in reversing to avoid evident danger from her failure to maneuver in the usual manner, caused by an undercurrent, is negligence, not mere error of judgment, although he may have supposed that the interruption of her movement was only temporary, for he is chargeable with knowledge of the currents.

2. SHIPPING—LIABILITY FOR TORT — NEGLIGENCE — STEAMSHIP LEAVING NEW YORK.

An ocean steamship is not negligent in backing out from her dock at New York to go out on the ebb tide, with only one tug to assist her in turning in the river, where the tug is a powerful one, and its use is continued as long as practicable, as this can be done safely, with proper care, and it is customary to employ but one tug for the purpose.

3. SAME—DUTY OF MASTER OF VESSEL IN CHARGE OF PILOT.

While the navigation of a steamship is under control of a pilot, her master is not in fault for failing to interpose his authority to stop her in order to avoid danger from her failure to maneuver as usual, caused by an undercurrent, where he suggests such danger to the pilot, and the pilot thinks it may be avoided without stopping; the case not being one of extreme peril or of incompetency on the part of the pilot.

4. PILOTS—COMPULSORY PILOTAGE.

The New York pilot law, giving the outward pilotage of a foreign ship to the pilot who brought her in, or, in case of objection, to another assigned by the commissioners of pilots, and subjecting the master and owner to penalties in case of refusal, and making refusal by the master a misdemeanor, is compulsory.

5. ADMIRALTY JURISDICTION—DAMAGE TO PIER BY VESSEL.

Admiralty has no jurisdiction of a suit against either a vessel or her owner for damage to a pier by the vessel striking it, such injury not being a maritime tort.

6. SHIPPING—LIABILITY FOR TORT—NEGLIGENCE OF COMPULSORY PILOT.

A shipowner is not liable at common law for damages caused by negligence of a pilot compulsorily employed.

This was an action by the Homer Ramsdell Transportation Company against the Compagnie Generale Transatlantique, owner of the steamship La Bretagne, for damages to a pier, tried before a referee.

Enoch L. Fancher and William H. Harris, for plaintiff.

Jones & Govin (Edward K. Jones, of counsel), for defendant.

WM. G. CHOATE, Referee. This is an action at common law against the owner of the steamship La Bretagne for damages caused to the plaintiff's pier No. 42 North river, under the following circumstances: The La Bretagne was lying at her dock, No. 42 North river, on the 10th December, 1892. About five minutes after 8 o'clock in the morning, the tide being about the last of the ebb, the La Bretagne was backed out of her slip in order to start on her voyage to Havre. She was in charge of a Sandy Hook pilot. The tide being ebb, her wheel was put hard a-port, and she was backed towards the west side of the river as far as it is usual or safe to bring her. A tug was employed to push her stern up stream, and her engines were started

full speed ahead. She began to turn down the river, but, when she had reached about the middle of the river, it was observed by the master and pilot, who were together on the bridge, that she had ceased to turn. The master and pilot were in consultation, and the master suggested that it might be better to stop her. The pilot, however, thought that she had still room to turn in the river, and did not immediately give the order to slow or stop; but, after she had run a short distance further, he gave the necessary orders to slow, stop, and back at full speed, but, in spite of these precautions, she ran into the plaintiff's pier, striking it with her bow at an angle of 45 degrees, some 20 feet or more from the end on the north side, and inflicted considerable damage.

It is claimed on the part of the defendant that there was no negligence in the management of the steamer on the part either of the master or the pilot, but, at most, an error of judgment, for the consequences of which no action would lie. I think, however, that it is clear that the pilot was negligent. The cause of the arrest of the turning of the steamer was probably an undercurrent of the new flood tide striking her bottom. It was or should have been evident to him, before he gave the order to reverse, that there was great danger of her running into the pier. He is chargeable with knowledge of the tides and currents, and cannot claim as a pilot to have been surprised at the action of the ship. He seems to have supposed that the failure of the ship to turn to starboard was temporary, and would be presently overcome. In this he took too great a risk, and should have given the order to reverse sooner than he did, and thereby the accident would have been avoided.

It is claimed on the part of the plaintiff that there was negligence in going out upon the ebb tide; also, in not employing two tugs instead of one to turn the stern of the ship up stream, and in not continuing the use of the tug which was employed longer in that service. It was shown, however, that the tug employed was a powerful tug; that it was customary to employ one tug, and not two, for this purpose; and that the tug so employed pushed against the stern as long as it was practicable to do so after the engines of the ship were started forward, and that it was necessary to start the engines forward to prevent her striking on the other side of the river. It was also proved that steamers backed out and turned in the river upon the ebb tide, and that with proper care on the part of the pilot this can safely be done. These allegations of fault, therefore, appear to me to be groundless.

The next question is whether there was any fault on the part of the master in not interposing his authority to control the action of the pilot, and to insist that he should stop the ship or back her sooner than she was stopped and backed. There seems to be no doubt of the authority of the master in an extreme case to supersede the authority of the pilot, and to take charge of the ship himself, where it is necessary for the safety of the ship or the avoidance of imminent danger. The cases, however, all agree that it must be an extreme case of obvious danger, or incapacity on the part of the pilot, to authorize such interference. As regards the

navigation of the ship, she is under the exclusive control of the pilot; and, even while the master believes that the action of the pilot is indiscreet or involves danger, it does not follow that he should interfere with the navigation. He may do his whole duty by pointing out what he conceives to be the danger, and leaving the responsibility where it is, upon the pilot.

In the case of *The Maria*, 1 W. Rob. Adm. 110, Dr. Lushington says:

"It would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law and specific enactments from liability for the acts of the pilot, would be most severely prejudiced. It is the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication or ignorance or any other cause, to interpose his authority for the preservation of the property of his employers."

So in *The Lochlibo*, 3 W. Rob. Adm. 329, the same learned judge says:

"I should never go to the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or otherwise to keep as near the South Sand light, and vice versa, or to bring the ship up, was 'interfering,' in the legal acceptation of the term, with the duties of the pilot. Illegal interference is of a different description. If, for example, in this case, the boatswain had called out to the man below to starboard the helm, or if the master had called out to port the helm, it would be interference; but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success."

In the case of *Camp v. The Marcellus*, 1 Cliff. 491, Fed. Cas. No. 2,347, Mr. Justice Clifford says:

"While on board, the pilot, in the absence of the master, has the exclusive control and direction of the navigation of the vessel; but if the master is present, the power of the pilot does not so far supersede the authority of the master that the latter may not, in case of obvious and certain disability or gross ignorance and palpable and imminent danger or mistake, disobey his orders, and interfere for the protection of the ship and lives of those on board. Divided authority in a ship with reference to the same subject-matter is certainly not to be encouraged, and can never be justified or tolerated except in case of urgent and extreme necessity. While standing by and witnessing a self-evident mistake, manifestly and imminently endangering the ship and certain to cause a collision, the master should not remain silent, but might well interpose, so far at least as to point out the error and suggest the proper corrective."

In the present case the master did his full duty in suggesting to the pilot the danger of proceeding, but, in answer to his remonstrance, the pilot explained that he thought the ship would come round. His knowledge, or supposed knowledge, of the tides and currents, and their effects upon the ship, is or should be far superior to that of the master. It is on account of this superior knowledge that the ship is obliged to employ the pilot, and I think it is clear that this case does not come within that class of cases of extreme peril or incompetency in which the master is justified or it becomes his duty to take the management and navigation of the ship out of the hands of the pilot.

The next question is whether the owner of a ship is liable at common law for damages occasioned by the negligence of a pilot compulsorily employed.

There is no doubt in this case that the law of New York compels the ship to employ a pilot appointed by the state. By the New York pilot law, a foreign ship, when inward bound, is obliged to take the first pilot that offers his services. While the masters of certain vessels may be licensed to pilot their own vessels, it is provided in the statute that all vessels from foreign ports shall take a licensed pilot, or, in case of refusal, pay full pilotage; and it is further provided that any person not holding a license who pilots a vessel in or out of the harbor of New York shall be held guilty of a misdemeanor, and any one employing a person not holding a license to pilot a vessel shall forfeit and pay the sum of \$100. The provision with regard to outward pilotage is that the pilot who brought in the ship has the right, by himself or one of his boat's company, to take her out, unless he has been complained of for misconduct, subject, however, to the right of the shipowner to object to this particular pilot, in which case the commissioners of pilots shall assign another pilot from the same boat's company to take the ship out. 3 Rev. St. (7th Ed.) pp. 2017, 2019, 2020. If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the state, it could not be held that the shipowner was compelled to take the particular pilot employed. But the right to object to one particular pilot certainly does not make the appointment of another selected by the commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot.

In the case of *The China*, 7 Wall. 53, the majority of the court held that the New York statutes created a system of compulsory pilotage. Both the master and the owner are subjected to penalties besides their liability to pay full pilotage in case of their refusal; and, as to the master, such refusal is expressly made a misdemeanor. It seems to me there can be no question that the pilotage is compulsory.

The plaintiff has proceeded by a common-law action. He could not do otherwise, because the tort for which he proceeds is not a marine tort, not being consummated on navigable water. The pier injured is part of the land. *The Plymouth*, 3 Wall. 20; *The Maud Webster*, 8 Ben. 547, Fed. Cas. No. 9,302; *The Neil Cochran*, 1 Brown, Adm. 162, Fed. Cas. No. 10,087; *The Ottawa*, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; *The M. R. Brazos*, 10 Ben. 437, Fed. Cas. No. 9,898. The admiralty, on the foregoing authorities, would have had no jurisdiction to entertain the suit for the damage done to this pier, either against the vessel or against her owner. The question involved, therefore, is one strictly of liability at common law.

In England it is settled, after a good deal of discussion, that independently of the statutes regulating pilotage, and which exempt the owner from liability, the owner of a vessel cannot be held at common law personally liable for the negligence of a pilot whom the vessel is compelled to employ, for the reason that the ground of the lia-

bility of the owner for the negligence of those who navigate the vessel is based upon the relation between the owner and the parties guilty of negligence,—of master and servant, or principal and agent,—and that as no such relation exists between the owner and the pilot, who is imposed upon him by the superior authority of the state, the reason for the liability in case of a master or crew appointed by the owner ceases. The English courts, however, hold that if the master or crew co-operate in any way in the negligent act of the pilot, or the damage is caused by their disobedience of his orders, the owner is liable. To exempt the owner, the fault must be that of the pilot alone. The principal English cases are the following: *The Maria*, 1 W. Rob. Adm. 102; *The Protector*, Id. 54; *The Agricola*, 2 W. Rob. Adm. 19; *The Neptune Second*, 1 Dod. 467; *The Christiana*, 7 Moore, P. C. 171; *The Girolamo*, 3 Hagg. Adm. 169; *Bennet v. Moita*, 7 Taunt. 258; *Attorney General v. Case*, 3 Price, 303; *The Annapolis*, Lush. 312; *Carruthers v. Sydebotham*, 4 Maule & S. 77; *The Halley*, L. R. 2 Adm. & Ecc. 3, L. R. 2 P. C. 201. And the rule so established is quite in accordance with the general principle of the law of master and servant, or principal and agent, which holds one person liable for the tortious act of another only where the person committing the wrong is employed by the person sought to be held.

The mere fact that the person sought to be held derives some benefit in an indirect way from the act done is not enough if the person committing the wrong is employed by another party exercising an independent employment. Thus, a party hiring a carriage of a livery stable keeper is not liable for the negligence of the driver, and a butcher employing a licensed drover to lead a bullock through a city is not liable for the negligence of the servant of the drover, and a railroad company is not liable for the negligent act of the servant of the contractor who builds the road. *Laugher v. Pointer*, 5 Barn. & C. 547; *Milligan v. Wedge*, 12 Adol. & E. 737; *Reedie v. Railway Co.*, 4 Exch. 244.

In this country the question of the liability of the owner of a ship for the act of a compulsory pilot has received considerable discussion, but there appear to be only two cases in which the point has been directly decided that the owner is liable in personam in such case. These are the cases of *Bussy v. Donaldson*, 4 Dall. 206, by the supreme court of Pennsylvania, decided in 1800, and *Williamson v. Price*, 4 Mart. (N. S.) 399, decided in 1826, by the supreme court of Louisiana. There are dicta, however, to the same effect in other cases in this country, and especially in the case of *The China*, supra, where Mr. Justice Swayne, delivering the opinion of the court, disapproves of the rule of the English cases, and cites with approval the case of *Bussy v. Donaldson*. The case of *The China*, however, was the case of proceeding in rem against the vessel for damages from a collision caused by the fault of the pilot, and the decision stands upon a ground wholly independent of the personal liability of the owners. As the court says in that case:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant. 63F.no.6—54

ant, nor from the common law; it had its source in the commercial usages and jurisprudence of the middle ages. * * * According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

On the question of the liability of the vessel, the case of *The China* has been followed by the same court in the case of *The Merrimac*, 14 Wall. 199, which was not, however, a case of compulsory pilotage, like the case of *The China*.

The opinion in the case of *Bussy v. Donaldson*, 4 Dall. 206, by Shippen, C. J., shows that the point was taken before the court that the owner was not liable for the reason that the pilot was not the servant of the owner, but the officer of the state. The court says of this point:

"The distinction is rather plausible than solid. The legislative regulations were not intended to alter or obliterate the principles of law by which the owner of a vessel was previously responsible for the conduct of the pilot, but to secure in favor of every person (strangers as well as residents) trading to our port a class of experienced, skillful, and honest mariners to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only, reason why the law in general makes the master liable for the acts of his servant; and, in many cases where the responsibility is allowed to exist, the servant may not in fact be the choice of the master. For instance, if the captain of a merchant vessel dies on the voyage, the mate becomes captain, and the owner is liable for his acts, though the owner did not hire him originally, nor expressly choose him to succeed the captain. The reason is plain. He is in the actual service of the owner, placed there, as it were, by the act of God. And so, in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature. The general rule of law, then, entitles the plaintiff to recover; and we have heard of no authority—we can recollect none—that distinguishes the case of a pilot from those numerous cases on which the general rule is founded."

Smith and Brackenridge, JJ., concurred.

The reasons given for the rule seem to depend more upon considerations of convenience than upon strict legal principle. If the effect of the legislative regulation was to take the ship out of the hands of her owner, and put her in the hands of a public officer, there seems to be no principle of law under which the owner could be responsible for the negligence of such public officer, even if the legislative act did not express any intention to alter or obliterate what would otherwise have been the responsibility of the owner for the act of the pilot; that is, for the act of a pilot appointed by the owner. Of the many cases said to exist of responsibility for the act of another, though such other was not the choice or appointee of the person held liable, the illustration is not a fortunate one. In case of the death of the captain, the mate becomes captain, with the consent and by the authority of the owner; and, whether appointed by the owner himself or by the captain, he is appointed by the act of the owner, or by his authority, and it is a part of his understood duty by the maritime law to take command of the vessel in case of the death of the captain. So as to the circumstance that the voyage is for the benefit of the owner, and that the pilot is in his actual service,

in the sense that he is working towards the completion of the voyage upon which the ship is sent by the owner, the same argument would hold with reference to the passenger in the livery stable carriage, and would impose a responsibility for the drover's servant upon the owner of the bullock, and, indeed, would impose responsibility upon the owner of a ship for the negligent act of the master or crew employed by the charterer.

The law is well settled that if the terms of the charter party are such as to amount to a demise of the ship, putting her out of the control and possession of the owners, and under the control and into the possession of the charterers, who appoint the master and crew, the owners are not responsible for the negligent acts of the master and crew, whether to persons contracting with the master as shippers of cargo, or to outside parties injured by negligent navigation, except, perhaps, as to the former, who may be ignorant of the terms of the charter party and who contract with the master, believing him to be the servant of the owners. The test of liability of the owner in such cases is whether the master and crew were his servants or not. *Fenton v. Steam Packet Co.*, 8 Adol. & E. 835. For a very full and careful statement of this doctrine and the authorities, see *Abb. Shipp.* (12th Ed.) pp. 57-70. And yet in all such cases the ship is liable for negligent navigation in the admiralty in rem (*The Ticonderoga*, Swab. 215; *The Tasmania*, 13 Prob. Div. 110; *The Lemington*, 2 Asp. Mar. Law Cas. [N. S.] 475); and the only limitation of this liability in rem which these cases suggest is that the liability of the ship in rem ceases where she is navigated, and the injury is done by some one not deriving his authority to navigate her from the owners; that is, if a ship is sent to sea without the owner's consent or tortiously, she may not be bound in rem.

The analogy of the non-liability of the owners of a ship under charter, and therefore out of control of the owners, and navigated, not by their servants, but by the servants of other persons, certainly supports strongly the defense in this case.

Since the case of *Bussy v. Donaldson*, the true ground and limit of the liability of the master or principal for the negligence of the servant or agent has been very carefully considered both in England and in this country, and, unless an exception is made with regard to a vessel and the owners of vessels, the case of *Bussy v. Donaldson* is out of harmony with the law of master and servant, and principal and agent, as now held. The argument of convenience with regard to the remedy is, indeed, made a reason for this exceptional liability in the case of *Williamson v. Price*, 4 Mart. (N. S.) 399. I think both in that case and in the case of *Bussy v. Donaldson* the court assumed that the pilotage was compulsory. The Louisiana case is decided largely upon the authority of *Bussy v. Donaldson* and the case of *The Neptune Second*, 1 Dod. 467, which latter case was afterwards overruled. The court refers to the case of *Fletcher v. Braddick*, 5 Bos. & P. 182, as sustaining the rule. That was a case of a vessel chartered by the defendant to the government, and having on board a naval officer, who had in general the command of the ship, but the master and crew were appointed by the owner. It seems, however, that

that case is rather an authority against the liability in case of compulsory pilotage, because the damage being caused by fault of navigation, the owner was held liable, but the court intimated that, if it had been caused by the fault of the naval officer, he might not be liable.

The argument of convenience is thus stated by the supreme court of Louisiana:

"It seems hard, on the one side, that while necessity, and in many places the law, compels to place a vessel under the absolute command of a pilot, his misconduct should subject to damages the owner of the ship, on whom he is, it may be said, forced; but, on the other hand, pilots are very seldom persons able to compensate the owner of a vessel run foul of. The owner of a vessel by whom the damage is done receiving the benefit of the voyage, it has been judged he should indemnify persons injured by his vessel while employed for his benefit."

This argument from convenience, as a reason for holding the owner liable, is stated by the court in the case of *The China* thus:

"The maxim of the civil law '*sic utere tuo ut non laedas alienum*' may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice."

The same reason is stated by Parker, C. J., in the case of *Yates v. Brown*, 8 Pick. 22. But that was not a case of compulsory pilotage.

The argument from convenience, or a desire to secure to the party injured a remedy against the person who can respond in damages, which it is assumed a pilot ordinarily cannot do, may have had its legitimate influence in establishing the rule of maritime law making the vessel liable for all torts committed by her, at least where she is navigated with the consent of, or under authority derived from, the owners. She goes from port to port; and, if she were not herself held responsible in the maritime courts of the world for her torts, persons injured thereby would for the most part be remediless; and this may have been the reason for the rule making her liable,—a rule of so great antiquity that the time and manner of its origin are lost in the past, but so wholesome that it stands undisturbed to this day wherever the maritime law is administered. It is not necessary to inquire whether the decision in the case of *The China* was a correct application of this principle according to the general maritime law. It must be assumed that that decision is at present the established law of our courts of admiralty so far as relates to the liability of the vessel in rem. But such an argument from convenience has no place in determining the question of a common-law liability of the owner, which rests upon rules of law governing the responsibility of the master for the acts of the servant or the principal for the acts of the agent. That the liability in personam of the owner does stand upon this principle, in this country as well as in England, appears by the case of *Sturgis v. Boyer*, 24 How. 123, in which it was held that a vessel employing a tug to move her from place to place is not liable for the fault or negligence

of the master and crew of the tug who are employed by the owners of the tug. Mr. Justice Clifford there says:

"Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug nor ship the crew, nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation."

In that case the court follows and approves the case of *Sproul v. Hemmingway*, 14 Pick. 1, in which Chief Justice Shaw discusses the question at considerable length of the ground of liability of the owner of a vessel at common law for the negligence of the master and crew of a tug employed to tow her; and the liability was denied, on the ground that the master and crew, who were guilty of negligence, were not the servants of the owner of the ship.

While the English courts have reached a different conclusion from the supreme court as to the liability of the tow and her owner for the negligence of those in charge of the tug, yet it is upon grounds which do not conflict with the principle of the liability of the master for the acts of a servant. That difference is carefully pointed out by Judge Lowell in the case of *The Belknap*, 2 Low. 281, Fed. Cas. No. 1,244. The English courts have taken a different view of the relation between the owner of the ship and those managing the tug. The latter are held to be the servants of the former. The owner of the vessel is held responsible as a master for the acts of his servant, under the doctrine of "respondeat superior." *The Belknap*, Id. It is not pertinent to the present inquiry whether in *Sturgis v. Boyer*, which was a suit in rem, it was rightfully assumed by the court that the vessel was not liable if the owners would not be liable in personam, or whether that case can be reconciled with the later case of *The China*, in respect to the liability of the vessel.

The case of *Smith v. The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033, was a libel in rem against the vessel in admiralty. So, also, was the case of *The Lotty, Olcott*, 329, Fed. Cas. No. 8,524.

The other American cases cited in support of the liability of the defendant are clearly distinguishable.

The case of *The Julia M. Hallock*, 1 Spr. 539, Fed. Cas. No. 7,579, does not appear to be a case of compulsory pilotage. The Massachusetts pilot law, while requiring a vessel refusing a pilot to pay pilotage fees, is not regarded as making pilotage compulsory. *The Carolus*, 2 Curt. 69, Fed. Cas. No. 2,424; *Camp v. The Marcellus*, 1 Cliff. 481, Fed. Cas. No. 2,347.

The case of *Snell v. Rich*, 1 Johns. 305, involved the question of the liability of the master while the pilot was on board. As stated in the case of *The China*, the liability of the master does not depend upon the rules of the common law, but the rules and usages

of the maritime law. It is evident from the opinion of Mr. Justice Curtis in the case of *The Carolus*, *ut supra*, that, if the pilotage had been compulsory, he would have held the owner not liable; and although this dictum is disapproved by Mr. Justice Clifford in the case of *Camp v. The Marcellus*, 1 Cliff. 492, Fed. Cas. No. 2,347, it would seem to be well founded, both on reason and authority.

The case of *Yates v. Brown*, *ut supra*, indeed states the general proposition that the owners of a vessel which, by collision with another vessel, has caused damage through the fault or negligence of any one on board, is answerable to the injured party in respect of their property, notwithstanding there may be a pilot on board, who has entire control and management of the vessel. It is put upon the ground of inconvenience. It is doubtful if in that case the pilotage was understood by the court to be compulsory. In the other Massachusetts cases the pilotage has been held not compulsory. Of course, if the owner accepts a pilot not by compulsion of law, but voluntarily, no distinction can be made between the negligent acts of such a pilot and a master appointed by the owner; but it appears to be true of the case last cited, as of many others in which the doctrine of a more convenient and satisfactory remedy for the injured party is urged, that the court adopted and applied to the question of the liability of the owner, consciously or unconsciously, the principle of the maritime law which imposes a liability upon the vessel, which principle is not strictly or properly applicable where the case has to be determined purely upon the principles of the common law. The liability of the owner in personam by the maritime law has been said to be the same as at common law (*The Germania*, 9 Ben. 356, Fed. Cas. No. 5,360); and I find no cases inconsistent with this dictum.

It is certainly most unjust to give a remedy against a party who is not legally responsible because the injured party may have an inadequate remedy against the party who is legally liable; and, with the utmost respect for the courts which have put the liability of the owners on the argument of convenience, I am unable to follow them, or to attribute to this circumstance the effect of making a distinction between vessels and other chattels as respects the liability of the owners for negligence in their use. I think the common law makes no such distinction.

The case of *Denison v. Seymour*, 9 Wend. 1, was the case of a vessel in charge of a pilot appointed by the owners, and the question before the court related to the liability of the master in such case. It has no bearing upon the question involved in the present case.

While, therefore, it must be admitted that there is some authority and many dicta in favor of holding the owner of a vessel liable for the negligence of a pilot compulsorily imposed upon the vessel, I have come to the conclusion that, both upon reason and authority, the rule is otherwise, and that, therefore, the defendant in this case is entitled to judgment.

The objection that this pier was the property of the city, and that the city is but a part of the government of the state, and that it was the agent of the state whose negligent act caused the injury,

has no merit as a ground for refusing relief in damages. The argument seems to be that the property destroyed was not the property of the plaintiff, but the property of the state. The action, however, is for the injury to the private and individual interest of the plaintiff in this property, the fee of which belongs to the public. By obtaining a lease from the city, the plaintiff acquired an interest which is entirely independent of the property of the state; and by the terms of the lease the plaintiff was under obligation to repair the pier, and both upon the ground of this obligation, whereby the plaintiff has been injured, and also upon the ground of the plaintiff's special interest in the pier, which is quite independent of that of the state or the city, which special interest has been damaged by the act of the pilot, it would be no obstacle, in my opinion, to the plaintiff's recovering the damage, if otherwise entitled, that the fee in the land is vested in the city, as one of the departments of the state government.

So, also, the defense set up in the answer that the "Harter Act," so called, (27 Stat. 445, c. 105), relieves vessels from all liability for the negligent act of the master and crew if the vessel is properly manned and equipped for the voyage, cannot be sustained. That act is limited to the regulation of the liability of the vessel, her owners, and master, to the shipper, and has no application to torts committed against other persons or their property, nor do its provisions seem to be retroactive. This tort was committed before the passage of the act.

The amount of the damages may, however, be properly determined upon this reference, in order that judgment for the proper amount may be finally entered if the court should hold the plaintiff entitled to recover. It is proved that the cost of repairing the plaintiff's pier was \$13,153.34. Of this amount, \$5,460 was paid by the plaintiff on the 15th February, 1893, and the balance on the 15th March, 1893; and interest is to be allowed on those payments from the said dates respectively. It is also proved that the plaintiff lost the opportunity to rent out a part of the pier, in consequence of the damage, for a period of three months. There was a demand for such property, and the plaintiff could have obtained for it, during the period it was thus deprived of its use, \$2,250; and I think the plaintiff would be entitled to recover this sum in addition to its actual expenses, with interest from the 15th day of March, 1893, if it were entitled to a judgment.

But, for the reason given above, the defendant is entitled to judgment, with costs.

LATHAM et al. v. HAMILTON & MERRIMAN CO.

(Circuit Court of Appeals, Seventh Circuit. October 11, 1894.)

No. 134.

COLLISION BETWEEN STEAM AND SAIL—TUGS—NEGLIGENCE.

Two tugs started at the same time to go to a schooner in order to tow her into the harbor. Both tugs approached the schooner at full speed, and, in attempting to turn so as to catch the towline, one of the tugs forced the other so near the schooner that it collided with the schooner. *Held*, that both tugs were guilty of negligence, and were responsible for the injury. 50 Fed. 583, reversed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Libel by the Hamilton & Merriman Company against John Latham and Thomas H. Smith for damages for a collision. Libellant obtained a decree. 50 Fed. 583. Respondents appeal.

Max C. Krause, for appellants.

F. M. Hoyt, for appellee.

Before WOODS, Circuit Judge, and BUNN, District Judge.

BUNN, District Judge. This is a case involving the question of responsibility for a collision which took place between the steam tug Jesse Spaulding and the schooner Butcher Boy, occurring near Sturgeon Bay canal, on Lake Michigan, on September 29, 1889. The contest is between the steam tugs Jesse Spaulding and George Nelson. The facts proven or mainly undisputed are these: On that day these two steam tugs, the Jesse Spaulding and George Nelson, were lying moored at the same dock in Sturgeon Bay canal, on the north side thereof, and about one-half mile from the mouth of the canal where it enters Lake Michigan, the Nelson lying just beyond the Spaulding, a few feet further from the mouth of the canal. These tugs were both engaged in the same business, and were of about equal size and speed. Some of the witnesses testify that the George Nelson was a little faster boat, Charles A. Graves, the master, testifying that his boat could run from one-fourth to one-half of a mile per hour faster than the Spaulding. But the weight of evidence shows that the tugs were of substantially the same speed, which was about 13 miles per hour each. Early on that morning, between 5 and 6 o'clock, the officers of the tugs, both having steam up, sighted at about the same moment the schooner Butcher Boy, coming down the lake from a southeasterly direction, loaded with lumber, and evidently with the purpose of coming into the canal. Thereupon both tugs let loose at the same time, and started out of the canal and up the lake towards the schooner, to get the tow of the schooner, to take her into the canal. There was a dead sea, hardly any wind blowing, and the schooner, being a sailing vessel, was moving in a north-westerly direction at a very slow rate, not to exceed one mile or a mile and a half an hour. The Spaulding, lying ahead

of the Nelson, led out down the canal towards the lake, the Nelson following immediately behind; but the Nelson, from having more steam up, or for some reason, gained on the Spaulding, and overtook and came alongside of the Spaulding, on her starboard side, at the mouth of the canal, or a little after the tugs entered the lake; and from that time until they came to a point opposite the stern of the schooner, on her port side, and about a mile and a half or two miles southeasterly from the mouth of the canal, the two tugs kept substantially abreast of each other. Some of the witnesses for the Nelson testify that the Nelson forged a part of a length ahead of the Spaulding, and kept that position until the turn was made, and that the Spaulding was enabled to keep its position and maintain the contest of speed by keeping in the suction of the Nelson, which the Nelson was unable to avoid, because running so near to rocks on its starboard or shore side; and the captain of the Spaulding admits that his boat may have been in the suction of the Nelson. But, if the Nelson were ahead at all up to the time they undertook to make the turn to come alongside the schooner, it was not more than about one-half length. The tugs thus deliberately entered into a contest, each running wide open and at full speed, in order to obtain the tow first. The witnesses all agree that this was the purpose of each, and that they were both running at full speed, or about 13 miles per hour. Nor did either tug slacken its speed when coming into the near vicinity of the schooner, and when they undertook at the same instant to execute a movement which should change their course from a southeasterly to a north-northwesterly course, to come alongside the schooner on her port side, where her towline was out, ready for the tug that should first reach it. When the tugs arrived at a point somewhere from 400 to 1,000 feet from the schooner, and about opposite or a little beyond her stern, they simultaneously turned their wheels a-starboard, in order to turn about and come alongside the schooner on the rear or port side, to obtain the tow. In endeavoring to execute this movement, the Nelson, having the outward sweep, fell part of a length behind the Spaulding, and, both moving still at full speed, the Spaulding headed in an easterly direction, directly towards the schooner, and ran into her amidships, and very nearly at right angles, plowing through about four feet of her timbers, and making a serious breach in the vessel. The Nelson, being still on the starboard side of the Spaulding, reversed her engine in time to avoid a collision with the schooner; but the Spaulding, although she reversed her engine, did not succeed in avoiding a collision. The Spaulding took the tow, and hauled the vessel into the canal before she had time to fill with water enough to cause her to sink.

So far the facts are fully and fairly established by the evidence. The principal conflict relates to the question of the controlling cause of the collision between the tug Spaulding and the schooner, the Spaulding contending that it was caused by the Nelson running into the Spaulding on her starboard side, a little back of amid-

ships, after the turn was partially made, and throwing the bow of the Spaulding to the eastward, and thus changing the course of that tug, and that, but for this action of the Nelson, the Spaulding would have cleared the schooner, and avoided the collision. The district court took this view, holding that the Spaulding was the leading vessel; that it was the business of the Nelson, which was the following vessel, to keep out of the way, and that the Nelson was alone responsible for the collision. The contention of the Nelson is that the Spaulding either could not, considering its speed and close proximity to the schooner, execute a turn without a collision, or that it was so determined upon getting the bow that it took the risk involved in crowding the Nelson out, and preventing her from coming between itself and the schooner. The evidence in support of these two contentions is conflicting, and it is difficult to say in which way is the preponderance. But we are of the opinion that, in any view of the case which may be taken, both tugs were guilty of a want of proper care and caution in the premises. We do not think the case should be decided upon the principle that it was the duty of the Nelson to keep out of the way of the Spaulding, as the leading boat, without regard to other rules of navigation. One purpose of all these rules is to prevent accidents involving property and life. Here was a collision imminently dangerous to life, as well as property. It was the duty of each boat, in the presence of such danger, to do all in its power to avoid a collision. Neither tug did this. On the contrary, they deliberately entered into a contest which, as conducted, was necessarily hazardous, and, for the small prize involved, were willing to imperil the safety of the property and crew of the schooner, and, as the event showed, sacrificed the one to the other. The damage being done by the Spaulding, the presumption is strong that that tug was responsible, in whole or in part, for the result, unless the contrary is clearly shown by the weight of evidence, which we cannot say is the case. Nor is the court able to say, from the evidence, that the Spaulding is to be considered the "leading boat," within the meaning of the rule which requires in such case that the following boat must keep out of the way. They started from the canal at the same time, and, from the time they entered the lake until they began to make the turn, the Spaulding was not actually in the lead; and whatever advantage it had, if any, was because its course was inside that of the Nelson, or nearer the schooner. But out of this fact, on the contrary, the owners of the Nelson invoke the rule that, at the time of making the turn, the Spaulding, having the Nelson on the starboard side, was required to keep out of the way. See Rule 19, § 4233, Rev. St.

We are of opinion that the case should not be decided upon a consideration of either or both of these rules alone, without regard to another rule quite as important and controlling,—that, in the presence of danger, it is the duty of any boat to do all in its power to prevent serious accident to property and life. We cannot say from the evidence that the Spaulding was wholly free from the

charge of negligence in undertaking to reverse its course in such near proximity to the schooner while sailing at such a high rate of speed. No doubt, by reversing the engine sooner, and slacking the speed, the Spaulding could have cleared the schooner; but then, in doing so, there was danger of losing the tow by allowing the Nelson to come between the Spaulding and the schooner; and we are convinced that both tugs voluntarily, not to say recklessly, took chances of accident in order to succeed in the contest. Supposing it to be lawful to enter into such a contest at all, for the sake of so paltry a stake, each had an equal right to enter into it; and it must be evident that it was culpable in either to sacrifice anything of safety for property and crew to success in the struggle. We will make a brief reference to the testimony upon either side of the contention as to what was the controlling cause of the collision.

The libellant's view is fairly presented by the testimony of William Marshall, the captain of the Spaulding. He says his tug was aft the schooner 4 to 6 lengths away when he began to make the turn. As the tug was about 71 feet long, this would make the distance from the schooner about 355 feet. That the Nelson was right on his starboard side when he put his wheel hard a-starboard, to come around. That, after doing this, he was headed to clear the schooner, when he saw the Nelson coming in towards them, headed for his after quarter, which she ran into, and swung the stern of the Spaulding to port and the bow around to starboard, so that the Spaulding ran into the schooner. That, the moment the Nelson ran into him, he gave the signal to reverse the engine and back. He further explains in regard to the coming together of the tugs that "as they dropped together, the Nelson struck the Spaulding in the quarter aft, swung right together, more of a jar. That, of course, the Nelson did not run head on, but got in the suction of the Spaulding, and that the suction drew them together." That the Spaulding then became unmanageable; would not mind her rudder; could not do anything with her after the Nelson struck her, but that she rolled down in the water, so that the water ran over the deck. That his boat was not damaged any. Peter Bachellor, a cook on the Spaulding, says that he was in the pilot house of his boat; that the tugs started at the same time; that the Nelson gained on the Spaulding right along, and he thinks came alongside when about 100 feet in the canal; that both tugs headed south after getting into the lake, the Nelson a little in advance, about half a length, keeping that position until they began to make the turn, he thinks about a quarter of a mile from the schooner; that, after they had headed to the east, the Spaulding was in the advance in making the circle, about one-half a length or more, and about 100 feet away; that the Spaulding at this time was in shape to clear the schooner if the Nelson had not struck her. Louis M. Peterson thinks the tugs were about 300 feet from the schooner when they began to make the turn, or between 300 and 400; that, when the Nelson came into them, the Spaulding was

heading about onto the schooner, about east, and that the effect of the tugs meeting was to prevent the Spaulding from swinging so as to clear the schooner. E. L. Blakefield testifies that the tugs were 250 or 300 feet from the vessel when they began to make the turn; that they turned about the same time, the Spaulding first, but that the Nelson turned quicker than the Spaulding; that, at the time the Nelson struck the Spaulding, the latter was heading about towards the forward quarter of the schooner, about northeast, and, when the Nelson hit the Spaulding, she was heading a little north or northeast; and that they would have both made the turn if the Nelson had made the same movement as the Spaulding. Charles A. Graves, captain of the Nelson, says he came up with the Spaulding at the end of the piers, and went by him; that he was possibly 1,000 feet away from the schooner when they began to turn; that the Spaulding was then astern of the Nelson, on his quarter; that the Nelson was then the leading boat; that the Spaulding had the Nelson on her starboard, and that the Nelson was the leading boat, and it was the duty of the Spaulding to keep out of his way; that, when he starboarded his wheel, he was ahead, and did not know whether the Spaulding had starboarded his, but thinks he had, as they came around together; that the Spaulding, having the shorter turn, gained a little, when the boats got too close, and lapped in together; that, when they lapped together, his stern was a little forward of the Spaulding's fire-hole door, and that the boats sucked in together alongside; that the Spaulding listed over a little; that, when the boats were 10 or 15 feet apart, the suction caught them, and pulled them together; that he thereupon rang two bells, to back up, and stopped his boat before they got to the schooner; that there was nothing to prevent the Spaulding backing and reversing at the time he did, and, if the captain had given that order at that time, he would have stopped his boat; says that, in his judgment, the man got rattled and lost his head; that from his actions he should judge that his wheel was a-port; that, if he had backed and stopped, he would not have struck the schooner, or, if he had kept his wheel hard a-starboard, he might have cleared the schooner. James Curry was engineer on the Nelson, and says they were half a length ahead of the Spaulding when they turned; that the Spaulding's pilot house was just even with his engine door, which was a little aft of midships; that the stem of his boat did not strike the Spaulding at any time, or come anywhere near it, but that the boats came together with a jam, rather than a blow, and that no damage was done to either; that the lapping together would not have any material effect on the course of the two tugs if they had kept their wheels in the same position; says he should say it was the suction that drew the boats together; that he does not think the lapping of the two boats caused the collision, but that it might have been prevented by the Spaulding's stopping; that she might have stopped and backed up a little sooner; that the Spaulding was very easily listed over; and that she listed over and

listed back some, but not clear back, until after she struck the schooner. Other witnesses for the Nelson testify that the collision might have been prevented by the Spaulding reversing and backing sooner, but that she kept her course in order to cut the Nelson off from getting the tow.

Perhaps the captain and mate on the Butcher Boy, who should be disinterested witnesses, were in as good a position, being in the pilot house of the schooner, to observe the movements of the two tugs as any other witnesses. Samuel Parker, the captain, says the tugs both came out of the canal together, and they seemed to be about the same when they got up abreast of him. That he thinks they were 10 or 12 lengths west of the vessel, inshore; that there was not any wind. That when they got abreast of the schooner, or a little further south than abreast, they started to turn to the east, to come to the vessel. That, just as soon as they started to him, he said to the mate: "My God, they can't make that turn in that distance. They are going to run into the vessel,"—and that he sang out: "Back the tugs. You are going to run into the vessel." He says: "I sang out from the time they made the turn until they struck the vessel. I imagined they could not make the turn at the rate they were going." That his opinion still was that they could not make the turn in the distance she was from the vessel, and come up alongside of the vessel, at the speed she was going. Says that he is positive that neither of the tugs was headed at any time to the northward or northeast, so as to pass the bow of the schooner, after they started to make the turn. That he begged probably 20 times, from the time the turn was made until the boat ran into him, "For God's sake, to back." That he was looking the man in the face, and seeing what was coming. That he heard no signal to back in either boat, and only knew that the Nelson gave any from her action. That she did not touch the vessel, but just dropped across the stern. That, if the Spaulding had given orders to her engineer to stop and reverse at the time he hallooed to him to back, he thinks she would not have collided with the schooner. That the Spaulding struck his vessel end on, probably a very small fraction of an angle, leading a little towards the bow of the vessel, by the stem iron, by the impression on the vessel's side, and would have sunk her in about half an hour if she had not been as close as she was to the canal. That they got a bag of oakum, and put in the break to keep the water out. He says:

"The tug struck me with her stem about square. I will call it square, but I say it angles probably a very little, right amidships, three feet forward of the main mast, and broke through the first and second plank under the water. When the upper part of the stem came in collision with the upper part of the vessel, she walked through four feet of plank, solid oak in regard to building a vessel. There she stopped. The Nelson was then twenty or thirty feet away, just going across the vessel's stern."

The following questions, with the witness' answers, further illustrate his views of the situation:

"Q. It is claimed by the tug Spaulding that the collision between the Spaulding and the Butcher Boy was caused by the Nelson striking the Spaul-

ding on the starboard quarter, and forcing her bow around to the eastward. State whether this is true or not. A. I do not think it. I may have looked at it different to this man. I thought he had not got room to make that circuit, and I think so yet. Q. The Spaulding? A. Yes, sir. Q. At the time he started to make the turn? A. Directly he started to make that turn, I started to sing out for him to stop; he could not make it. Q. Independent of the movements of the Nelson? A. I don't think I ever looked at the Nelson. I was watching the man that I thought was going to run into me. Q. And you made up your mind that he was going to run into you as soon as he started to make the turn? A. As soon as he did, I guess they all know I sung out to him, to back their boat; they couldn't make it; and it looked to me by the collision that they hadn't distance to make that turn at the rate they were coming. I looked at it that way then, and I look at it so now. If he had backed his boat, the same as the Nelson, we would have had no collision. That is all about it, no matter how close the turn had been. One man backed, and he got clear of the vessel, and the other man, if he backed— I don't say that he didn't. It is not for me to dispute. He says he backed. I did not hear either of them; only by the action of the boat I could see that the other man didn't hit me. Q. You were watching the Spaulding. Did you see anything, while watching her, of the movements of the Nelson that interfered with movements of the Spaulding? A. I don't know anything about that. I could not tell anything about that. Q. Now, if the Spaulding had backed when you hallooed, and when she started to make the turn, would she have got the tow? A. If she had backed? Q. Yes. A. No; she would not have got the tow. She would have lost the tow. That is all about it. They knew that. That is why they were going ahead, but, if the other boat had backed, why then the Nelson would have got the tow. Q. If the Spaulding had backed? A. Yes; certainly she would. If the Nelson had backed, the Spaulding would have got the tow; if he had backed in the first place. But the Nelson did not back until she was alongside,—until he see that trouble was coming close. When these boats first started to turn, if either one had backed they would have been in the lurch. That is all there is about it. But when they see there was a collision imminent— I don't know. I did not hear the man's bells, but he kept clear. Q. The Nelson? A. Looks like it. I did not hear the bells to back. I didn't pay any attention to him, nor the boats either, any more than getting my tow in, until I see them going to make that turn so close to the vessel; and I said to my mate before it occurred, "My God, them boys can't make the turn." And I started to sing out to them to back. They could not make the turn; nor they didn't make the turn. Whose fault it was, that I don't know anything about. I am not supposed to know."

Thomas Wilson, mate on the schooner, testifies that the Spaulding did not head towards the northwest, but came straight for the schooner from the first, and struck her right straight, stem on, and no glancing at all; that he supposes what caused the collision was that they were both racing to get the tow, to get the line first; that Captain Parker hallooed, and made motions with his hands, to the captain of the Spaulding to back up, but he heard no bells on the Spaulding, but heard two on the Nelson after she was fast in the Spaulding; that he saw the Nelson strike the Spaulding; that at that time the Spaulding was heading directly east, 40 or 50 feet from the schooner; thinks the Nelson struck the Spaulding somewhere around the foremast, a little forward of midships, and that the Spaulding listed over a little, but did not alter her course; that she was in the same position when she struck the vessel as when she commenced to turn; that, if the Spaulding had given the signal to back at the time the Nelson did, she would not have struck the schooner; that the position of the Nelson did not at any time interfere with the movements of the Spaulding,

and there was nothing to prevent the Spaulding backing, the same as the Nelson did, but that, if she had done that, the other boat would have got inside of her, come alongside, and got the tow; that the Spaulding had time enough to have made the turn if she had tried, but, after she had first turned towards the vessel, she did not turn any more, but made right for the vessel, about east; that she could have made the turn, but that the other tug would then have been inside of her; that the Spaulding kept going and cutting the other boat off, crowding her away, so she could not get up alongside, all the time until it was too late; that they expected the collision the way they saw it,—they saw it coming; that he knew the Nelson did not hit the Spaulding aft the beam, but forward of amidships; that, at the time, the Spaulding was too close to the vessel, and had no chance to turn. She was too close to the vessel. At the speed she was going, she could not turn. Asked what caused the collision, the witness says:

"Well, he was trying to get a tow, to get alongside of the vessel first, and get a line. That is about all I can say about that. He tried to crowd the other boat out and get there. If he had stopped and backed up, or turned his boat in proper shape, everything would have been all right. We would have had no collision. The Spaulding was going too fast to handle the boat."

—Thinks the Spaulding was some 300 feet away when she began to make the turn and head for the vessel.

This view of Captain Parker and Mate Wilson—that the true reason for the collision is to be sought in the anxiety of both tugs to obtain the tow—is singularly corroborated by some answers made by the captain of the Spaulding on the cross-examination. The questions and answers are as follows:

"Q. Do you think it is good seamanship to go at the rate of thirteen miles an hour, approaching a vessel under sail, within five or six lengths? A. Circumstances alter cases. Q. Under the circumstances of this case? A. I think it had to be thirteen or fourteen miles an hour, or stop and let some other man take the vessel."

This answer probably reveals the true secret of the situation. If either slackened his speed, the other would get the tow.

We think, upon the whole evidence, that each tug was in fault in bringing about this accident; that they should share the loss equally, and congratulate themselves that the damage was not more serious than it was. If it had been further out at sea, the accident might have resulted in the loss of life, as well as the cargo of the vessel injured. It is happily not for the court to apportion the blame or degree of negligence between the parties. That might be a difficult thing to do. But the court is pretty clear in the opinion that the negligence and fault of each contributed and conspired to cause the damage. We cannot but think that the fact of entering into such a determined and spirited contest for so slight a prize, and maintaining it in the face of danger, at so high a rate of speed, and in such proximity to a sailing vessel, lying in a calm sea, powerless to help herself or keep out of danger, and undertaking to execute the movement of turning around and

coming alongside of the vessel, both undertaking to execute the same movement, with purpose to crowd the other out, without slackening speed, or taking any other precaution to prevent accident, is evidence of recklessness and want of caution on the part of both. The officers of the Spaulding, when they began making the turn, knew what the position of the Nelson was, and that she was in fact, whether she had a right to do so or not, endeavoring to execute the same movement, and to come between the schooner and her, and that in so doing there would be liability of collision; and, as good and experienced sailors, if there was danger of losing control of a tug on account of suction, produced by the tugs coming near to each other, probably the liability to such danger should also have been contemplated and foreseen. It seems quite evident that each tug was more intent upon getting the advantage of the other in obtaining the tow than of providing against danger from accident; and we do not think that it is competent for either to shield itself under a technical rule, and at the same time disregard other rules and principles equally important, intended for the safety of navigation. There is this, for instance, contained in the Revised Statutes, which seems quite as applicable to this case as any that has been invoked by either as a shield, and that is:

"Every steam vessel, on approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. And every vessel shall, when in a fog, go at a moderate speed." Rule 21, § 4233, Rev. St.

If this rule had been duly observed by both tugs, there would have been no collision in this case.

As was said by Judge Brown, in the case of *The Amos C. Barstow*, 50 Fed. 623:

"The fatal result in this case only emphasizes once more the necessity of observing, not merely one rule, but all the accumulation of rules designed for the avoidance of collisions."

See, also, *The Clara*, 49 Fed. 767; *The Aurania*, 29 Fed. 98.

The decree should be reversed, and the case remanded to the district court, with directions to enter a decree in accordance with this opinion.

FREY et al. v. WILLOUGHBY et al.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 310.

1. FEDERAL COURTS—EQUITY JURISDICTION—PARTITION—REMEDY AT LAW.

A tenant in common who is out of possession, and who has been disseised by his cotenant, who is in possession of the land, claiming title to the whole of it, cannot maintain a bill for partition in the federal courts until he has established his title and right of possession by a suit at law.

2. SAME.

Where one of several cotenants in a tract of land, claiming the sole title thereto, sold and conveyed the land to a third party, who, in turn, sold and conveyed portions thereof to others, and thereupon the other cotenants instituted a suit in equity to have the deed and all other conveyances which had been made conveying the land, or any portion thereof, canceled and decreed null and void as against their interests, and also praying for a partition of the same, the court *held* that a federal court of equity had no jurisdiction, since the complainants had a plain, adequate, and complete remedy at law.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This is a suit in equity commenced in the United States circuit court for the district of Nebraska by Jacob Willoughby and six others against Henry H. Frey and 26 others. In substance, the bill avers that the seven complainants and Isabella Willoughby (now Isabella Adams) are the only and equal heirs at law of James D. Willoughby, who died, intestate, on the 9th day of July, 1882, seised in fee of the 10 acres of land, described in the bill, which descended in fee simple to the complainants and Isabella Adams, as his only heirs, in equal parts, each heir being entitled to one-eighth of the land; that Isabella, claiming to be the sole and only heir of James D., on the 24th of November, 1884, sold and conveyed the land to William Lang, who sold and conveyed it to the defendant Henry H. Frey; and that Frey and one of his grantees laid out and platted the 10 acres into lots, blocks, streets, and alleys as an addition to the city of Lincoln, Neb.; and that the other defendants had purchased lots in the addition from Frey and his grantees. The prayer of the bill is "that a decree of this court may be entered establishing and quieting the title of your orators in and to the said premises according to their respective rights, as alleged in this bill; and that it may be decreed that each of your orators is an equal and joint heir in the estate of James D. Willoughby, with equal interests and rights in and to the said premises with the said Isabella Adams; and that the deed of said Isabella Adams and all other conveyances which have been executed, conveying the said premises, or any portion thereof, be canceled and decreed to be null and void as against the seven-eighths interests of your orators in and to the said premises. Your orators further pray that judgment and decree may be entered confirming the shares of the parties as above set forth, and for a partition of said real estate according to the respective rights of the parties interested therein." The answer denied that the complainants were heirs of James D.; averred that Isabella was his only heir, and that the complainants had no interest whatever in the land; that the defendants were in the actual possession of the land, and had made valuable improvements thereon; and that they and their grantors had paid the taxes thereon since the year 1882. The defendants, in their answer, and by special plea, objected to the jurisdiction of the court, upon the ground that the bill did not state a case of equitable cognizance, but showed that the complainants' remedy was at law. The parties stipulated that the defendants were purchasers in good faith, and for value, without notice of the complainants' claim, and that they "took possession under their deeds at the

date thereof, and are still in possession." The circuit court overruled the defendants' objection to its jurisdiction, and found and decreed that the complainants were heirs of James D., and as such severally inherited one-eighth of the land in controversy, and that their title thereto was not affected by the conveyance made by Isabella, whose deed and all subsequent deeds executed by her grantees only passed the title to one-eighth of the land, and were null and void as to the remaining seven-eighths. From this decree the defendants appealed to this court.

A. J. Sawyer (N. Z. Snell, Lincoln Frost, S. L. Geisthardt, S. B. Pound, and L. C. Burr, on the brief), for appellants.

T. M. Stuart, T. M. Marquett, J. W. Deweese, and F. M. Hall, filed brief for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Upon the averments of the complainants' bill and the stipulation of the parties, a federal court of equity could not take cognizance of this suit, over the timely objection of the defendants that the complainants had a plain, adequate, and complete remedy at law. It is admitted that the defendants are in the actual possession of the land, claiming to have the legal title thereto. The complainants claim to be the owners in fee simple of seven-eighths of the land. The title they set up and rely on is a legal title, and their remedy to recover the land against those in possession, claiming it by a paramount title, is by an action at law, and not by a bill in equity. The complainants' remedy at law is plain, speedy, and adequate. There is no impediment to its assertion; and, where this is the case, one claiming to be the owner in fee of lands which are in the actual adverse possession of another cannot maintain a suit in equity in the federal court in the state of Nebraska, or in any other state, against the party in possession to recover the possession of the land, or to establish his title thereto. *Sanders v. Devereux*, 8 C. C. A. 629, 60 Fed. 311; *Hipp v. Babin*, 19 How. 271, 277; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Leighton v. Young*, 10 U. S. App. 298, 3 C. C. A. 176, and 52 Fed. 439; *Bigelow v. Chatterton*, 10 U. S. App. 267, 280, 2 C. C. A. 402, and 51 Fed. 614.

The holder of the legal title, or one whose bill upon its face shows him to be such, cannot evade this rule, and deprive his adversary of his constitutional right of trial by jury, by alleging that the title of the defendant in possession, claiming to own the fee, is a cloud upon his title, and asking to have it removed; or by alleging that the plaintiff and defendant are tenants in common, and praying for a partition. The proper mode of removing the so-called "cloud" in such a case is by an action at law for the recovery of the land. If the plaintiff recovers in the action, the cloud is effectually dissipated. Nor can a tenant in common who is out of possession, and who has been disseised by his cotenant, who is in possession of the land, claiming title to the whole of it, maintain a bill for partition in the federal courts until he has established his right of possession by a suit at law. *Sanders v. Devereux*, *supra*, and cases cited. The rules that obtain where the plaintiff's title is equitable, or the land

is vacant and unoccupied, have no application to this case, and need not be discussed. *Vide* *Lamb v. Farrell*, 21 Fed. 5. Whether, under the Nebraska statute and the decisions of the supreme court of that state, a bill like this could be maintained in the courts of that state, we need not inquire; for neither a state statute nor the decisions of a state court can do away with the act of congress (section 723, Rev. St.) which declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law," or deprive a suitor in those courts of his right of trial by jury, secured to him by the seventh amendment to the constitution of the United States.

The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the bill at the complainants' cost, without prejudice to their right to sue at law.

ST. JOSEPH & C. I. R. CO. v. STEELE.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 428.

RES ADJUDICATA—ESTOPPEL.

The laws of Kansas provide that all railroad companies in the state shall annually report to the state auditor all their property, which shall be thereupon assessed for taxation by the state board of assessment, and do not authorize assessment of such property by local taxing officers. Complainant, the S. R. Co., in 1889, brought suit against D., as sheriff, to enjoin the sale of part of a bridge owned by it for a tax of 1888, assessed by the township of W.; alleging that said bridge formed part of its railroad property, and all such property had been reported by it to the auditor, and a tax assessed thereon by the state board, which had been paid, and that the local assessment was illegal. D's answer averred that the bridge in question was a toll bridge, and not railroad property; and the court so adjudged, and also adjudged that the right of assessment was in the local assessor, and dismissed the bill. *Held*, in a suit brought against defendant, the successor in office of D., to enjoin the sale of the bridge for a similar local tax of 1892, upon the same grounds, that this adjudication was conclusive upon complainant, which was thereby estopped to contest the liability of the bridge to local taxation, though in the former suit a question as to the location of the state boundary, which the bridge crossed, was involved and determined, and though it did not appear in the former suit, as it did in the latter, that the return to the auditor disclosed the fact that a part of the property of complainant consisted of the bridge.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a bill which was filed by the appellant, the St. Joseph & Grand Island Railroad Company, against R. M. Steele, in his official capacity, as sheriff of Doniphan county, Kan., to restrain him from selling a portion of a bridge across the Missouri river under a warrant that had been issued by the treasurer of Doniphan county, Kan., to enforce the collection of certain taxes theretofore assessed against the bridge by the local authorities of Doniphan county. The eastern terminus of the bridge is in the city of St. Joseph, Mo. The western terminus and the western 926 feet of the structure are situated in Washington township, Doniphan county, Kan. The residue or eastern portion of the structure lies within the boundaries of the state of Missouri. In May, 1892, the local authorities of Doniphan county, Kan., assessed that portion of the bridge which is situated in Kansas, for taxation

for that year, at a valuation of \$200,000, upon the theory that it was a toll bridge, and that as such it was subject to valuation and assessment by the local township assessor. A tax of \$8,100 on such valuation was subsequently imposed, and duly extended on the tax books of the county. This tax not having been paid, a warrant was issued for its collection; and the appellee, R. M. Steele, as sheriff of the county of Doniphan, was proceeding to enforce the collection of the tax by a sale of that portion of the bridge lying within the state of Kansas, when the present suit was instituted by the appellant to restrain the sale, and to prevent the collection of the aforesaid tax. The laws of Kansas do not authorize local township or city assessors to assess railroad property within their jurisdiction for the purpose of taxation. They require all railroad property to be valued as an entirety, by a board of railroad assessors, and the amount of the aggregate valuation to be apportioned for taxation among the various townships through which the road runs. In this behalf the statutes of that state provide, in substance, as follows: That the lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general shall constitute a board for the valuation and assessment of all railroad property in that state. It is made the duty of said board to ascertain all the railroad property owned and operated within the state by every railroad company, and to appraise and assess such property, as an entirety, at its actual value in money. To aid the board in thus ascertaining and assessing railroad property, each railroad company owning or operating a road within the state is required to make a return of all its property to the state auditor on or before March 20th in each year. The laws of Kansas further provide that, when the board of railroad assessors have valued and assessed the property of a railroad, it shall cause the state auditor to make a return to the county clerk of every county in the state in which any part of the road is located, which return shall show, among other things, the number of miles of track located in each township of the county, the average valuation per mile, and the amount of the aggregate valuation for the purpose of taxation that shall be placed to the credit of each city and township in the county through which the road runs. Gen. St. Kan. 1889, §§ 6871-6873, 6875, 6879-6881, 6884. With reference to the allegations of the bill of complaint which was filed by the appellant, it is sufficient to say that it averred, in substance, that the aforesaid bridge had been owned by the appellant company since June, 1885, and that in the meantime it had formed an integral part of its railroad, which extended from St. Joseph, Mo., to the city of Grand Island, Neb.; that during said period it had been used continuously for the passage of its trains over the Missouri river; that in the month of May, 1892, the appellant had duly made a return to the state auditor, as required by law, of all its property located in Kansas, including that part of said bridge which was situated within the state; that the state board of railroad assessors had subsequently valued all of its property so returned for the purpose of taxation; and that the board had likewise certified to the county clerk of Doniphan county, as required by law, the amount of the aggregate valuation that had been apportioned to Doniphan county for the purpose of taxation therein. The bill further averred that the board of county commissioners of Doniphan county had subsequently caused taxes for the year 1892 to be levied and extended upon the valuation of the appellant's property within Doniphan county that had been fixed and certified by the state board of railroad assessors, and that the tax so levied and extended had been duly paid to the proper officers of the county on December 19, 1892. In view of the premises, the bill charged that the taxes levied upon said bridge, as a toll bridge, under the assessment made in May, 1892, by the local township assessor, was an illegal tax, and that the warrant under which the appellee was proceeding to sell said bridge was utterly void and of no effect. In his answer to the bill of complaint, the appellee pleaded, in substance, that the said bridge referred to in the bill was an independent structure, to wit, a toll bridge; that it was not constructed as a part of any railroad, and had never been used exclusively as a railroad bridge; that, being a toll bridge, the power to assess the same for the purpose of taxation, or to assess so much thereof as was located in Kansas, was vested exclusively in the local township assessor; and that it had been

erroneously returned as railroad property to the state auditor, and had been unlawfully assessed by the state board of railroad assessors. The defendant also pleaded specially that the right of the local township assessor to assess the bridge as a toll bridge had been previously litigated, in a suit brought by the appellant against John Devereux, a former sheriff of Doniphan county, Kan., in which suit it had been finally adjudged and determined that the right to assess said bridge for the purpose of taxation was vested by the laws of Kansas in the local township assessor, and not in the board of railroad assessors. *Railroad Co. v. Devereux*, 41 Fed. 14. The circuit court, on final hearing, dismissed the bill of complaint, whereupon the complainant appealed.

M. A. Reed (John M. Thurston, on the brief), for appellant.

J. H. Gillpatrick (P. L. Soper, on the brief), for appellee.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question that merits our attention on this appeal is whether the relief sought by the appellant is barred by the decree dismissing the appellant's bill of complaint in the suit formerly brought by this appellant against John Devereux, the then sheriff of Doniphan county, Kan., in the circuit court of the United States for the district of Kansas. In the present action, as will be seen by the foregoing statement, the appellant bases its right to relief on the sole ground that the local authorities of Doniphan county had no right to assess any portion of its bridge which spans the Missouri river at St. Joseph, Mo., for the reason that an exclusive power to assess said bridge for the purposes of taxation had been vested by the laws of Kansas in the state board of railroad assessors, inasmuch as the bridge formed an integral part of the appellant's railroad, and was not a toll bridge. It will be important, therefore, to inquire at the outset as to the nature of the former suit against John Devereux, and as to the precise issues that were tried and determined in that proceeding. The record discloses that that suit was begun in the month of February, 1889, and that it involved the validity of a tax for the year 1888 which had been assessed against the aforesaid bridge, on the theory that it was a toll bridge, by the township assessor of Washington township, Doniphan county, Kan. That suit, like the one at bar, was a bill for an injunction to restrain the collection of the aforesaid tax, on the ground that it had been illegally imposed by the local authorities of the township and county. The bill in the former case (*Railroad Co. v. Devereux*, 41 Fed. 14), as in the case at bar, alleged, in substance, that the St. Joseph & Grand Island Railroad Company was the absolute owner of the bridge now in controversy; that it formed a part of its railroad property; that the complainant company had duly made a return of all its railroad property, including that portion of said bridge which was located in Kansas, to the state auditor; that the state board of railroad assessors had duly valued and assessed the property so returned, for taxation for the year 1888; that the board had thereupon caused the state

auditor to make a due return of said assessment to the county clerk of Doniphan county, and that the board of county commissioners of that county had subsequently extended a tax for the year 1888, basing the same on the assessment so made and furnished by the board of railroad assessors; and that such tax had been duly paid by the complainant company prior to filing its bill to restrain the collection of the tax which had been assessed by the local authorities. The bill in the case against Devereux also contained the following specific allegation and prayers for relief, to wit:

"Your orator further alleges that neither the county nor township authorities or assessors of said Doniphan county have or had any authority or jurisdiction to levy, assess, extend, or charge up any taxes whatever against any part of the said railroad bridge of your orator in said Doniphan county; that the state board of railroad assessors of said state of Kansas had exclusive jurisdiction for assessing the said property to your orator in said Doniphan county for the year 1888. Wherefore, your orator prays * * * that on a final hearing of this case * * * your honors will find and decree * * * that the said bridge of your orator over the said Missouri river is a part of its railroad, and is and was assessable in the state of Kansas for the year 1888 by the said board of railroad assessors of said state only; that the said assessment of the said bridge of your orator made by the said Thomas B. Hickman [the township assessor] for the year 1888, the taxes levied and extended on such assessment, are illegal and void, and not chargeable to your orator or its property."

The defendant's answer to the former bill of complaint likewise contained the following allegations:

"Further answering, the defendant avers * * * that said bridge is, and from the completion thereof has been, used for the purpose of crossing persons and property, for which tolls have been demanded and received by the corporations, the predecessors of complainant, and the prior owners thereof, and is now, and constantly has been since the construction thereof, the common thoroughfare for teams, carriages, and the ordinary vehicles used in travel and the transportation of men and merchandise in transit between the states of Kansas and Missouri at the points aforesaid, and by the plaintiff and complainant for its coaches, cars, and engines, as well as by other railroad companies; the latter, and all railroad corporations, paying to complainant full compensation for such use and carriage. * * * And the said defendant alleges that the said board of railroad assessors of the state of Kansas, did not, as averred, assess the said bridge, and have no power so to do, and that that would be beyond the scope of their functions and duties as such assessors."

Moreover, the opinion of the circuit court, on the rendition of its final decree in the former case, contains the following statement of the questions involved in that action, which it was called upon to decide. The court said:

"Two questions are presented: First. Is it [the bridge] wholly within the county of Doniphan? And that depends upon where the boundary line between the states of Kansas and Missouri is,—whether in the center of the main channel, or on the east bank of the river. Second. Did the return of this as a part of the railroad track exempt it from subjection to taxation, as an independent structure, in Doniphan county? With respect to the latter question there can be little doubt. The bridge was not constructed as a part of the railroad. It is a costly structure, used for general purposes of travel; and the fact that the railroad company has its rails upon and runs its cars across it does not destroy its original character as an independent structure. It is clearly subject to local taxation."

From what has been said with reference to the nature of the former suit, and the allegations contained in the pleadings therein, it is obvious, we think, that one of the issues that was tried and determined in that action was whether the bridge which figures in the present controversy was an independent structure, to wit, a toll bridge, and as such was subject to valuation and assessment by the local township assessor, or whether it was an integral part of the St. Joseph & Grand Island Railroad, and as such was exclusively subject to assessment by the state board of railroad assessors. It is hardly necessary to remark, in view of what we have already said concerning the character of the present action, that this is the identical issue with which we are confronted in the case at bar. No attempt is made in the present bill of complaint to state any ground for equitable relief, against the assessment of 1892, other than the fact that the aforesaid bridge was not a toll bridge when said tax was imposed and that it was not then subject to valuation and assessment by the local assessor. It is true that in the former suit against Devereux a question as to the boundary line between the states of Missouri and Kansas was tried and determined. The validity of the tax assessment by the local authorities for the year 1888 was challenged in the former suit, because the local authorities had valued the entire bridge on the assumption that it was wholly within the state of Kansas; but it is equally true that the other and more fundamental question was involved, and was duly tried and determined, as to whether the bridge was or was not an integral part of the appellant's railroad, and as to whether any part of it was subject to assessment by the local authorities of Doniphan county. We do not understand that any of the propositions heretofore advanced are seriously controverted. It seems to be conceded by counsel for the appellant that at least one of the issues involved in the suit against Devereux is the same issue that is presented by the case at bar. It is also conceded—or, if not conceded, it is manifest—that the parties to the two suits were the same, for in each instance the defendant was sued, not as an individual, but in his representative character, as sheriff of Doniphan county.

In view of these concessions, and the facts disclosed by the record in the former suit, counsel for the appellant has realized the obvious necessity of avoiding the effect of the final decree of the circuit court of the United States in the suit against Devereux. An attempt is made to avoid the operation of that decree upon the ground that the facts on which the circuit court predicated its ruling in the former suit, that the bridge was subject to assessment by the local township assessor, are materially different from the facts disclosed in the case at bar. In support of this contention it is said, in substance, that in the former case it was not disclosed by the return made by the appellant to the state auditor in the year 1888 that a portion of the property then returned consisted of a bridge, whereas the return made by the appellant in 1892 did show that 926 feet of the mileage therein returned for taxation

consisted of a bridge structure, on which the appellant's track was laid. It is urged that this latter circumstance destroys the conclusive effect of the former decree, and enables the appellant to relitigate a question which has once been tried and determined in a suit between the same parties. We think it clear that the circumstance last stated is quite immaterial, and that it does not impair the effect of the former decree, for the following reasons: The ultimate point to be decided in the former case was whether the bridge was subject to assessment by the local township assessor, and the decision of that question turned upon the further inquiry, whether it was in fact a toll bridge, within the meaning of the Kansas statute which permitted toll bridges to be assessed by the local assessors. It is manifest that the finding upon the latter issue depended, not upon the form of the return made to the state auditor, but upon the circumstances under which the bridge had been built, and the manner in which it had thereafter been used, and the evidence as to those points was quite as full and specific on the former trial as at the last hearing. In other words, the fact that the appellant did not distinctly specify in its report to the state auditor that a portion of the mileage by it returned consisted of a bridge had no bearing, so far as we can see, upon any question, either of law or of fact, which the circuit court had to determine in the former suit. It results from this view of the case that its failure to specify the fact aforesaid in its return to the state auditor does not alter the conclusive effect of the former decree.

In conclusion, it is only necessary to add that in our judgment the decree in the suit against Devereux operates as an estoppel, and precludes the appellant in this action from contending to the contrary of what was therein found and determined, namely, that the bridge now in question is a toll bridge, and as such is subject to assessment by the local authorities of Doniphan county. This conclusion, we think, is the necessary result of a long line of federal adjudications, to wit: *Cromwell v. County of Sac*, 94 U. S. 351; *Campbell v. Rankin*, 99 U. S. 261, 263; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004; *Nesbitt v. Riverside Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746; *Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co.*, 5 C. C. A. 249, 55 Fed. 690, and cases there cited.

The decree of the circuit court being for the right party, on the ground and for the reasons last stated, we have not deemed it necessary or profitable to consider any of the other questions that have been discussed by counsel. The decree of the circuit court is hereby affirmed.

HASKELL v. BAILEY.

(Circuit Court of Appeals, Fourth Circuit. October 5, 1894.)

No. 66.

1. FEDERAL COURTS—CITIZENSHIP.

It is citizenship, and not the residence, of the party, that confers jurisdiction, and gives the right to sue in the federal courts.

2. LIBEL UNDER CODE VA. 1887, § 2897—PLEADING.

An allegation that the words used are, "from their usual construction and common acceptance, construed as insults, and tend to violence and breach of the peace," in the language of the statute (Code Va. 1887, § 2897), makes the declaration one under the statute, though the words used are objectionable at common law.

3. SAME—EVIDENCE.

In an action under the statute for procuring the publication of a libel (Code Va. 1887, § 2897), articles printed in a newspaper published in another state, detailing an alleged interview with defendant, are admissible in evidence on testimony of defendant that he used substantially the words set out in the declaration in his conversation with one of the editors of the paper prior to their publication, where he never disavowed their authorship, and was careful to correct some criticisms therein.

4. SAME.

A finding that defendant caused the publication of libelous articles (Code Va. 1887, § 2897) will be sustained where it appears from his testimony as a witness for plaintiff that he uttered the words set out in the declaration in a conversation with one of the editors of the paper prior to their publication.

5. SAME—PLACE OF PUBLICATION.

It is not the place where the libelous article is printed, but the place where it is published and circulated, that makes the words actionable under Code Va. 1887, § 2897, making one who procured their publication liable therefor.

6. SAME—EVIDENCE—NEWSPAPER ARTICLES.

In an action for procuring the publication of libelous words (Code Va. 1887, § 2897) in newspaper articles, such articles are admissible in evidence after the use of the actionable words has been established, not only on the question of damages, but in connection with the use of the words alleged as tending to show that the language was employed by defendant prior to the publication.

In Error to the Circuit Court of the United States for the Western District of Virginia.

This was an action by John C. Haskell against John M. Bailey for a libel under Code Va. 1887, § 2897, in procuring the publication of alleged libelous words in certain newspaper articles published in the Bristol Courier, a newspaper printed in the state of Tennessee, September 9, 1890, and June 5, 1891. Defendant demurred to the complaint on the ground that the cause of action did not accrue until after the institution of the action, and also on the ground that it did not allege that plaintiff was a resident of the western district of Virginia. A plea to the jurisdiction was also filed, alleging that at the time of issuing the writing plaintiff was not a citizen of the state of Virginia, but was at the date thereof a citizen of the state of New York, and that defendant was at said date a citizen of the state of South Carolina. The court overruled the demurrer and plea in abatement, and the case proceeded to trial, and a verdict for plaintiff for \$1,000 damages was rendered.

White & Buchanan, for plaintiff in error.

James A. Walker, for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and HUGHES, District Judges.

JACKSON, District Judge. The first question presented in the record for consideration is the ruling of the court below on the ground of demurrer assigned by defendant October 30, 1891, as the record discloses that new grounds of demurrer were interposed on the 12th day of May, 1893. It is claimed under the first demurrer "that the cause of action did not accrue until after the institution of this action." This position is met by the fact that it is not true as to the first five counts in the declaration, as appears from the record. The summons in the case to commence the suit issued on the 27th day of August, 1891, returnable to the first Monday of September following, to answer the plaintiff's cause of action. The declaration was filed at September rules, 1891, which, under the statute of Virginia, was the first Monday and was the 3d day of the month. It contained six counts, each one of which but the last alleged that the publication of the libelous articles complained of occurred in July, 1891. The demurrer to the sixth count was sustained, and does not require notice. The ground assigned for demurrer on May 12, 1893, was that the declaration did not allege that the plaintiff was a resident of the western district of Virginia. The answer to this position is that the declaration avers the plaintiff to be a citizen of the western district of Virginia. It has been repeatedly held that it is the citizenship, and not the residence, of the party that confers jurisdiction, and gives a party the right to sue in the national courts. A person may have a residence in one state and be a citizen of another, as is often the case. One so situated could not maintain an action in the national courts upon the ground of residence. To do so he must be a citizen of a different state from the defendant, and sue either in the district in which he is a citizen or in the one in which the defendant is a citizen. For the reasons assigned we sustain the ruling of the court below on the demurrer, and for the same reasons we must hold that the objection to the filing of the plea in abatement to the jurisdiction of the court was well taken.

Having noticed the grounds of error in connection with the demurrer, we will now consider the first grounds of error assigned. It will be observed that the plaintiff in error, in stating his assignments of error, does not refer to the two causes of error assigned in the record and just disposed of, but we deem it proper to briefly notice and dispose of them.

The first assignment of error is that the demurrer to the declaration should have been sustained, because in each count there is combined a common-law libel and the statutory cause of action for insulting words. We cannot concur in this position. The pleader has alleged in each count of the declaration that the words used are, "from their usual construction and common acceptance, con-

strued as insults, and tend to violence and breach of the peace." He has employed in each count of the declaration the very terms of the statute, which necessarily makes it a declaration under the statute. It does not follow that, because the words used were objectionable at common law, the action may not be sustained under the statute. Such we understand to be the ruling of the supreme court of Virginia upon this statute. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

In the second assignment of error it is alleged that the plaintiff was allowed to read in evidence two articles printed in a newspaper published at Bristol, Tenn., and that the court erred in allowing them to be read as evidence. The record discloses that the defendant was placed on the witness stand, and admitted on examination that he used substantially the words set out in the declaration in his conversations with Mr. Slack, one of the editors of the paper, prior to their publication. It does not clearly appear when he first made use of the language, but we must conclude that it was before the beginning of the action, as no error is complained of on that ground. It is claimed, however, that he denied the authorship of the articles referred to in the Bristol paper, yet he never disavowed them, though he frequently saw them, and was careful to correct some criticisms made in them. It must be apparent that there was no occasion for him to correct any statement so made unless he was either the author of the articles or authorized their publication. We think it sufficiently appears from the record that prior to these publications the defendant below had uttered the words set out in the declaration, and that the utterance of the libelous words instigated the publication of the libelous articles. He had several conversations with the editor of the paper, and after the conversations the publication occurred. Under the statute he must be held responsible for having "caused the publication by another," otherwise the object of the statute would be defeated. The acts and conversations were submitted to the jury for it to determine whether he caused the publication, and the verdict of the jury was that he did. In this connection it is contended that there is no evidence before the jury that the words used were actionable in Tennessee. We think there is nothing in that position. If the publication is actionable under the statutes of Virginia, and the defendant below was the cause of the publication, he must be held responsible for all the consequences of the publication that arise out of its circulation in Virginia. It is not the place where the libelous article is printed, but the place where it is published and circulated that makes the words used actionable. The publications, however, were admissible upon another ground. After the use of the actionable words had been established, the admission of the articles in evidence was proper, not only on the question of damages, but in connection with the use of the words sued on as tending to show that the language was employed by the defendant prior to the publication. It follows, from what we have said, that the judgment of the court below must be affirmed, and it is so ordered.

PARSONS v. SLAUGHTER, City Treasurer.

(Circuit Court, E. D. Virginia. October 10, 1894.)

1. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — TAX-RECEIVABLE COUPONS.

Coupons from bonds issued under Acts Va. March 30, 1871, and March 28, 1879, bearing on their face the contract of the state that they should be received in payment of taxes, etc., are valid obligations of the state, receivable for taxes and dues to her, and when a taxpayer, in person or by agent, tenders such coupons in payment of taxes due by him, and keeps his tender good, he will be considered to have paid the taxes, and will be protected in person and property from any effort of the state to enforce the tax.

2. SAME—SUIT AGAINST STATE OFFICER.

It seems that when a state officer commits an overt act, wrongful in its character to the rights and property of a citizen, he takes the responsibility of the act, and cannot justify it by the authority of the state, under color of an unconstitutional statute; but the court will not interpose to compel such officer to do an act for the state which the state could be made to do if she were suable.

3. SAME.

Complainant alleged that he owned \$50,000 of tax-receivable coupons of the state of Virginia; that the state refused to pay such coupons; that all remedies for their collection had been taken away, so that they could only be utilized in payment of taxes; that he had contracted with taxpayers of Virginia to pay their taxes with his coupons, for which they were to pay him on delivery of receipted tax bills; that he had tendered to defendant, the officer appointed to collect such taxes, the amount of the taxes in coupons, and demanded receipt of bills for same; that defendant refused to accept the tender or recognize the validity of the coupons, and threatened to treat the taxpayers as delinquent; that by such refusal complainant would lose the benefit of similar contracts with taxpayers, which they had been accustomed to make and would continue to make but for such refusal, and prayed for an injunction restraining defendant from refusing to accept such coupons. Held, that the suit was in fact one to compel the state to perform its contract, and would not lie in favor of a taxpayer who had made a tender of coupons; that complainant, whether regarded as agent of the taxpayers, as having sold the coupons at the time of the tender, or as owning and in control of them until delivery of receipted tax bills, was in no better position, and that the bill should be dismissed.

4. SAME—ACTION FOR DAMAGES.

It seems, however, that for any injury suffered by complainant by the wrongful refusal of defendant to recognize the tender, he might recover damages in an action at law.

This was a suit by Edwin Parsons against C. A. Slaughter, treasurer of the city of Petersburg, Va., to compel the acceptance of the coupons of certain bonds of the state of Virginia in payment of taxes.

Maury & Maury and D. H. Chamberlain, for complainant.

R. Taylor Scott, Atty. Gen., for defendant.

SIMONTON, Circuit Judge. Edwin Parsons, a citizen of the state of New York, filed his bill of complaint in this court, stating substantially these facts: That he is the owner and holder, to the amount of \$50,000, of coupons for interest issued by the state of Virginia by authority of "An act to provide for the funding and

payment of the public debt, approved March 30th, 1871," and of another similar act "to provide a plan of settlement of the public debt, approved March 28th, 1879;" the coupons having been cut from bonds issued under those acts. That these coupons are all genuine, and past maturity, and bear on their face the contract of the state of Virginia that they should be received in payment of all taxes, dues, and demands due said state. That the state of Virginia refuses to pay these coupons as therein provided, and that all remedies heretofore existing whereby the owners were afforded means of collecting them have been taken away by the repeal of the laws granting them; so that now there is no way for collecting or otherwise utilizing these coupons save that afforded by their legal-tender quality for the payment of taxes. That, confiding in his rights afforded by these coupons, he has made a contract with several hundred of the taxpayers of Virginia to pay their taxes assessed for the support of the government with his said coupons to the full amount, and they have agreed to pay him for so doing upon the delivery to them before November 30th next, but not otherwise, of their bills for said taxes duly receipted. These contracts exceed \$20,000, which is the value of the tax contracts to him. He accompanies his bill with a list of these taxpayers. That in accordance with said contract, and in performance thereof, on the 16th of August, 1894, he tendered to C. A. Slaughter, treasurer of the city of Petersburg, the officer appointed by law to collect said taxes, for each and every of the taxpayers in said list, the several amounts of their said taxes as in said list appears, in said coupons in payment thereof. That he waived any return when the amount in coupons exceeded the tax, and offered to pay the difference in money when this amount was less than the tax. That he then demanded the receipt of the bills for taxes. That he has always held, and still holds, himself ready to fulfill his tender. That at the same time he notified the treasurer of his duties under the law as settled by the supreme court of the United States, called upon him to obey and perform them, and offered to provide the treasurer, at his own expense, with able counsel to defend his action, if he complied with the tender. But that the said Slaughter, the treasurer, refused to obey and to recognize the validity of the coupons and of the tender, and to give a receipt of the demand, and declared that he would consider and treat said taxpayers delinquent unless the tax was paid in money. That there are other taxpayers for whom he could and would have made similar tenders, but Slaughter having adopted a uniform rule in all such cases, he was deterred, and did not tender the coupons. That for years, according to a method heretofore adopted by the state of Virginia, but now abandoned by her, the taxpayers of Petersburg have been accustomed to contract with him to pay their taxes in his coupons to the extent of nearly \$10,000, and that they would continue to do so but for this attitude now assumed by Slaughter, the treasurer. That if Slaughter be not compelled to abandon this attitude, many of the taxpayers who would otherwise contract with him will, for that reason alone, be deterred from so contracting, and the complainant be deprived irre-

trievably of the enjoyment of his rights and profits under the constitution and laws of the United States. That the only reason for this refusal on the part of Slaughter was that the tender was made in coupons, and to intimidate and induce the taxpayers to withdraw from their contract with him, and to revoke their authority to him; and that he accomplishes this by treating them delinquent if they tendered their coupons, and threatened them with all the consequences resulting therefrom. Thus a multiplicity of suits may be caused if the taxpayers are not deterred; and, if they are deterred, great injury will be daily and hourly done to the complainant. The bill prayed an injunction directed to the treasurer, forbidding and restraining him from refusing to accept the coupons as tendered, and from refusing to deliver the tax bills receipted in full on such tender. When the bill was presented to the court a temporary restraining order was granted, with a rule against the defendant to show cause why it be not made permanent. The defendant appeared, and has interposed a demurrer on various grounds to the bill.

The litigation over the debt of the state of Virginia created under the acts referred to in the bill has received the attention of the supreme court of the United States for many years. The result of this litigation is stated by the court itself in *McGahey v. Virginia*, 135 U. S. 684, 10 Sup. Ct. 972, as follows:

"Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established: First. That the provisions of the act of 1871 constituted a contract between the state of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute. Second. That the various acts of the assembly of Virginia passed for the purpose of restraining the use of the said coupons for the payment of taxes and other dues to the state, and imposing impediments and obstructions to that use and to proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect. Third. That no proceedings can be instituted by any holder of said bonds or coupons against the commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers, to control them in the exercise of their official functions as agents of the state. Fourth. That any lawful holder of tax-receivable coupons of the state, issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues, and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress by suit to recover his property, by suit against the officer to recover damages for the taking of it, by injunction to prevent such taking where it would be attended with irremediable injury, or by defense to a suit brought against him for his taxes or the other claims standing against him."

It can no longer, therefore, be said that these coupons are not valid obligations of the state of Virginia, receivable for taxes and dues to her; and it is equally clear that when a taxpayer of that state tenders these coupons in payment of taxes due by him, and

preserves this attitude, so as to make good his tender at any and all times, he will thenceforth, in law and in fact, be considered to have paid the taxes, and will be protected in person and property from any effort on the part of any state officer to enforce the tax. That is to say, the tender must either be made in person or by authority of the taxpayer for taxes due by him. The protection given by the court is given to the taxpayer. It will be observed that this protection is of a distinctive character. When the taxpayer has made his tender, producing his coupons, he has fulfilled all that is required of him, and in law the tax is paid. He has nothing more to do except to keep his coupons ready for delivery. If, after this, any step be taken looking to the issue of tax execution or distress warrant, or of beginning of suit against him or his property to collect the tax, upon reporting his case to the court it will restrain such act. Can he go further than this? Will a bill lie to compel the treasurer to receive coupons,—that is to say, specifically to perform the contract set forth in them? It is not the contract of the treasurer; it is the contract of the state of Virginia; and the only reason why it is presented to him for performance is that he is an officer of the state of Virginia. Such a bill would be, in fact, one to compel the state to perform its contract; and such a bill would not lie in this court.

Whether a suit against the officers of a state is or is not a suit against the state itself is a question which has long vexed the supreme court of the United States. The question is ably and elaborately discussed by that court in *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, Mr. Justice Lamar delivering the opinion. His analysis of the decisions, and his conclusion as to the result of them, have been reviewed and confirmed in *Reagan v. Trust Co.*, 154 U. S. 388, 14 Sup. Ct. 1047. This case seems to make this distinction: That when a state officer commits some overt act wrongful in its character to the rights and property of a citizen, he takes upon himself the responsibility of the act, and cannot justify it by the authority of the state under color of an unconstitutional statute. But if it be a suit not to restrain him from acting, but to make him do an act for the state which the state could be made to do were she suable, then the suit is really against the state. So, if this were a suit by a taxpayer who had tendered coupons for his taxes, and now asked this court, in aid of the contract in the coupon, to compel the treasurer to give him a receipt in full therefor, the suit would not be one restraining the treasurer from an act of trespass upon his property, threatened or committed, but would be a proceeding seeking the specific performance by him of a contract made by his principal with the taxpayer, which aid this court could not grant. The language of Mr. Justice Bradley in *Virginia Coupon Cases*, 114 U. S. 335, 5 Sup. Ct. 965, is not inapplicable:

"But then it will be asked, has the citizen no redress against the unconstitutional acts or laws of a state? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed, or invaded by unconstitutional acts, or by any attempt to execute unconstitutional laws, he may defend himself by any proper way by habeas corpus, by

defense to prosecutions, by actions brought on his behalf, by injunction, by mandamus. Any one of these methods of redress suitable to his case is open to him. A citizen cannot in any way be harassed, injured, or destroyed by unconstitutional laws, without having some legal means of resistance or redress. But this is where the state or its officers move against him. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce a state into a fulfillment of its contracts. The one is an indefeasible right, a right which cannot be taken away. The other is never a right, but may, or may not, be conceded by the state, and, if conceded, may be conceded on such terms as the state chooses to impose."

Is the complainant in a better position than the taxpayer? He is not a taxpayer, and no property of his is liable for taxes, or is exposed to any mode of attack. His case is this: He has made a contract with the taxpayers that he will tender his coupons in payment of their taxes, and that when he presents to each of them a receipt in full of his tax then, and not before, the taxpayer will pay him for the coupons so used. This contract may be either a sale of the coupons to the taxpayer, taking effect at the time of the tender, the price payable upon the delivery of the receipted tax bill, or it may be a sale of the coupons made and terminated at the time of the delivery of the receipted tax bill. If it be the first, and the property in the coupons passed to the taxpayer at the date of the tender, then the complainant, parting with the coupons, lost all of his interest in the contract, and cannot complain that it was not performed. *Marye v. Parsons*, 114 U. S. 329, 5 Sup. Ct. 982, 962. If, however, under the contract, he was to remain the owner of the coupons, and in control of them, up to and until the delivery of the tax bill receipted, then he has no standing in this court, for "it is only when in the hands of taxpayers or other debtors coupons are receivable for taxes and debts due the state." *Virginia Coupon Cases*, 114 U. S. 329, 5 Sup. Ct. 934.

It has been earnestly urged that the act of the complainant in making tender for all of these taxpayers was a lawful act. Of this there can be no doubt. *Bennett v. Hunter*, 9 Wall. 326. Any one can tender or pay the tax of another; and if, either by act or acquiescence, the tender is ratified, or the payment itself is good, the person tendering the payment acts as his agent. Mr. Parsons, in tendering these coupons, may have been the agent of each one of the taxpayers; but the refusal to receive them worked a wrong to his principals, under whose rights he acted. As taxpayers, they were entitled to make a tender, and only because they were taxpayers. The wrong was done to them as taxpayers, but no wrong by this refusal was done to him, their agent. The refusal involved him in no responsibility. It is said, however, that the complainant owns many of these coupons, and that he has made many contracts for disposing of them, and has the opportunity of making many more, and that the refusal of the treasurer to recognize the tender defeats these contracts. If this be so, and if the defendant willfully or wrongfully defeated any right of the complainant, there is no obstacle to his recovery of damages in an action at law for the wrong,—a single action, in which each refusal could be set up as sustaining

the cause of action. He can have no remedy in this court. It is ordered, adjudged, and decreed that the restraining order or injunction heretofore granted be dissolved, and the complaint dismissed.

HUBBELL v. LANKENAU.

(Circuit Court, E. D. Pennsylvania. October 23, 1894.)

No. 23.

1. EQUITY PRACTICE—FORM OF DECREE.

An opinion filed dismissing a bill, with costs, without a formal decree attached thereto, becomes, in effect, such a decree upon the acquiescence of complainant for a period of nearly 12 years.

2. SAME—BILL OF REVIVOR—LACHES.

A bill of revivor will be stricken from the record, on motion, after the lapse of 12 years of inaction from the date of the last proceeding.

3. SAME—ENTRY OF DECREE.

It is the duty of the party desiring the allowance of an appeal to prepare the form of a decree, and not of the court or the adverse party.

This was a motion to strike a bill of revivor from the record. The original suit was begun on January 4, 1881, by the filing of a bill in equity. On January 23, 1882, an opinion was filed by BUTLER, District Judge (McKENNAN, Circuit Judge, concurring) dismissing the bill, with costs. There was no formal decree made. The next proceeding in the case was on October 12, 1894, when the bill of revivor in question was filed.

Samuel Dickson, for the motion, advanced the following reasons upon argument before the court:

(1) Because, at the time of filing the bill of revivor, no suit was pending, the original suit having been settled and ended by the filing of an opinion and the entry upon the docket that the suit was dismissed, with costs. (2) Because the plaintiff had been guilty of unreasonable laches. (3) Because the claim set forth in the original bill of complaint would have been barred by the statute of limitations within six years from the date of the last transaction. If the plaintiff had a new cause of action at the time of filing the opinion, it would have been barred within six years from that date, and no amendment or bill of revivor can be filed introducing a new cause of action. (4) Because the plaintiff had his attention called to the state of the record within less than two years from the filing of the opinion, and, having acquiesced therein, should not now be allowed to appeal from the final decree of the court. (5) Because a court of equity considers that done which ought to have been done, and disregards purely formal mistakes or omissions, and the declaration in the opinion filed of record, and in the decree upon the docket, constitutes, in substance, a final decree. (6) Because the formula prescribed in the rule of court for the formal decree was only intended to obviate the necessity of repeating in the body of the decree the pleadings already filed of record. The entry upon the docket is substantially equivalent, and, having been acquiesced in for more than double the period of time necessary to bar any claim at law, it is not now competent for the plaintiff to avoid its effect.

Chas. C. Townsend, J. B. Townsend, Jr., and F. P. Dewees, opposed.

The only entry upon the docket is of an opinion filed dismissing the bill, with costs. It is not even an order, and far less a decree. Even if a

decree has been made, the suit would still be *lis pendens* until the decree was a finality. *Benn. Lis Pendens*, p. 58. *Lis Pendens* is not destroyed by mere lapse of time. *Id.* p. 185, and cases. It was not the duty of plaintiff, being the losing party, to draw a decree to submit to the court for the purpose of obtaining the allowance of an appeal. If there is any laches, such laches is either with the court or the defendants. The new cause of action is claimed. This is simply a bill of revivor of a case which is *lis pendens*.

BUTLER, District Judge. The bill is filed under No. 56 of the equity rules. Is there a suit pending? This is the only question. I think there is not. First, because under the circumstances the court's act in ordering a dismissal of the bill should be treated as a final disposition of it; and if not, then second, because the plaintiff abandoned the suit.

After the lapse of such a period of inaction the plaintiff should be regarded as having treated the court's order as final—the informal decree as a formal one. In effect the court ordered the bill dismissed; as the record shows; the formal decree would have signified no more. If the plaintiff desired to proceed further it was his duty to put the decree in form; it was not the duty of the court or its clerk. The defendant needed nothing more unless he chose to proceed for costs—which the record indicates would have been fruitless.

Besides, the circumstances justify, and require, a conclusion that the plaintiff abandoned the suit. How else can his conduct be accounted for? The lapse of such a period of inaction, unexplained, would of itself in any case be sufficient evidence of abandonment. Such inaction for a fourth the time in ordinary cases justifies dismissal of bills for want of prosecution. Under the circumstances of this case the conclusion of abandonment is unavoidable. An issue was raised, testimony taken, and judgment rendered. The purpose of the suit was accomplished—though the result may have been disappointing. The plaintiff acquiesced for twelve years. True he communicated with the clerk about an appeal and learned that the decree was not in form. Instead of putting it in form, as was his duty if he desired further proceedings, he rested ten years longer and now asks the court to treat the suit as pending, that he may renew the litigation. I repeat the conclusion that he acquiesced in the judgment pronounced and abandoned the suit, is unavoidable. It would not be more so if he had rested ten years longer.

Aside from these considerations, however, the delay is fatal. After such a period of inaction the revival of the suit and renewal of the litigation would be grossly inequitable.

The motion is sustained.

THE MARY LENAHAN.

DOHERTY v. McWILLIAMS et al.

(Circuit Court of Appeals, Third Circuit. November 1, 1894.)

No. 4.

Appeal from the District Court of the United States for the District of New Jersey.

This was a libel by Charles McWilliams and Daniel McWilliams against the canal boat Mary Lenahan, her tackle, etc. (Patrick Doherty, claimant), for materials used and labor expended in making certain repairs. The district court rendered a decree for libelants, GREEN, District Judge, delivering the following opinion, January 23, 1894: "The evidence in this cause is very conflicting, the only undisputed fact being that the libelants did repair the boat in question. After a careful consideration of the whole case, however, I have reached the conclusion that the libel should be sustained." The claimant thereupon appealed.

Stewart & Macklin, for appellant.

John Griffin, for appellees.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. By the assignments of error, it is alleged, in general terms, that the decree of the court below is erroneous. This allegation has not been sustained. No question of law is presented by the record, or is suggested by the argument which has been submitted on behalf of the appellant. The district court, upon the conflicting evidence which was before it, reached the conclusion that the libel should be sustained, and our own examination of that evidence satisfies us that this conclusion is correct. Therefore, the decree is affirmed with costs.

CITY OF TRINIDAD v. MILWAUKEE & TRINIDAD SMELTING & REFINING CO.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1894.)

No. 401.

1. DONATION BY CITY TO MANUFACTURING COMPANY—FRAUD—CONSTRUCTIVE NOTICE TO COMPANY.

The citizens of a certain city, and their committee, agreed with a smelting company to donate to it certain land for a smelter, on condition that it would erect thereon a smelting plant costing \$50,000. The land was bought by such citizens, and deeds taken in the name of one of them as trustee. Afterwards the company erected thereon a smelter costing \$80,000, and complied with the contract, and such trustee conveyed to it the land. The city council, on the petition of citizens, appropriated \$17,500 for the ostensible purpose of straightening a stream running through the city, but intending to use the money for the purpose of paying for the land purchased as a site for a smelter, and it was so used. The company's representatives dealt entirely with the citizens and their committee, and had no actual knowledge of the manner in which the land was paid for. *Held*, that the fact that the land was deeded to and by such citizen as trustee did not charge the company with constructive notice of the fraudulent use of the city's money in the purchase of the land, and did not entitle the city to a lien thereon for such sum.

2. SAME.

The rules relating to constructive notice, applicable to this case, stated.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill by the city of Trinidad, Colo., against the Milwaukee & Trinidad Smelting & Refining Company, to establish and enforce a lien on land donated to defendant, and paid for by an appropriation of the funds of such city. From a decree of the circuit court dismissing the bill, complainant appeals. Affirmed.

Everett Bell, for appellant.

Edward L. Johnson, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is a suit in equity brought by the appellant, the city of Trinidad, against the appellee, the Milwaukee & Trinidad Smelting & Refining Company (hereinafter called the "smelting company"), a corporation chartered under the laws of the state of Wisconsin, to establish and enforce a lien for \$17,500 on the land upon which the smelting company has erected its smelting works. The theory of the bill is that the city council of Trinidad fraudulently appropriated and used that sum of money to purchase the land for the use of the smelting company, and that the smelting company took title with notice, either actual or constructive, of this fact. There is no contention over the fact that the land was originally purchased with money raised by the sale of city warrants issued for that purpose; but the smelting company denies that it had notice, actual or constructive, of the fact, and pleads that it is a bona fide purchaser for value, without notice; and the material and contested issue in the case arises on this plea.

In June, 1889, John C. Hoffman and other stockholders of the Copper King Mining, Smelting & Refining Company of New Mexico, a corporation of Wisconsin, which afterwards changed its name, and became the Milwaukee & Trinidad Smelting & Refining Company, the appellee in this case, left Milwaukee, for the mining regions of the Southwest, with a view of locating and erecting smelting and refining works at some place in that region. They expected to go to New Mexico, but at Denver they met Mr. Floyd, who induced them to visit Trinidad, with a view of locating their works there. Mr. Floyd preceded them to that place, and, immediately upon their arrival at Trinidad, several of the property owners and business men of the place met them, and expressed an earnest desire to have them locate the proposed smelting works in that town, and, to bring about this desirable result, intimated their readiness to raise them a reasonable donation or bonus. After the citizens had shown different sites for a smelter, the representatives of the smelting company selected the site upon which the smelter was afterwards erected, and informed the citizens of the city, who were anxious to know what would induce them to build the smelter in Trinidad, that if the citizens would procure for them the site they selected, free of cost, they would erect a smelter thereon. The proposition was eagerly accepted by the citizens, and a public meeting of the citizens was

held, at which a committee was appointed to raise the funds, and do whatever was necessary to procure the title to the site selected. Shortly thereafter, the committee purchased several parcels of land comprising the site, and had them conveyed to "E. D. Wight, trustee;" and on the 28th of August, 1889, Wight, trustee, conveyed the same, by warranty deed, to John C. Hoffman, a representative of the smelting company; and on the same day, as a part of the same transaction, Hoffman entered into a contract with Wight, who was trustee for, and acting on behalf of, the citizens, whereby Hoffman, on behalf of the smelting company, in consideration of the execution of the deed by Wight to him for the site of the smelter, agreed to erect thereon a smelting plant of the capacity and dimensions described in the contract. Very soon thereafter the smelting company began the erection of a smelter on the land, which was completed within the time provided by the contract, and complied in all respects with the requirements of the contract. How fully the smelting company complied with its obligations to the citizens is shown by the following communication from the committee representing the citizens to their trustee, Mr. Wight:

"Edward D. Wight, Esq., Trinidad, Colo.: The undersigned, acting as a committee in behalf of the citizens of Trinidad, pursuant to the conditions under which certain real estate lying contiguous to said city was donated to the Copper King Smelting and Refining Company for the purpose of the construction and operation of a smelting plant by said company, have visited and inspected the buildings, machinery, and other appliances erected by said company on the land referred to, for the purpose of determining whether the company has complied with the terms of the agreement under which the property was donated by the citizens of Trinidad. We take pleasure in stating that the company, under the direction and superintendence of Mr. Thormeler, its general agent and financial manager, has complied in every particular with the conditions named in the agreement. He has done more than merely comply with the agreement, and has expended a sum of money very considerably in excess of the amount required to be expended by the company before it should receive a clear title to the property donated. The company has not only already expended a sum considerably in excess of \$50,000, but has under way additional structures and appliances, which it is intended to complete at an early day, that will require the expenditure of a still further sum of money. We have been much gratified at the absolute good faith manifested by the company, through its legal representative, Mr. Thormeler, and the correct business principles upon which this enterprise has been conducted from its inception; and we feel justified in the prediction that this plant, when in operation, will materially add to the prosperity of the community. As such committee, we advise that you execute to the company such release as may be necessary to vest in it a clear title to the property donated.

Caldwell Yeaman,
 "John Conkie,
 "M. Beshoar,
 "E. B. Sopris,
 "H. E. Mulnix,
 "Committee.

"Trinidad, June 11, 1890."

The total cost of the smelting plant erected on the land was about \$80,000. When the site was selected, it comprised several tracts owned by different persons, all of whom conveyed to Wight, trustee, representing the people of Trinidad. The total cost of the land was about \$17,000.

It now appears that the money to purchase the land was procured in this way: On the 11th day of July, 1889, some of the citizens of the city of Trinidad presented to the city council a petition asking for an appropriation of \$17,500 for the purpose of straightening the Las Animas river, which runs through the city. Thereupon, the city council, by resolution, authorized the mayor to appoint a committee, to be composed of three members from the city council and five citizens of the city, with power to contract for the straightening of the river through the city, and to expend \$17,500 for that purpose. The mayor appointed the committee. On the 7th of August, 1889, at a meeting of the city council, the committee reported that they had contracted with certain persons, whose names were given, for straightening the river through the city; that the contract price for the work was \$17,500; and that the contractors had performed the work, and were entitled to be paid that sum. Thereupon, the city council allowed the contractors \$17,500, for which city warrants were immediately issued and delivered to the committee previously appointed by the mayor to contract for straightening the river, who immediately sold them, and with the money derived from the sale of these warrants the land selected as a site for the smelter was purchased and paid for, and deeds therefor executed by the several vendors to "E. D. Wight, trustee." No bona fide contract was ever entered into for straightening the river, and it was not straightened. It was well understood by the mayor and city council and the committee appointed by the mayor that the \$17,500 was not to be expended in straightening the river, but was to be used in purchasing the site for the smelter. What was said and done about straightening the river was a mere device to make it appear upon the record that the warrants for \$17,500 were issued for a lawful purpose. The authorized representatives of the smelting company were not parties to, and had no knowledge of, this fraudulent scheme. From the inception of the business to its close, they dealt exclusively with the citizens and the citizens' committee. They had no communication or dealings with the city, or the committee composed of citizens and councilmen appointed by the mayor. It is apparent that the members of the city council, and the persons acting in concert with them, who conceived and carried out this monstrous fraud on the city, were not proud of their achievement; and the knowledge of their action was withheld from the public, and particularly from the representatives of the smelting company. Publicity would have defeated the scheme. The warrants could not have been sold, and it is highly probable the smelting company would have declined to accept the land if it had known it was acquired by any such fraudulent devices. We are satisfied that, at no time before the smelting company erected its plant on the land, were any of its officers or agents advised that the funds to purchase the land had been raised in the manner stated. In consideration that the smelting company would erect its smelter in Trinidad, the citizens agreed to donate the site therefor. There was nothing in this agreement to excite suspicion on the part of the smelting company. The donation of a site to induce the location

of a large manufacturing plant like this, by the property owners and business men of a new and growing town, was not a suspicious circumstance, or one which would impose on the donee the obligation to inquire where the donors got the money to purchase the land. Donations of this character are of common occurrence. The smelting company believed, and had reason to believe, that the citizens with whom it dealt had acquired the title to the land which had been conveyed to Mr. Wight, their trustee, in a legitimate mode. Certainly, the smelting company, in the absence of express information on the subject, could never have conceived or suspected that the city council would have given its sanction to any such extraordinary scheme as that by which the city was made to pay for the site. Such action by a city council is believed to be unprecedented, and, before this precedent, would have been regarded as incredible.

But it is earnestly contended that, if the officers and agents of the smelting company did not have actual notice that the city's money was used to purchase the land, they are chargeable with constructive notice of that fact. This contention is rested on the word "trustee," following the name of Wight, in the deeds made to him by the different persons who conveyed to him the several parcels of land comprising the site, and also in the deed made by him to Hoffman for the land on the 28th of August, 1889, and the agreement between the same parties of that date, heretofore mentioned, showing the conditions upon which the deed was made. It is said in the brief of the learned counsel for the appellant that "unless the word 'trustee,' after the name of Wight, may be regarded as mere descriptio personae, and rejected as a nullity, there was a plain and actual notice of a trust of some description." The trust was not declared in the deeds, but in the light of the agreement between Wight and Hoffman, of the 28th of August, 1889, which expressed the understanding previously agreed upon between Hoffman and the citizens' committee, there could be no doubt as to what it was. Wight had no connection with the city. He was acting for and on behalf of the citizens' committee. That committee agreed with Hoffman to purchase and pay for the land, and cause it to be conveyed to the smelting company. Through the agency of this committee, it was conveyed by the former owners to Wight upon the trust that he would hold the title for the committee, and convey the same to the smelting company upon its agreeing to erect its smelting plant thereon. Wight was not a trustee for the former owners. They received their purchase money, and made absolute and unconditional conveyances. All the circumstances, within the knowledge of the smelting company, were calculated to satisfy any one that the trust relation occupied by Wight was none other than that we have indicated. The company expended \$80,000 on the land without a suspicion of the existence of the facts upon which the alleged trust set up in the bill is predicated. When it is sought to bind a party by constructive notice, "there must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter." *Birdsall v. Russell*, 29 N. Y. 220, 250. In this case

there was not the remotest connection between what the smelting company actually knew, or had any reason to suspect, and the claim now set up by the city. The rules upon constructive notice in this class of cases are well settled. In *Jones v. Smith*, 1 Hare, 43, the vice chancellor states the rule thus:

"If there is no fraudulent turning away from a knowledge of the facts which the *res gestae* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser,—then the doctrine of constructive notice will not apply; then the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice."

In *Ware v. Lord Egmont*, 4 De Gex, M. & G. 473, the lord chancellor said:

"Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it, but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

This statement of the rule is approved by the supreme court in *Wilson v. Wall*, 6 Wall. 83, where that court says:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without knowledge."

Upon the facts, as we find them, the appellee is not chargeable either with actual or constructive notice of the claim set up by the city; and the decree of the circuit court, dismissing the bill for want of equity, is affirmed.

FWLER et al. v. JARVIS-CONKLIN MORTG. CO.

(Circuit Court, S. D. New York. September 22, 1894.)

1. RECEIVERS—REMOVAL.

It is no ground of removal of receivers of a mortgage company that they are acting as selling agents of trustees of mortgages executed by the company to secure its debentures; the power to sell the mortgages resting with the trustees, and not being controlled by the court or receivers as such.

2. SAME.

It is not ground for removal that a receiver of a corporation has become a member of a reorganization committee, but where a conflict over the plan of reorganization is foreshadowed the receiver will be required to resign from membership of the committee.

3. SAME—APPOINTMENT OF OFFICERS OF CORPORATION.

The mere fact that the officers of a corporation whose business was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scattered through several states, were imprudent in investing its money, is no sufficient ground for selecting as receivers strangers entirely unfamiliar with the assets, or the machinery for their collection.

Petition by Elizabeth Garnett for the removal of Samuel M. Jarvis and Roland R. Conklin as receivers of defendant in a suit by Benjamin M. Fowler, J. G. Zachry, and Elizabeth Garnett against the Jarvis-Conklin Mortgage Company.

Treadwell Cleveland, for the motion.

Wheeler H. Peckham, Arthur H. Masten, and Winslow S. Pierce, opposed.

LACOMBE, Circuit Judge. The petitioner gave to the receivers due notice of motion to remove them from office, and served there-with voluminous affidavits. Upon the hearing of such motion, counsel for the receivers submitted affidavits in answer to the charges made by petitioner. Inasmuch as counsel for petitioner had no opportunity to inspect these answering affidavits until the day of the hearing, he asked for and obtained from the court permission to file additional affidavits in reply to any new matter contained in those submitted on behalf of the receivers. To this counsel for receivers objected, insisting that his affidavits contained no new matter, but only detailed answers to the charges. Nevertheless the permission asked for was granted, it being assumed that counsel for petitioner would himself take the trouble to find out, from an analysis of his own and his adversary's papers, what was in fact new matter entitling him to reply. He seems to have preferred to leave this labor to the court. The voluminous additional affidavits which he has filed consist almost entirely of an amplification of his first charges, or of new averments as to the management of the insolvent corporation, not touched upon by the papers or arguments of either side when the motion was heard. Were this an ordinary motion, not concerned with the conduct of officers selected by the court itself, the additional affidavits would be returned as not complying with the terms upon which leave to file them was granted. As it is, the court has carefully examined them, and given due consideration to the few detached sentences found in them, which may, by a most liberal construction, be regarded as in the nature of a reply to the affidavits or argument of the receivers. The new charges contained in them are made without proper notice, and cannot be now considered. To do so would be grossly unfair to the receivers, who have had no opportunity to answer them.

There is nothing in the moving papers now properly before the court to show mismanagement or misconduct by the receivers. It appears that the mortgages which lie back of a particular series of debentures (not the series in which complainant owns) have been sold at 40 per cent. of their face value, and petitioner expresses the apprehension that those back of debentures in her own series may be sold at a sacrifice, without adequate advertisement and opportunity to bidders. But the power to sell or to refrain from selling mortgages back of debentures does not rest with the receivers, but with the several trustees of the different series, who are wholly uncontrolled by the court or its receivers. Nor is there any impropriety in the receivers acting as selling agents of these trustees, if

the latter choose to employ them in that capacity. On the contrary, it seems to be for the interest of all that they should do so.

Nor is it any ground for removal that one of the receivers has become a member of a reorganization committee. Several federal courts have approved of such a practice; and although this court entertains a different opinion, and will require absolute neutrality on the part of its officers, as between conflicting plans of reorganization, it will be sufficient if the receiver, now that some conflict over the plan of reorganization is foreshadowed, promptly resign from membership of the committee.

The bulk of petitioner's original moving papers is taken up with averments as to the management of the business of the corporation before the appointment of receivers. The careful, elaborate, and exhaustive answer of Jarvis and Conklin to the detailed charges as to the mortgages and investments specified in the petition disproves any suggestion of such fraudulent practices as would disqualify them from acting as officers of the court. It was well known to the court when they were appointed that it was under their management of its affairs that the corporation came to grief, and it would be no surprise to the court to learn that their business judgment had not been sound; that their methods of management had not been conservative; that they had been oversanguine, and improvident in investments. But it was apparent to the court then, and it is equally apparent now, that a business of such character, so complicated and intricate, so widely extended, with millions of dollars invested upon small mortgages scattered through several states, requiring prompt attention for collection of interest, maintaining of insurance, and payment of taxes, would be best attended to by receivers who, presumably, were familiar with all its details, and with the machinery already established for looking after its interests in hundreds of towns and hamlets in distant states. As receivers, there would be no new investments for them to make, calling for the exercise of a discretion which had in the past proved to be not always wise. They would only have to realize what they could from the assets by collection or by sale, and pay the same out under the court's order, meanwhile seeing to it that the property was conserved and the business organization kept up for the benefit of all concerned until some plan of reorganization was consummated, or the receivership wound up by sale and distribution of the property and good will. Inasmuch as this would have to be done under the supervision of the court, with full opportunity to all concerned of inspecting their books and papers and overhauling all their proceedings, the mere fact that they had, while officers of the company, been imprudent in investing its money, was no sufficient ground for selecting strangers entirely unfamiliar with those assets, or the machinery for their collection. The motion is denied.

GRAPE CREEK COAL CO. et al. v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 148.

1. PRACTICE—ASSIGNMENT OF ERROR.

Under the eleventh rule of the circuit court of appeals for the seventh circuit (1 C. C. A. xiv., 47 Fed. vi.), requiring the error urged to be set out separately and particularly, an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented.

2. FORECLOSURE—AMOUNT UNPAID BUT NOT DUE.

Upon foreclosure of a mortgage for nonpayment of interest, when the principal is not due, and is not, by the terms of the mortgage, to become due upon default in payment of interest, it is both proper and necessary for the court to find the amount of principal unpaid, and decree its payment out of the proceeds when the property is to be sold as an entirety.

3. SAME—WHERE PRINCIPAL NOT DUE—REDEMPTION.

A mortgage securing an issue of bonds provided—First, that if the interest should be in arrear for six months, or if the principal should not be paid at maturity, or if a stipulated payment to a sinking fund should not be made, the trustee should take possession, manage the property, pay the interest in default, and coupons maturing from time to time, and apply the remaining income upon the principal of the bonds; second, that after six months' default in payment of principal or interest the trustee should sell the property as an entirety, and apply the proceeds to the payment of principal and interest, "whether the principal is then due or not;" and, third, that in case of the trustee's taking possession, or proceeding to sell, if the mortgagor, before the bonds became due, and before sale, should pay all arrears of interest, with costs, etc., the proceedings should be discontinued by the trustee, and the property restored to the mortgagor. *Held*, upon a bill to foreclose for default in payment of interest, that a power to decree the whole debt due could not be inferred from the foregoing provisions, and though it was proper to direct payment of the whole debt from the proceeds of the property, when sold as an entirety, the mortgagor should be permitted by the decree to redeem before sale, upon payment of the overdue interest and costs only.

4. SAME—HARMFUL ERROR.

The provisions of the mortgage permitting the mortgagor to stay proceedings by paying the overdue interest does not render harmless the error in a decree adjudging the whole debt due, since, until modified in some lawful way, such decree is conclusive for every purpose of the amount due.

5. SAME—SALE PENDING APPEAL.

The fact that a sale had actually been made pursuant to a decree erroneous in adjudging the whole debt due, should not prevent its reversal; the error being substantial, and the appellate court not being in a position to determine the bona fides of the sale.

6. FORECLOSURE—COST—AMOUNT NOT FIXED.

It is no objection to a decree for foreclosure that it leaves uncertain the amount of costs, counsel fees, etc., to be paid in order to redeem before sale; it being common practice to leave such amounts unfixed, and it being in the power of any party to move to have them fixed.

7. MORTGAGE—LIEN UPON AFTER-ACQUIRED PROPERTY.

Courts of equity extend the lien of a mortgage to after-acquired property upon the theory that, though ineffective as a conveyance, it operates as an executory agreement attaching to the property when acquired. It seems, therefore, that a mortgage, purporting to convey all after-

acquired lands in V. county, but containing covenants for further conveyance and assurance of property afterwards acquired for the business of the mortgagor, would cover the latter only.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit by the Farmers' Loan & Trust Company against the Grape Creek Coal Company, the Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown. Complainant obtained a decree. Defendants appeal.

This appeal is from a decree of foreclosure in favor of the Farmers' Loan & Trust Company, appellee, against the Grape Creek Coal Company, Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown, appellants, foreclosing a mortgage executed by the first-named company to secure the payment of a series of 500 bonds, each for \$1,000. The other appellants are judgment creditors of the mortgagor, who recovered their respective judgments pending the foreclosure suit. The first bill of complaint for foreclosure was filed December 17, 1891. A second bill was filed April 11, 1892. The two suits were consolidated by order of court April 14th. On May 23, 1892, the first bill was dismissed by the complainant, and the case proceeded to decree April 19, 1893, on the second bill, which, on July 7, 1892, had been amended to include certain after-acquired real estate. The mortgage or trust deed bore date April 1, 1886, and contained the following, with other, conditions: "First. That if the interest on any of the bonds so issued shall not be paid by the party of the first part when the same shall become due, and if such interest remain in arrears for six months after demand at the place where the same is payable, or if the principal of said bonds, or any of them, shall not be paid at their maturity, or in case of default for six months in the payment of whatever may be due on the sinking fund hereinafter provided for, then it shall be lawful for the party of the second part, or its successor in trust for the time being, and it shall be the duty of such trustee, upon the request in writing of the holders of not less than one-half of the then outstanding bonds of the issue hereby secured, to enter forthwith, demand, take, and maintain possession of, all and singular, the estate and premises hereby conveyed, and as the attorney in fact or agent of the said party of the first part, by itself and agents or substitutes, duly constituted, have, use, manage, operate, and enjoy the same, and" (after paying expenses of management) "shall apply the remaining income and revenue arising from the use of said mortgaged property, and coming to its hands, to the payment of the interest in default, and maturing from time to time, satisfying the said coupons in the order of their several maturities, and thereafter apply the residue upon the principal of the then outstanding bonds. Second. And upon the further trust that if a six-months default shall occur in the payment of either principal or interest of any of the bonds hereby secured, after such actual demand, as aforesaid, then it shall be lawful for said party of the second part, or said trustee for the time being to cause, and upon the written request of the holders of a majority in amount of said bonds then outstanding, it shall, with or without entry, as aforesaid, cause, all and singular, the said premises, appurtenances, equipments, and property of every description, hereby conveyed, to be sold as an entirety, at public auction, to the highest bidder, * * * and on such sale said party of the second part, or the trustee for the time being, shall make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed, in fee simple, conveying the property so sold * * * and after deducting from the proceeds of sale the costs and expenses thereof, and a reasonable compensation to said trustee and its attorneys and agents for services in connection therewith, shall apply so much of the proceeds as may be necessary to the ratable repayment of principal and then-accrued interest of all the said bonds, whether the said principal is then due or not. * * * Third. In case of any such taking possession or proceeding to sell the

mortgaged premises for default of payment of interest or sinking fund, if the said party of the first part, before the said bonds shall become due, and before such sale shall be made, shall pay and satisfy all interest then in arrears on all such outstanding bonds, and shall also pay and discharge all costs, expenses, and disbursements and reasonable compensation incurred by reason of such default or possession, then, upon evidence thereof to his satisfaction, the said party of the second part shall thereupon discontinue such proceeding, and restore possession of the mortgaged premises to the party of the first part, to be thereafter held subject to these presents, in like manner as if such default or entry had not occurred. Fourth. The said party of the first part expressly covenants and agrees that it will, on demand, from time to time, hereafter, execute, acknowledge, and deliver unto the said party of the second part any and all such further and other conveyances and assurances as may be necessary and proper to fully convey to and vest in the party of the second part, or the trustee for the time being, all such future-acquired ground, estate, equipments, and property as it may hereafter, from time to time, purchase for use in the working and carrying on of its said mines. And the said party of the first part doth still further agree that it will, in case of any default in the payment by it either of the principal or interest of any of its bonds hereby secured, forthwith, upon demand of the party of the second part, or the trustee for the time being, surrender the full and peaceable possession of, all and singular, the premises hereby conveyed, or intended to be conveyed, including all the real and personal property by it acquired subsequent to the date of these presents for use in connection with its said mines. * * * Seventh. It is further agreed that beginning April first, A. D. eighteen hundred and ninety-one, and annually thereafter, the said party of the first part shall and will set apart the sum of twenty thousand dollars as a sinking fund to be used and applied in the payment of said bonds. * * * Eighth. It is further agreed that, when any of the lands hereby conveyed shall no longer be available for mining purposes, they may be sold and conveyed in the discretion of the parties of the first and second part, both parties uniting in any conveyance to be made, and such sale may be either of the lands, reserving all mines underneath the surface of the ground, or with such mines as the parties hereto shall deem proper; and the proceeds of said sale shall be reinvested in coal lands, and brought under this mortgage, or be added to the sinking fund provided for in the previous section, and applied as therein directed."

The court found and decreed the lien of the mortgage to be superior to any other lien in favor of any party to the cause; that default had been made in the payment of interest due, entitling the plaintiff to a sale of the mortgaged property and premises, including the after-acquired lands described, "unless the defendant mortgagor shall pay the amount of the entire bonded indebtedness secured by the mortgage, with all costs and expenses of the suit, at a short day to be fixed by the court"; that there were secured by the lien of the mortgage the following amounts of bonds and coupons outstanding and past due, with 6 per centum interest thereon after maturity, to wit, \$14,760 for coupons due October 1, 1891, the same amounts, respectively, for coupons due April 1, 1892, October 1, 1892, April 1, 1893, and the sum of \$492,000 for the principal of the bonds, aggregating the sum of \$555,349.93 due for the principal and interest, and interest upon the unpaid coupons to the date of the decree. It was further ordered and decreed "that unless the parties defendant, or some of them, shall, on or before the expiration of twenty days from the entry of this decree, pay the plaintiff the following sums, namely: First, a sufficient sum of money to pay the costs of the plaintiff in this cause as they shall be taxed, and its compensation as trustee, with its counsel fees and other expenses and disbursements, as the same may be fixed by this court; and, secondly, the entire sum due for principal and interest, and interest on unpaid coupons up to the date of this decree, as hereinbefore fixed and determined, with interest thereon from the date hereof,—then the said mortgaged premises and property shall be sold as hereinafter directed." A sale under the decree was made September 22, 1893, to Joseph J. Asch, P. J. Cronan, and

A. D. Irving, for \$200,000, was reported September 26, and November 2, 1893, was confirmed. This appeal was taken October 18, 1893.

The errors assigned, excepting the first, which is waived, and the eighth, which is not briefed, are stated as follows: "(2) The circuit court erred in rendering a decree for any further or greater sum than the amount due upon said trust deed, for interest on said bonds, and for the amount due on the sinking fund. (3) The circuit court erred in finding and decreeing that the sum of five hundred and fifty-five thousand three hundred and forty-nine dollars and ninety-three cents (\$555,349.93) was due upon said trust deed and bonds secured thereby. (4) The circuit court erred in finding and decreeing that the said trust deed was a lien upon the lands described in said first amendment to said original bill, being the lands acquired by said Grape Creek Coal Company after the execution of said trust deed, superior to the lien of the judgments of said Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown. (5) The circuit court erred in finding and decreeing that the entire amount of said mortgage indebtedness was due. (6) The circuit court erred in not fixing a definite amount to be paid by said defendant Grape Creek Coal Company and the other defendants within twenty days from the entry of said decree. (7) The circuit court erred in leaving uncertain the amount to be paid by said defendants, and each of them, in order to prevent a sale of said mortgaged premises."

J. B. Mann (C. H. Remy, of counsel), for appellants.

H. B. Turner and William Burry, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the case). The second and third specifications of error do not, in conformity with the eleventh rule of this court, "set out separately and particularly" the error intended to be urged. An assignment cannot be good, under this rule, if it is necessary to look beyond its terms, to the brief, for a specific statement of the question sought to be presented. Under the first of these assignments, it is urged that the principal of the mortgage debt was erroneously declared due; and under the second, after claiming that all said concerning the first was applicable to this, it is urged, in addition, that the court erred in allowing interest at six per cent., or more than five per cent., on overdue coupons, and on the principal of the debt from the time when the last coupons matured. There is in the record no assignment of error which properly raises the question of interest; and in respect to the principal of the debt, whether due or not, it was not only proper, but necessary, that the court should have found the amount unpaid, and decreed its payment out of the proceeds of the sale. There was therefore no error, as specified in the second assignment, even if it were otherwise sufficiently specific, "in finding and rendering a decree for any further or greater sum than the amount due." But the fifth specification states more definitely that the court erred in decreeing the entire amount of the mortgage indebtedness to be due, and, though it is not so treated in the brief, we will consider the question as presented by that assignment.

By the terms of the bonds the principal debt was not payable until the 1st day of April, 1916, and we find nothing in the conditions of the mortgage which authorized the court to declare the debt due

before that time. There is, confessedly, no specific provision that the principal may be declared due for default in the payment of interest; but from the authority given the trustee in possession, under the first condition, to apply the residue of income upon the principal of outstanding bonds, and, under the second condition, to cause the property to be sold as an entirety, and from the provision of the third condition, that, if the trustee is proceeding to sell the mortgaged premises for default in interest or sinking fund, the mortgagor, at any time before sale is made, may pay all interest then in arrears, costs, expenses, disbursements, and reasonable compensation, and that thereupon the trustee shall discontinue the proceeding and surrender the possession, it is insisted that the power to treat the principal debt as due should be inferred. The inference, we think, is neither necessary nor reasonable. To use the language of the supreme court in *Railroad Co. v. Fosdick*, 106 U. S. 47, 75, 1 Sup. Ct. 10:

"It does not affect this conclusion that, by the terms of the sixth article of the conditions of the mortgage, it is provided that upon the exercise of the power thereby conferred, resulting in a sale of the mortgaged premises for a single default in the payment of interest (it may be one coupon, merely), the property is to be sold as an entirety, and free of the incumbrance of the mortgage, so as to pass all the title, both of the mortgagor and mortgagee, and that the proceeds of the sale are to be applied, after the payment of overdue interest, to the payment of the principal of the debt, though not yet due. The provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment. It is simply the application to the case of a sale by the trustees, under the power, of the practice of courts of equity in cases of judicial sales upon foreclosure. In either case the right of the mortgagee to redeem, and thus prevent the sale, is preserved, on payment, not of the unmatured principal of the debt, but merely of the interest then actually due and in arrears,—the very right which, by the decree now in question, was denied. If authority is needed on such a proposition, it will be found in *Holden v. Gilbert*, 7 Paige, 208, and *Olcott v. Bynum*, 17 Wall. 44."

We find nothing inconsistent with the foregoing in *Pope v. Durant*, 26 Iowa, 233.

It is contended further that, if the decree was erroneous in this respect, no harm was done the appellants, because, "by a tender of the amount due, the decree would have been stayed, and the premises not been sold. Defendants could have come into court, and tendered the amount due, and had the proceedings dismissed." Down to the entry of the decree, the defendants doubtless had that right; but, once the decree had passed, it was no less conclusive in respect to the amount due than of other matters involved and determined. We cannot agree that the mortgagor's right to have the proceedings for foreclosure discontinued upon payment of interest in arrears, costs, etc., was so far separate and independent that it needed not to be embodied in the decree, and that the court would have enforced it, as against the trustee, at any time before sale, upon any of the defendants tendering the amount required, and moving to have the case dismissed. If the trustee had been proceeding under the power, as was the case in *Tiernan v. Hinman*, 16 Ill. 400, the mortgagor's right to prevent a sale by paying the overdue interest might have been asserted, as provided by the terms of the deed, at any time before

sale; but, when the principal debt has been declared due by a decree of court, it must be so treated for every purpose, until in some lawful way the decree shall have been modified or set aside. Under such a decree the debt cannot be regarded as due for one purpose, and not due for another purpose. The rights of the trustee and of the mortgagor in this respect were correlative, and it was error for the one to take an adjudication which, either in terms or by necessary implication, was inconsistent with the right of the other.

It is shown by a supplemental transcript that a sale made under the decree had been reported before the appeal, and afterwards confirmed; and it is insisted that for that reason the decree, if erroneous, may be modified, but should not be reversed, as against the purchaser. *Brignardello v. Gray*, 1 Wall. 627. But whether or not the sale in this case was bona fide, and should stand, is not a question which can be determined now, or which should be allowed to affect the character or scope of our action on the appeal. Of the amount declared due, which the mortgagor was required to pay within twenty days in order to save the mortgaged property from sale less than one-tenth was actually due. The error, therefore, was a substantial one, which, to the extent possible, should be corrected by reversing the decree.

The objection that the decree left uncertain the amount to be paid in order to prevent a sale we do not consider important. It amounted to no more than a reservation of power by the court to include in the decree a sum sufficient to pay, besides taxable costs, the trustee's compensation, counsel fees, and other expenses or disbursements which should thereafter be allowed by the court. The items enumerated are of the nature of costs, which, by common practice, and from necessity, are often left, when decrees or judgments are pronounced, for subsequent taxation. No harm can result, because it is always in the power of any party interested to move for a determination of whatever in such particulars had been left at large.

In respect to the after-acquired property, it is not claimed that the mortgage was invalid or ineffective as between the parties to the instrument. If, therefore, the court erred in extending the lien of the mortgage over property of that kind, the judgment creditors alone were harmed by the ruling, and the error should have been assigned by them, or in their behalf, only. *MacDonald v. U. S.* (by this court) 63 Fed. 426, and cases there cited. But, if properly presented, the question can hardly be deemed to have the general scope given it in the discussion. The theory upon which courts of equity extend the lien of a mortgage to after-acquired property is "that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired." *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793. While in this instance the mortgage, by the general terms of the granting clause, covers all other lands in Vermilion county, besides those described, which the company shall acquire, there is an express covenant for further conveyance and assurance, which is restricted to future-acquired property purchased by the company "for use in the working and carrying on of its said mines." It would seem, therefore, that this

mortgage, while valid in respect to lands acquired for mining purposes, should not be construed to include, and it does not appear that by the decree below it was made to include, lands which were not purchased for use in the company's business. We think there was no error in this particular. For the error of the court in declaring the principal of the mortgage debt due, the decree below is reversed.

HORTON v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, N. D. New York. October 22, 1894.)

1. RES JUDICATA—DAMAGES FOR INFRINGEMENT OF A PATENT.

The owner of a patent obtained a decree for a perpetual injunction against infringement, and was awarded damages and profits for infringements occurring prior to a certain time. *Held*, that he could not maintain a second suit against the same defendant to recover damages and profits arising from other acts of infringement committed during the same period, but of which no evidence was given in the former suit, and no recovery asked.

2. PATENTS — INFRINGEMENT — INJUNCTION — SECOND SUIT AGAINST SAME DEFENDANT

Complainant in a bill to recover damages and profits accruing from acts of infringement committed by defendant subsequent to a former decree prayed for an injunction as well as for an account. *Held*, notwithstanding an injunction was unnecessary, that a decree for an injunction as well as for an accounting would be granted.

This was a suit in equity by Cornelius M. Horton against the New York Central & Hudson River Railroad Company, impleaded with the West Shore Railroad Company, for infringement of a patent.

James A. Allen, for complainant.

Frank Hiscock, for defendant.

WALLACE, Circuit Judge. This cause presents the question whether the owner of a patent, who, in a former suit in this court against the defendant, obtained a decree for a perpetual injunction against infringement, and awarding him damages and profits for the infringements occurring prior to January 11, 1892, can maintain a second suit against the same defendant to recover damages and profits arising from other acts of infringement, committed during the same period, but of which no evidence was given in the former suit, and no recovery asked. I am aware of no principle which authorizes a second recovery against the defendant upon such a state of facts. For aught that appears, the complainant deliberately withheld all proof in respect to acts of infringement which he knew the defendant had committed, and in respect to which he might, if he had chosen, have recovered full compensation. His cause of action in the former suit has passed into judgment, and the maxim applies, "*Expedit reipublicae ut sit finis litium.*"

The complainant also seeks to recover damages and profits accruing from acts of infringement committed by the defendant since the rendition of the former decree. In this bill he prays for an injunction as well as for an account. Notwithstanding an injunc-

tion is unnecessary, as the complainant can have recourse to the one he already has to obtain all necessary relief, I think that fact does not deprive him of the right to resort to a court of equity, and obtain the ordinary decree in a patent suit against a defendant who is violating his rights. A decree is ordered for the complainant for an injunction, and for an accounting of damages and profits accruing from the infringements committed since January 11, 1892. There will be a reference to Anson J. Northrup, of the city of Syracuse, as master, to take and report the account.

BANK OF COMMERCE v. BANK OF NEWPORT.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1894.)

No. 441.

1. CORPORATION—MEMBER—WHO IS.

The holders of bank-stock certificates, which stated that the shares were "transferable only on the books of the bank," on surrender of the certificate properly indorsed, sold, indorsed, and delivered such certificates to J. Bros. & Co., who were debtors of the bank. One of the latter firm, and also one of the sellers, notified the bank of the transfer; and the cashier made an entry on the stock-certificate book—which was the only book kept showing who were stockholders—that the certificates were transferred to, and owned by, J. Bros. & Co. Held, that the firm of J. Bros. & Co. was a "member" of such corporation, within the meaning of Mansf. Dig. Ark. § 975, which provides that the stock of every corporation shall be transferred only on the books thereof, in such form as the directors prescribe, and such corporation shall "have a lien upon all the stock or property of its members" for all debts due from them to it.

2. SAME—STOCK—LIEN FOR DEBTS DUE FROM MEMBERS—ESTOPPEL.

The facts that the certificates recited that the shares were transferable only on the books of the bank on the surrender of the certificates, and that the bank did not adopt or use that mode of transfer, did not estop it from claiming a lien on the stock for the debts due it from such firm, as against a subsequent vendee and indorsee of such certificates, who took them from such firm.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Action by the Bank of Commerce against the Bank of Newport to compel defendant to transfer to plaintiff, on defendant's corporate books, certain shares of its stock. From a judgment for defendant, plaintiff appeals.

U. M. Rose, W. E. Hemingway, and G. B. Rose, for appellant.
J. M. Moore, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The question to be decided on this appeal arises out of the following facts, which are practically undisputed: On the 3d and 4th days of August, respectively, in the year 1890, the appellee, the Bank of Newport, of Newport, Ark., issued two stock certificates, one of which certified that the firm of Jones Bros. & Mask was the owner of 100 shares of stock

in said bank of Newport, and the other that said firm was the owner of 20 shares of stock. Each certificate stated that the shares were "transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate properly indorsed." Subsequently, Jones Bros. & Mask sold, indorsed, and delivered the two certificates of stock to the firm of Jones Bros. & Co.; and on May 16, 1891, notice of such transfer and sale was given to the Bank of Newport by R. J. Jones, who was a member of the firm of Jones Bros. & Mask, and also a member of the firm of Jones Bros. & Co. A similar notice of sale was given by W. R. Jones, of the firm of Jones Bros. & Co., on July 7, 1891. Thereupon, the Bank of Newport made the following notation on its stock-certificate book, which contained the only record kept by it relative to the ownership and transfer of shares of stock:

"Notified by R. J. Jones that this certificate is transferred to and is owned by Jones Brothers and Company, May 14, 1891. Notified to the same effect by W. R. Jones, and certificate shown, July 7th, 1891."

On the 30th day of January, 1892, Jones Bros. & Co. delivered the certificates to the appellant, the Bank of Commerce, of Memphis, Tenn., as collateral for advances made to Jones Bros. & Co. by the appellant. The certificates at that time bore the indorsement of Jones Bros. & Mask, to whom they had been originally issued. On January 30, 1892, and for some months previously thereto, Jones Bros. & Co. were and had been largely indebted to the appellee, the Bank of Newport. After the delivery of the certificates to the Bank of Commerce, the latter bank requested the appellee to transfer said shares of stock to it, upon the corporate books kept by the appellee for that purpose. This request was refused, the Bank of Newport claiming that it had a lien on said stock to the full amount of the indebtedness due to it from the firm of Jones Bros. & Co., under and by virtue of the following statute of the state of Arkansas, to wit:

"The stock of every such corporation shall be deemed personal property and be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Mansf. Dig. § 975.

Subsequently, the present action was commenced by the Bank of Commerce against the Bank of Newport to compel a transfer of said stock on the corporate books of the last-named bank. The trial in the circuit court resulted in a decree in favor of the defendant.

The question to be determined is whether the firm of Jones Bros. & Co. was a member of the defendant corporation on January 30, 1892, in such sense that the corporation can avail itself of the lien created by the aforesaid statute of the state of Arkansas. The contention of the appellant is that the firm of Jones Bros. & Co. was not a member of the defendant corporation, within the meaning of the statute, and that, at most, as between the firm and the corporation, the firm only had an equitable title to the stock, which might be transformed into a legal title, and constitute the firm a

member of the corporation, by surrendering the old certificates, and taking out new certificates in the name of Jones Bros. & Co.

It is very generally held, and it may be accepted as the established view; that a provision that shares of stock shall be transferable only on the books of the corporation, in person or by attorney, on the surrender of the old certificate properly indorsed, is a provision intended primarily for the benefit of the corporation, to enable it to preserve an authentic record of its shareholders, and thereby to deal safely and intelligently with its members, in the matter of paying dividends, giving notice of corporate meetings, and in all other matters relating to the internal affairs and the government of the corporation. Incidentally, no doubt, a provision of that kind is also intended to preserve a record of the ownership of stock, to which third parties may resort when they have occasion to purchase or otherwise deal in the stock of the corporation. It has never been supposed, however, that a stipulation of that nature, whether it is contained in the charter or the by-laws, operates as a prohibition against other modes of transfer. Such provisions are merely cumulative. They provide a particular mode of transfer, on which the corporation or its assignee may insist, before the shareholder is released from any of his obligations as a member of the company; but as between the shareholder and his vendee a good title to stock may doubtless be conveyed by a simple indorsement and delivery of the certificate, or by a bill of sale, or any other conveyance which is adequate to transfer the title to any other species of personal property. It is a well-known fact that thousands of shares of stock are daily transferred from hand to hand by a simple delivery of the stock certificates after they have been indorsed in blank by the registered shareholder, and no doubt can be entertained that, as between the parties to such transactions, a good title is conveyed. *Johnston v. Laffin*, 103 U. S. 800, 804; *Spring Co. v. Harris*, 20 Mo. 382, 388; *Railroad Co. v. Schuyler*, 34 N. Y. 30, 80; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 557, 558, 23 Atl. 795; *Fisher v. Jones*, 82 Ala. 117, 122, 3 South. 13; *Robinson v. Bank*, 95 N. Y. 637; *Haegle v. Manufacturing Co.*, 29 Mo. App. 486, 492; *Cook, Stock, Stockh. & Corp. Law*, §§ 378, 379, and cases there cited. It follows, no doubt, from what has been said, that a vendee of stock may have a good title thereto, as against his vendor, although he has not been accepted as a member of the company, and although the vendor has not been released from his obligations as a member or shareholder. This is the necessary result of the doctrine that the corporation is entitled to insist upon the mode of transfer specified in its charter or prescribed by its by-laws, if the method prescribed is reasonable, and does not impose unnecessary restrictions upon the right of the member to sell. We think, however, that it is not true, as seems to be contended in the case at bar, that a mode of transfer provided by the charter or by-laws of a corporation must be in all respects strictly pursued, before the title of the vendee of stock is complete as against the corporation. Considering the fact that a regulation requiring a transfer of stock on the books of the company, and a surrender of the old certificate, is intended primarily

for the benefit and advantage of the corporation, we think that it is competent for the corporation to waive a strict observance of prescribed forms, and to admit the vendee of stock to full membership in the corporation without a literal compliance with such regulations. So much, at least, has already been decided. In the case of *National Bank v. Watson town Bank*, 105 U. S. 217, 222, a statute under which the Watson town Bank was organized provided, in substance, that its shares should be transferable on its books in the presence of its president or cashier, but that no stockholder indebted to the bank for a debt actually due should be authorized to make a transfer until the debt was discharged, or secured to the satisfaction of the directors. It seems to have been the custom of the bank, on the entry of transfers of stock, to cancel the old certificate and issue a new one. In the case before the court the cashier, on being advised of a sale of certain shares by the purchaser thereof, had made an entry on the stock ledger showing the transfer, but the old certificate was not canceled, nor a new one issued. Moreover, the vendor of the stock was indebted to the corporation at the time the transfer was noted on the stock ledger, and he had not been required to discharge the debt, or to secure it to the satisfaction of the directors. It was held, in substance, that a stock certificate is a mere evidence of title to stock, but is not the stock itself; that, independent of the certificate, a person may occupy the relation to a corporation of a legal owner of certain shares of its stock; and that the action of the cashier in noting the transfer of the shares on the stock ledger, although the old certificate was not canceled, nor a new certificate issued, and although the former shareholder had neither paid nor secured his indebtedness to the bank, constituted the vendee the owner of the shares, and precluded the bank from asserting a lien on account of the indebtedness of the former owner. In the case of *Upton v. Burnham*, 3 Biss. 431, 520, Fed. Cas. Nos. 16,798 and 16,799, a certificate of stock which had been indorsed in blank by the original owner was transferred for value to the defendant, by an intermediate holder, by mere delivery. Subsequently, the corporation, on being advised of the fact, had entered the defendant's name on its books as a shareholder without canceling the old or issuing a new certificate. The certificate contained a clause to the effect that it was transferable on the books of the corporation on the surrender of the certificate. It was held in that case that the entry of the defendant's name on the books of the corporation constituted him the legal owner of the stock, and, as between himself and the corporation, gave him all the rights and subjected him to all of the liabilities of a stockholder. See, also, *Insurance Co. v. Smith*, 11 Pa. St. 120; *Fisher v. Jones*, 82 Ala. 117, 3 South. 13; *Bank v. Gifford*, 47 Iowa, 575, 583; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 558, 23 Atl. 795; *Cook, Stock, Stockh. & Corp. Law*, § 383, and cases there cited.

The application of the foregoing principles to the case at bar will serve to demonstrate, we think, that Jones Bros. & Co. became members of the defendant corporation, within the meaning of the Arkansas statute, above quoted, long prior to January 30, 1892, by

what had been done to consummate a transfer of the stock. The notation made on the stock-certificate book of the defendant bank, which was the only book kept by it showing who were its stockholders, to the effect that it had been "notified by R. J. Jones that this certificate is transferred to, and is owned by, Jones Brothers and Company," was tantamount to a formal acknowledgment by the corporation that it had agreed to release the original shareholder from his obligations as a member of the company, and to accept the vendee of the stock as a member. If it was not the intention of the corporation to thus release the former owner from further liability as a stockholder, or not to acknowledge the full legal ownership of the stock by the transferee, it should have given notice to that effect when the certificate was exhibited to it by the transferee, and when the above notation was made. Not having done so, it clearly relinquished its right to further treat the original owner as a member; and it could not thereafter successfully assert, as against the original stockholder, any right or claim dependent upon the existence of that relation. Such, we think, was the necessary legal effect of that transaction.

It is claimed, however, by the appellant, that it was prejudiced by the statement contained in the stock certificates as to the mode of transfer, and by the neglect of the defendant bank to adopt that mode of transfer, and by its failure to require a surrender of the original certificates when it was notified of the sale and transfer of the stock. On this ground an attempt is made to raise an estoppel against the defendant. With reference to this contention, it is sufficient to say, that the certificates, when acquired by the appellant, conveyed correct information as to who was the owner of the stock. It doubtless accepted the certificates from Jones Bros. & Co. in the belief that that firm was the owner of the stock, and entitled to deal with it as it saw fit, and such was the fact. If at that time the appellant considered it important to know whether, as between the Bank of Newport and the vendee of the stock, the latter had been admitted to full membership in the defendant company, so as to give the company a lien upon the stock for any indebtedness of Jones Bros. & Co., it was its plain duty to have made inquiry. The appellant was affected with knowledge that Jones Bros. & Co. might have been admitted to full membership in the corporation notwithstanding the fact that the old certificate was outstanding, for knowledge of that sort was a matter of law, and it should have ascertained by proper inquiry whether such relation of membership had in fact been established. There is no sufficient ground on which to base an estoppel. It results from what has been said that the decree of the circuit court should be, and it is hereby, affirmed.

PARSONS v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 407.

1. INTERSTATE COMMERCE ACT—REASONABLE RATE—UNDUE PREFERENCE.

Two connecting carriers united in putting in force a joint through tariff between given points. *Held*, under sections 3 and 4 of the interstate commerce act, that such joint tariff was not the standard by which the reasonableness of the local tariff on either line was to be determined, and that the fact that a railroad company charged a local shipper more for transporting property between two points on its road than it charged for the same services when the property transported was received from a connecting railroad, and was carried under a joint tariff established by the connecting carriers, did not establish the charge of an undue preference or discrimination. *Railway Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912, 10 U. S. App. 430, and *Tozer v. U. S.*, 52 Fed. 917, followed.

2. SAME—SUFFICIENCY OF COMPLAINT.

The C. & N. W. Ry. Co. operated a line of railroad from Chicago to a point in Iowa at which it connected with two roads controlled by it, extending to points in Nebraska. Said company issued a freight tariff headed "Joint Tariff on Corn and Oats in Car Loads to R., Illinois, When Destined to New York, Boston, &c.," giving certain rates from points in Nebraska, and referring, for rates from R. to New York, etc., to a previous tariff. P. sued the railway company for damages, alleging that while this tariff was in force he was required to pay a higher rate for shipments over defendant's road from points in Iowa to Chicago than the rate given from Nebraska points to R., though for a shorter distance; that the fixing of R. as a terminus was a device to evade the law, R. not being a grain market, and the grain being in fact transported to Chicago; that a brother of defendant's freight agent was interested in the grain business in Nebraska; that the tariff for Nebraska points was not made known in Iowa, and the tariff sheet was not filed with the interstate commerce commission; and that the charge to plaintiff was unlawful because an undue preference was given to Nebraska shippers, and a larger charge made for a shorter than a longer haul; also, that defendant, in combination with other companies, had made a through rate from Nebraska points to eastern ports, less than plaintiff, paying local rates to Chicago, and thence to the East, was obliged to pay, no through rates from Iowa points being made; and that an unlawful discrimination was thereby made against Iowa shippers, and the long and short haul clause violated. *Held*, on demurrer, that no cause of action was stated, since the freight tariff pleaded showed that it was part of a joint through rate, and such a rate is not the standard of reasonableness of a local rate, while the other allegations were either immaterial, or insufficient to establish the unreasonableness of the rates or a violation of law.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action for damages founded on the provisions of the act of congress of February 4, 1887, commonly called the "Interstate Commerce Act" (24 Stat. 379). Plaintiff in error, E. M. Parsons, was the plaintiff in the trial court. There were five counts in the declaration. The first of these counts contained, in substance, the following allegations: That the defendant corporation, the Chicago & Northwestern Railway Company, is a common carrier of freight and passengers, and operates a line of railroad extending from the city of Chicago, Ill., to Missouri Valley and Council Bluffs, in the state of Iowa; that it also owned the majority of the stock, and, by the same general officers and board of directors, controlled and operated two other railroads, to wit, the Fremont, Elkhorn & Missouri Valley Railroad and the Sioux City & Pacific Railroad, which latter roads connected with the Chicago

& Northwestern Railway at Missouri Valley, and extended westwardly from that point to points in the state of Nebraska; that in February, 1888, the plaintiff was a shipper of corn, residing in the state of Iowa, and had accumulated a large amount of corn, for shipment to Chicago and eastern cities, at various stations in Iowa along the line of the defendant company's railroad, particularly at a place called Carroll in said state, which was 395 miles west of Chicago; that previous to December 30, 1887, the freight rate on corn and oats shipped from Nebraska points over the aforesaid railroads to Rochelle, Ill., and to Chicago, Ill., had been higher than on shipments from Iowa points to the same places, because the distance was greater, and the cost of carriage greater; that on December 30, 1887, the defendant company, acting in concert with one K. C. Morehouse, who was the general freight agent of the Sioux City & Pacific Railroad and of the Fremont, Elkhorn & Missouri Valley Railroad, put in force from points in the state of Nebraska a certain freight tariff upon corn and oats, in the words and figures following, to wit:

"Chicago and Northwestern Railway, Fremont, Elkhorn & Missouri Valley and Sioux City and Pacific Railway. Joint Tariff on Corn and Oats, in Car Loads. Taking effect December 30, 1887, to Rochelle, Ill., when destined to New York, Boston, Philadelphia, Baltimore."

From	Per 100 lbs.
Blair, Neb	11
Kennard, Neb	11
* * * * *	

[Here follow rates from many other Nebraska points to Rochelle, Ill.]

"Prepaid. Waybill through to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York, and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

"K. C. Morehouse,
"G. F. A., S. C. & P. and
"F., E. & M. V. Rs."

H. R. McCullough,
G. F. A., C. & N. W. R.

The declaration further averred that said freight tariff was never printed in type, or published at any of the defendant's railroad stations in Iowa; that no copy thereof was filed with the interstate commerce commission, and that knowledge thereof was concealed from the plaintiff and other Iowa shippers; that said tariff remained in force until February 1, 1888, and that in the meantime large quantities of corn and oats were shipped thereunder from Blair and Kennard, Neb., to Rochelle, Ill., and thence to Chicago, at the rate specified therein, to wit, 11 cents per 100 pounds; that during the same period the plaintiff had a large amount of corn at Carroll, Iowa, for shipment to Chicago, which he was compelled to ship over the defendant's railroad, and did so ship it to Chicago, paying therefor freight charges at the rate of 19 cents per hundredweight for carrying the same 395 miles, the distance from Carroll to Chicago, which was somewhat less than the distance from Blair and Kennard, Neb., to Rochelle, Ill. The plaintiff further averred that the fixing of the point Rochelle as the terminus of the route under the aforesaid special tariff issued December 30, 1887, was a mere device to evade the law, as Rochelle was not a grain market, and had no elevators, and that said grain was intended to be, and was in fact, transported by the defendant to Chicago, Ill., and was there sold on the market, or delivered to connecting roads for eastern seaboard points; that the charge of 19 cents per 100 pounds, which the plaintiff was compelled to pay for transporting corn from Carroll, Iowa, to Chicago, was an unlawful charge, under the interstate commerce act, such as entitled plaintiff to recover damages, because an unlawful preference was thereby given to Nebraska shippers over Iowa shippers, and also because a greater compensation was demanded for a shorter than a longer haul, the shorter haul being included in the longer. The first count of plaintiff's declaration also contained an allegation that K. C. Morehouse, who was the general freight agent of the two roads extending into Nebraska, had a brother, who, in January and February, 1888, was a copartner with persons who owned large quantities of corn at points in Nebraska on the line of the Fremont, Elkhorn & Missouri Valley Railroad. The second, third, and fourth counts of the plaintiff's declaration were the same, in substance, as the first

count, except that the plaintiff therein claimed damages on account of shipments of corn from other Iowa points to Chicago, which he had made between the 30th of December, 1887, and February 1, 1888. The fifth count of the declaration charged, in substance, that the Chicago & Northwestern Railway Company, combining with said K. C. Morehouse and other railroad companies operating roads east of Chicago to give a preference to grain shippers in Nebraska, and to discriminate against grain shippers in Iowa, did put in force on February 17, 1888, at all stations on the Fremont, Elkhorn & Missouri Valley Railroad in Nebraska, between Blair and Skull Creek, a freight tariff on corn and oats destined to New York and other seaboard points, whereby it did between February 17 and March, 1888, transport corn and oats from said Nebraska stations to New York for 36½ cents per hundred-weight, and to Philadelphia for 34½ cents, and to Baltimore for 33½ cents; that all of said Nebraska points were further from New York, Philadelphia, and Baltimore than the stations on the defendant's road in Iowa; that the through rate so established for said Nebraska points was not established for Iowa points on the line of the defendant's road, or made known to Iowa shippers; that the tariff sheet in question was not filed with the interstate commerce commission, or printed or published as required by law; that during the period in question, from February 17 to March, 1888, the plaintiff was compelled to pay on corn by him shipped from Carroll, Iowa, to New York, via Chicago, a local rate to Chicago of 19 cents per hundredweight and from there to New York of 27½ cents, making a total of 46½ cents per hundredweight, as against a rate of 36½ cents per 100 allowed to shippers residing at the aforesaid points in Nebraska. The plaintiff averred, in substance, that the establishment of this latter rate was an unlawful discrimination against Iowa shippers, as well as a violation of the long and short haul clause of the interstate commerce act, by virtue of which he had sustained damages in the sum of about \$1,000. The defendant company demurred to the declaration, as a whole, on the ground that the several counts of the declaration each showed that the rate complained of therein from Nebraska points to the seaboard was a joint rate established by two or more connecting railroads, while the rate exacted of the plaintiff was a local rate for shipments wholly upon the defendant company's own line, and that the rate so exacted from the plaintiff, it being a purely local rate, was not rendered unlawful by the establishment or existence of the joint through rate. The trial court sustained the demurrer, and the plaintiff declined to plead further, whereupon final judgment was entered in favor of the defendant. To reverse that judgment the plaintiff sued out a writ of error.

C. C. Nourse (C. L. Nourse, on the brief), for plaintiff in error.

Lloyd W. Bowers (N. M. Hubbard, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This court held in the case of *Railway Co. v. Osborne*, 10 U. S. App. 430, 3 C. C. A. 347, and 52 Fed. 912, which suit grew out of the establishment by the defendant company of the same freight rate that gave rise to the present action, that, where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not the standard by which the reasonableness of the local tariff on either line is to be determined. It was decided that, where two connecting carriers unite in a joint tariff, they form practically a new and independent line, and that the joint rate established over such line may be made less than the sum of the local rates, or even less than the local rate of either company over that part of its road constituting a part of the joint

line, without violating the long and short haul clause found in the fourth section of the interstate commerce law. The court was careful to limit the foregoing proposition by the proviso that, under the first section of the interstate commerce act, all rates, whether local or joint, must be "reasonable and just." But it distinctly overruled the contention that a local rate between two points on the same road is necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies. In the case of *Tozer v. U. S.*, 52 Fed. 917, it was also decided, that the fact that a railroad company charges a local shipper more for transporting property between two points on its road than it charges for the same services when the property transported is received from a connecting railroad, and is carried under a joint tariff established by the connecting carriers, is insufficient evidence to establish the charge of an undue preference or discrimination under the third section of the interstate commerce act. The court remarked, in substance, that it did not follow, and that a jury was not warranted in finding, that an undue preference or advantage had been given, because the local rate was in excess of the carrier's share of the joint rate. While this latter ruling in *Tozer v. U. S.* was made by the circuit court, it is to be noted in passing that the case was brought to the circuit court on writ of error from the United States district court, and that the case was heard and determined in the circuit court by Mr. Justice Brewer and Judge Caldwell, both of whom had taken part in the decision of the case of *Railway Co. v. Osborne*, above cited. Moreover, both cases were under advisement, and the opinions therein were promulgated at about the same time. Accepting the views thus expressed as sound, and without undertaking to reconsider questions which have already been decided by this court after full consideration, we turn to consider the various points argued by counsel, bearing on the general question involved in the present suit, whether the petition filed therein stated a cause of action.

The first, and perhaps the most important, contention of the plaintiff in error, seems to be that the petition does not allege or otherwise show, as was assumed by the demurrer, that on December 30, 1887, the defendant company, acting in concert with other connecting railroad companies, had put in force a joint through tariff between certain Nebraska points and the city of New York and other eastern cities, and that it does not show that the rate of 11 cents per 100 from Blair and Kennard, Neb., to Rochelle, Ill., was a part of such joint through rate to the seaboard. It is said that the petition shows affirmatively that the tariff established on December 30, 1887, was a tariff to Rochelle, Ill., only, and that the only parties to it were the Chicago & Northwestern Railway Company, the Fremont, Elkhorn & Missouri Valley Railroad Company, and the Sioux City & Pacific Railroad Company. With reference to this contention, it is to be observed that the tariff sheet of December 30, 1887, set forth in the petition in the case at bar, was

before this court in the case of *Railway Co. v. Osborne*, supra, and that it was there found and determined that by an agreement between the defendant company, the Fremont, Elkhorn & Missouri Valley Railroad, the Sioux City & Pacific Railroad, and certain eastern companies, a joint through rate from certain Nebraska points to the seaboard was in fact established and put in force. It is true that in the case last cited we had before us other evidence than the tariff sheet of December 30, 1887, which may have aided, somewhat in reaching the conclusion last stated; but we think that the tariff sheet itself, which is set out in the petition, sufficiently shows that an arrangement or agreement existed between the several companies last named, whereby corn and oats were to be carried through from the Nebraska points named in the tariff sheet, to the eastern cities therein named, at a certain specified rate, and that the rate of 11 cents per hundredweight from Blair and Kennard, Neb., to Rochelle, Ill., was a part of such joint through rate and not a local rate. The caption of the tariff sheet shows that the rate of 11 cents per 100 only applied when the grain was destined through to New York, Boston, Philadelphia, and Baltimore; and the memorandum at the foot of the sheet shows that the total through rate was to be ascertained by the company's agents by consulting the tariff sheet of November 25, 1887, and subsequent issues, for the rate from Rochelle to the eastern cities specified in the schedule. The inference is clear and irresistible that a specific joint through rate from the Nebraska points named in the tariff sheet to the seaboard had been established by the several companies above mentioned on December 30, 1887; that shippers of corn and oats from said points to the seaboard points named had the right to avail themselves of the joint through rate; and that the 11-cent rate from Blair and Kennard to Rochelle was only applicable to such through shipments. Nor are we able to hold that the inference above stated, arising from the language of the tariff sheet, is sufficiently rebutted by the allegation of the petition, above recited, that "the fixing of said point, Rochelle, as the terminus of the route under the special tariff sheet of December 30, 1887, was a mere device to evade the law," etc. No facts are averred, showing that the agreement for a joint through rate, indicated by the tariff sheet in question, was merely colorable; that no such agreement was ever made or acted under; and that the station agents along the line of the roads in Nebraska had received private instructions to disregard the direction to only allow the rate specified in the tariff sheet on through shipments to the seaboard. Without some such allegations as these, showing that no agreement was made by the several carriers for a joint through rate, or that the directions contained in the tariff sheet were secretly recalled and were not observed, we can attach no importance to the charge that it was a mere device to evade the law. That allegation, standing by itself, and without the averment of facts to support it, is a mere conclusion of the pleader. Nor do the facts stated in that connection—that Rochelle was not a grain market; that the grain was not transshipped at Rochelle, but was carried

through over defendant's road to Chicago, and was there delivered to the connecting roads for eastern seaboard points—serve to support it; for conceding that it was so carried through to Chicago, and there delivered to the other connecting carriers, it may nevertheless have been carried on a joint through rate given to the Nebraska shippers, such as the tariff sheet indicates. In other words, the facts pleaded do not substantiate the charge that the pretended tariff agreement of December 30, 1887, "was a mere device to evade the law." We must accordingly conclude that the petition does show the establishment and existence of a joint through rate, such as is assumed by the demurrer, and that the 11-cent rate accorded to Nebraska shippers was not a local rate, such as was paid by the plaintiff in error, but was a portion of the joint through rate. If such was not the meaning of the pleader, the fault lies with him, in failing to make his complaint more definite.

Other allegations found in the petition, to which our attention has been particularly directed by counsel for the plaintiff in error, on the ground that they aid materially in the statement of a cause of action, are these: That the general freight agent of the Nebraska roads, whose signature is appended to the rate sheet of December 30, 1887, had a brother, who was a copartner of the owners of large quantities of grain in Nebraska, and that the rate sheet of December 30, 1887, was not filed with the interstate commerce commission, and was not published at Iowa stations on the defendant's road.

Of the first of these allegations little need be said. It is not averred that the special tariff was put in force merely to favor a brother of the general freight agent in question; neither does it follow, as a matter of law, that the rate sheet in question was purely fictitious and colorable, and that no joint through rate was in fact established, or, if it was established, that Iowa shippers were discriminated against, merely because K. C. Morehouse, the general freight agent of the Nebraska roads, had a brother who was interested in corn and oats in Nebraska. We can attach no importance to this allegation, because it is wholly immaterial and irrelevant.

Concerning the fact that the tariff sheet of December 30, 1887, was not published at the Iowa stations, it will suffice to refer to what was said on that subject by Mr. Justice Brewer in delivering the opinion of this court in *Railway Co. v. Osborne*, heretofore cited. The claim is not made, as we understand, that the defendant company cannot take advantage of the fact that the 11-cent rate from Blair and Kennard to Rochelle was in reality, and as shown by the petition, a part of a joint through rate, merely because the tariff sheet of December 30, 1887, was not filed with the interstate commerce commission. The purpose of the whole allegation touching the nonpublication and nonfiling of the rate sheet in question seems to have been to show that there was an actual intent on the part of the defendant company to discriminate against Iowa shippers; but it matters not what its intent may have been, if the act committed was not an illegal discrimination, though

intended as such. As the law stood when the transaction took place, the interstate commerce commissioners undoubtedly had the right to determine whether they would make public such agreements between railroad companies, and such joint tariff sheets, as were filed with them pursuant to the provisions of the sixth section of the act. Its language is:

"Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and such commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem practicable for such common carriers to publish."

We are unable to say, therefore, that a complaint otherwise clearly insufficient is made good by a single allegation of the non-filing of the rate sheet, which was evidently inserted for the purpose of developing the intent of the defendant company, and for no other purpose, so far as we are advised.

The only other proposition advanced in the argument which we deem it necessary to notice is this: It is said that as the complaint made in the case of *Railway Co. v. Osborne* was for a violation of the long and short haul clause of the statute, whereas the petition in the case at bar also counts upon a violation of the third section of the law, therefore the latter case is not ruled by the former. Of this contention it may be said that, while the present petition does charge an unlawful discrimination against persons and places, yet the only material fact averred to support the accusation is the fact that the defendant charged a local rate of 19 cents per 100 for hauling grain from Carroll to Chicago, while 11 cents per 100, being its proportion of a joint through rate to the seaboard, was the sum received by it for hauling grain a longer distance, from Blair and Kennard to Rochelle, which latter point was a station on its road intermediate between Carroll and Chicago. It is manifest that the alleged disparity between the local rate and the defendant's proportion of the joint through rate is not sufficient, as a matter of pleading, to establish the charge of an "undue or unreasonable preference or disadvantage," under the third section of the act, unless it follows, as a matter of law, that because of the alleged disparity in the two rates an undue or unreasonable preference was given to persons and places. Now, in the case last above cited it was ruled, as we have heretofore stated, that if "two companies make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined." More pointedly it was said in *Tozer v. U. S.*, where the sole question was one of undue preference and discrimination under section 3 of the act, that, "if the joint through tariff of the two connecting roads is not a standard by which the local tariff of either can be declared in violation of section 4, neither can it be the standard by which the question of undue preferences is determined under section 3," and that the principle announced in the case of

Railway Co. v. Osborne, must control the decision of the case then in hand. In other words, it was held in both of the cases last cited that a question of undue discrimination must be determined by other considerations than the mere disparity that may exist between a local rate and a joint through rate, and that it never follows, as a matter of law, that an undue preference has been given to a person or locality, because a disparity is shown to exist between a local rate and a joint rate. We must accordingly overrule the last-mentioned contention of counsel, that the petition in the case at bar stated a cause of action, notwithstanding the previous rulings of this court in the case heretofore cited.

In conclusion, it is only necessary to add that we have reviewed all of the points to which our attention has been invited by counsel for plaintiff in error, with a view of showing that the petition stated a cause of action, with the result that we are not able to say that the circuit court erred in sustaining the demurrer. Its judgment is therefore affirmed.

MERCANTILE TRUST CO. v. ATLANTIC & P. R. CO. (POSTAL TELEGRAPH CABLE CO., Intervener).

(Circuit Court, S. D. California. October 19, 1894.)

1. GRANT OF RAILROAD RIGHT OF WAY—FEE OR EASEMENT.

Act July 27, 1866 (14 Stat. 292), granting a railroad right of way over public land, as to which no provision is made for issuing evidence of title, and granting to the railroad company, in aid of construction, various sections of public land, for which patents were to issue to it, does not carry the fee to the right of way, but only an easement therein. *Railway Co. v. Roberts*, 14 Sup. Ct. 496; 152 U. S. 114, explained.

2. RAILROADS—CONTRACTS WITH TELEGRAPH COMPANIES—DISCRIMINATING AGAINST COMPETING LINES.

A railroad company, which is not only a common carrier, but, by the act incorporating it (Act July 27, 1866), is declared to be a post route and military road, cannot make a valid contract with a telegraph company on the right of way not to furnish facilities for the construction of a competing line; and it cannot, therefore, refuse to carry and distribute material for the construction of such line.

Intervention by the Postal Telegraph Cable Company in the suit of the Mercantile Trust Company against the Atlantic & Pacific Railroad Company.

For former report, see 63 Fed. 513.

Lamme & Wilde and F. J. Loesch, for intervening petitioner.

L. M. Estabrook and R. B. Carpenter, for Western Union Tel. Co.

ROSS, District Judge. The ruling upon the demurrer to the intervening petition of the Postal Telegraph Cable Company adjudged the right of that company to erect its line of telegraph upon and along the right of way of the Atlantic & Pacific Railroad Company between the Needles and Mojave, in this judicial district, if such could be done without interference with the use of the right of way by the railroad company for ordinary travel. The reasons for that determination were stated in the opinion filed by the court at

the time. Thereafter, counsel for the Western Union Telegraph Company, who, by the consent and authority of the receivers of the Atlantic & Pacific Railroad Company, had filed in their name the demurrer, obtained from the court leave to file, and did file, an answer thereto in the name of the Western Union Telegraph Company; and upon the issues thus joined evidence was taken which shows, among other things, an acceptance by the Postal Telegraph Cable Company of the conditions imposed by the act of congress of July 24, 1866 (14 Stat. 221; Rev. St. § 5263), and that the erection of a line of telegraph by that company upon and along the right of way of the Atlantic & Pacific Railroad Company, from the Needles to Mojave, will not in any manner interfere with the use of the right of way by the railroad company for ordinary travel. If, therefore, the court was right in its ruling upon the demurrer, it follows that by congressional grant the Postal Telegraph Cable Company has the right to erect its line of telegraph upon and along the right of way in question. It is, however, urged on behalf of the Western Union Telegraph Company that the ruling of this court upon the demurrer is inconsistent with the decision of the supreme court in the case of *Railway Co. v. Roberts*, 152 U. S. 114, 14 Sup. Ct. 496; that the ruling of the supreme court in that case, applied to the grant of the Atlantic & Pacific Railroad Company, shows that that grant conveyed to the Atlantic & Pacific Company the fee of its right of way, free from the operation of the act of July 24, 1866, and from any rights thereby conferred upon telegraph companies complying with its conditions.

In ascertaining what a court, in any given case, has decided, the first important thing to do is to see what was before the court for decision. And so, in looking at the case of *Railway Co. v. Roberts*, 152 U. S. 114, 14 Sup. Ct. 496, it is seen that it was an action of ejectment, involving the right of possession of certain lands situated in section 16 of township 34 in the county of Labette, state of Kansas, occupied and used by the Missouri, Kansas & Texas Railway Company as part of its right of way, to which it claimed title under the act of congress of July 26, 1866, granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific Railway & Telegraph Company from Ft. Riley, Kan., to Ft. Smith, Ark. 14 Stat. 289. That act granted to the state of Kansas, for the use and benefit of the railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of 5 alternate sections per mile on each side of its road, and not exceeding in all 10 sections per mile: provided, that in case it should appear that the United States had, when the line of the railroad was definitely located, sold any of the sections, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement had attached to the same, or that it had been reserved to the United States for any purpose whatever, then it should be the duty of the secretary of the interior to cause to be selected, for the purposes stated, from the public lands of the United States nearest to the sections specified, so much land as should be equal to the amount of the land sold, reserved, or other-

wise appropriated, or to which the right of a homestead settlement or pre-emption had attached. But to the act a proviso was attached that any and all lands reserved to the United States by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement or other purposes whatever, were reserved and excepted from the operation of the act, except so far as might be found necessary to locate the route of said road through such reserved lands, in which case the right of way 200 feet in width was thereby granted, subject to the approval of the president of the United States. It will be seen that by the last proviso mentioned all lands reserved to the United States by competent authority, for any purpose whatever, were reserved and excepted from the operation of the grant, except so far as it might be found necessary to locate the route of the road through such reserved lands, in which case the right of way 200 feet in width was thereby granted, subject to the approval of the president. The action was brought in one of the courts of the state of Kansas by Roberts, who claimed under a patent issued by that state to his grantor for the premises as part of the lands ceded to the state by congress for school purposes; the patent having been issued prior to the grant of July 26, 1866, made by congress to the railway company. At the time of the last-mentioned grant the disputed premises constituted a part of the lands reserved by treaty made and promulgated in 1825 for the use and occupancy of the Osage Indians. Being an action of ejectment, the question involved was the right of possession of the lands included in the right of way granted to the railway company. The trial court gave the plaintiff judgment, which judgment was, on appeal to the supreme court of the state, affirmed. The case having been taken to the supreme court of the United States, that tribunal reversed the judgment of the state supreme court, holding that under the "legislation of congress and of Kansas, and the accepted conditions upon which that state was admitted into the Union, that her original claim to the school sections in townships 16 and 36 of the state was rejected by congress and abandoned by the state, and the right of congress was conceded to the absolute control of the lands thus embraced, and of lands set apart for the use of the Indians, until such right should be extinguished by appropriate legislation. * * * No such right was relinquished until after the grant of the right of way under the act of congress of July 26, 1866, to the Missouri, Kansas & Texas Railway, and the title of the land composing that right of way had become vested in that company,"—and further holding that lands reserved for the occupancy of Indians are subject to the absolute disposition of congress, and that the possession as well as the fee of such lands may be disposed of by congress either expressly or by necessary implication; that while nothing was said in the grant to the railway company of the right of way through the Osage reservation, in respect to the Indian occupancy thereof, the uses to which the lands within the right of way were to be applied necessarily involved their possession. It is true the court also said that the grant covered "both the fee and possession, and

left no rights on the part of the Indians to be the subject of future consideration." But it is to be observed that the question the court was discussing was as to the right of congress to make absolute disposition of lands reserved for the use and occupancy of the Indians, the court holding that this right applies both to the fee and the possession. No point appears to have been made in the case as to whether the right of way there granted to the railway company was but an easement, or carried the fee, nor was such point necessarily involved, since the grant of the right of way for the construction of the railroad, whatever its nature, necessarily carried the right of possession thereto, as against any inconsistent use thereof. I do not think, therefore, that the case of *Railway Co. v. Roberts* should be held to be an adjudication by the supreme court that a grant of the right of way over the public domain is not the grant of an easement therein, but necessarily carries the fee thereof, or that the court so intended it, especially where, as in the case at bar, the act of congress grants to the railroad company various sections of the public lands, for which, it is provided, patents shall be issued by the officers of the government, and also grants the right of way over lands of the government, for which no provision is made for the issuance of any evidence of title. Of course, this distinction in the grant between the lands granted in aid of the construction of the road, and the right of way therefor, is not conclusive, for the fee of land may be granted by direct act of congress. But, in my opinion, it strongly indicates that congress did not intend that the grant of the right of way to the Atlantic & Pacific Railroad Company should cover the fee of the lands included only within the right of way, but only such an easement therein as, under the settled rules of law, is usually covered by such grants. *Williams v. Railway Co.* (Wis.) 5 N. W. 482; *Lumber Co. v. Harris* (Tex. Sup.) 13 S. W. 453; *St. Onge v. Day* (Colo. Sup.) 18 Pac. 278; *Railroad Co. v. Lesueur* (Ariz.) 19 Pac. 157; *Mills, Em. Dom.* § 110. It follows from these views that the ninth clause of the contract entered into June 1, 1872, between the Atlantic & Pacific Railroad Company and the Western Union Telegraph Company, referred to in the intervening petition of the Postal Telegraph Cable Company, and set up in the answer of the Western Union Telegraph Company, by which it was, among other things, provided that "the said railroad company further agrees to grant the said telegraph company, as far as it has the right and power so to do, the exclusive right of way, for telegraphic purposes, on and along the line of its road, and will not permit any other person or corporation to construct a line or lines of telegraph along said railroad," was and is ineffectual, as against the congressional grant to the Atlantic & Pacific Railroad Company.

The ninth clause of the contract of June 1, 1872, further provided, "Nor in any case will it [the Atlantic & Pacific Railroad Company] furnish to such other person or corporation facilities, aid, or assistance in constructing or maintaining such competing lines, which it may lawfully withhold." The contention of the Western Union Telegraph Company is that the Atlantic & Pacific Railroad Company

can lawfully withhold all of the facilities asked for by the Postal Telegraph Cable Company; and it is upon that construction of the contract that the receivers deny to the Postal Company the facilities in question. I am of the opinion that it did not lie in the power of the Atlantic & Pacific Railroad Company to contract that it would not furnish to any other person or corporation than the Western Union Telegraph Company facilities, aid, or assistance in constructing or maintaining a line or lines of telegraph which might compete with the Western Union Telegraph Company. The Atlantic & Pacific Railroad Company was not incorporated for any such purpose. That company derived its existence from the act of congress of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast." 14 Stat. 292. By that act the Atlantic & Pacific Railroad Company was incorporated, and authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, "Beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the river Del Norte, and thence, by way of the Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river at such point as may be selected by such railroad company for crossing, thence by the most practicable and eligible route, to the Pacific" ocean. The eleventh section of the act provided that the company so incorporated shall be a post route and military road subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation. And by the twentieth section of the act it was provided "that, the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, congress may at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend, or repeal this act." The Atlantic & Pacific Railroad Company was thus created, and made a great highway of communication, with the declared object of promoting the public interest and welfare. There is not a syllable in the act indicating that it was intended by congress to be used as an instrument for the building up or fostering of any monopoly of any character, or that it should be permitted to do any act inconsistent with the objects for which it was created. If it may lawfully withhold facilities for the transportation of material and supplies for the erection of a line or lines of telegraph which

may come into competition with some other line, no reason is perceived why it may not also withhold facilities for the transportation of any other kind of freight in the interest of some one or more favored persons or corporations. The Atlantic & Pacific Railroad Company is a common carrier, and common carriage must be kept open to all alike, under like circumstances and conditions. What the considerations were that induced the Atlantic & Pacific Company to make the stipulation in question is immaterial. Its purpose plainly was to prevent competition. In the present age of progress the telegraph is as essential to the needs and comforts of the public as the railroads themselves. "Telegraphs," said Mr. Wharton in a note to the case of *W. U. Tel. Co. v. Burlington & S. Ry. Co.*, 11 Fed. 12, "are now essential to business, and, as such, are to be kept open to competition, unless the legislature should otherwise determine, in the same way that common carriage is to be kept open to competition. Any agreement to give a particular line of carriers monopoly in a state would not, without legislative aid, be enforced, nor should a contract to give a monopoly to a particular telegraph company." The Atlantic & Pacific Railroad Company, being a common carrier, is bound to afford every telegraph company, as well as every other company or person, equal transportation facilities under like circumstances and conditions; and its agreement to withhold from any other company or person than the Western Union Telegraph Company such facilities is, in my opinion, at variance with the declared purposes for which that company was created, against public policy, in restraint of trade, and void.

It was stated by counsel for the receivers, in open court, that but for the provisions of the contract of June 1, 1872, to which reference has been made, they would afford the facilities asked for by the Postal Telegraph Cable Company, namely, the distribution of the necessary material between the regular stations, and the furnishing of water to the force engaged in the construction of that line. The evidence shows, what is also judicially known to the court, that the right of way of the Atlantic & Pacific Company between the Needles and Mojave is over a desert country, and that the railroad company, through the receivers, has possession and control of all the available water supply upon and along the right of way. Evidence was also given to the effect that it is customary for the railroad company to furnish miners and others parties at and between their stations with water for their necessities, upon compensation paid therefor, and that the poles and other material can be distributed, and water furnished to the petitioner, without any inconvenience, and in accordance with the usual and ordinary method of transacting the business of the railroad between the Needles and Mojave. That being so, and there being no valid contract preventing it, there can certainly be no valid reason why the receivers should not distribute the poles and other material between stations, for a just compensation. It is in evidence, and is also a matter of common knowledge, that the erection of another line of telegraph along the right of way in question will be a direct

benefit to the railroad company, in that it will increase its telegraphic facilities, especially in case of accident to or other interruption of the lines of the Western Union Company. In respect to water, if the company has any to spare, I do not see that the furnishing of it to those in need along its line can be objected to by any one,—certainly, not by one who has no interest therein. The furnishing of water, under the circumstances appearing, is not inconsistent with any of the purposes for which the Atlantic & Pacific Railroad Company was created; and, if those administering the property can earn something thereby for the owners of the property, there is no good reason why they should not do so. An order will be entered directing the receivers to afford the facilities asked for by the petition, upon just compensation.

CHARLESTON ICE MANUF'G CO. v. JOYCE.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 84.

1. CONTRACT FOR BORING ARTESIAN WELL—CONSTRUCTION.

Whether a 12-inch artesian well is one which has a bore of 12 inches, or one which, after being cased, has a flow of 12 inches, depends on evidence, and is a question for the jury.

2. SAME.

In an action against a corporation on a contract for boring a 12-inch artesian well, it appeared that plaintiff sunk a well having a 12-inch bore, with the knowledge of defendant's agents, and under the supervision of its vice president and chief engineer, without any suggestion that the work was not being done in accordance with the contract. *Held*, that the jury properly construed the contract to mean a well having a 12-inch flow after being cased.

3. SAME—RESCISSION BY MUTUAL AGREEMENT.

The contract gave plaintiff the privilege of changing the size of the well to 8½ inches, but required him to carry a 10-inch hole to a depth of 1,300 feet, if possible. When a depth of 1,016 feet was reached with a 10-inch pipe, it was impossible to drive it further with the 1,100-pound maul in use, and there was danger of the pipe's collapse if it was driven further, and plaintiff proposed to use an 8½-inch pipe. Such facts were stated to defendant's vice president and chief engineer, and to its treasurer and manager, the president being absent. These latter asked permission to use a maul weighing 4,000 pounds at their own risk and expense, and continue with the 10-inch pipe, and agreed that if they spoiled the well it should be their loss. Plaintiff consented thereto, and while such officers were using the heavy maul the pipe collapsed. The president was at a directors' meeting at the company's office, near the well, while the 4,000-pound maul was being used, and no objection was made by him. *Held*, that it was not error to submit to the jury the question whether the original contract was rescinded when a depth of 1,016 feet was reached, and a new arrangement made by the company, through its agents, by which they undertook to complete the well.

4. SAME—MEASURE OF DAMAGES.

Under such new agreement, if it was made, plaintiff was entitled, for work afterwards done, to whatever such work was worth, and the cost of any materials used, in the absence of any definite contract as to price.

5. SAME.

In such case, plaintiff was entitled to charge the contract price for the work done up to the time the new contract was made.

6. SAME—RESCISSION—INSTRUCTION.

There was evidence from which the jury might find that while there was no agreement to wholly abandon, in the future prosecution of the work, the original contract, yet that defendant's officers assumed for it the responsibility of driving further than plaintiff thought safe the 10-inch pipe, and that the subsequent collapse of the pipe was entirely due to such officers' action in so doing. *Held*, that it was proper to charge that in case the jury so found, and the collapse of the pipe rendered the performance of the contract impossible, it rescinded the contract.

Error to the Circuit Court of the United States for the District of South Carolina.

This was an action by E. F. Joyce against the Charleston Ice Manufacturing Company to recover an amount claimed to be due him from defendant for drilling an artesian well. There was a verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Samuel Lord, for plaintiff in error.

J. P. K. Bryan, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES and SEYMOUR, District Judges.

SEYMOUR, District Judge. This action was brought by defendant in error to recover the amount due to him from the plaintiff in error for drilling an artesian well. The work done was begun under a written contract containing the following provisions:

"This agreement, made and executed in duplicate, this 19th day of November, 1889, by and between E. F. Joyce, of St. Augustine, Florida, party of the first part, and the Charleston Ice Mfg. Co., of Charleston, S. C., party of the second part, witnesseth: That the said party of the first part, for and in consideration of the compensation hereinafter mentioned, has agreed, and by these presents does agree, to drill in a proper and workmanlike manner, for the said Charleston Ice Mfg. Co., at their works on Market street, Charleston, S. C., a twelve-inch (12-in.) artesian well, one thousand feet (1,000 f.) deep, and to continue this well, with a ten-inch (10-in.) bore, to the depth of three hundred feet (300 f.) further, the whole depth of the well to be thirteen hundred feet (1,300 f.), in such manner as may be necessary, on account of the earth's formation, as will secure, if possible, a ten-inch (10-in.) flow of water from the last (30 f.) thirty feet of water-bearing strata next above a depth of thirteen hundred feet (1,300 f.) below the earth's surface, with the privilege of reducing the size of the well, if necessary, to eight and one-half inches (8½ in.), but to carry a ten-inch hole to the depth of thirteen hundred feet (1,300 f.) if possible, with his machinery, and to case the well, if needed, to a depth of twelve hundred and seventy feet (1,270 f.) with standard wrought-iron drive pipe, and provide it proper steel shoes. The party of the first part to furnish all pipes, shoes, machinery, tools, and labor for said well. The party of the first part further agrees to begin work on said well just as soon as possible, i. e. said party of the first part has to complete two wells with one set of men and rig, and some work with another crew and rig, for the city of Savannah, Ga., all of which work will be pushed to completion as soon as possible, and, immediately after, work will be commenced on the well contracted for by this agreement; and no unnecessary delay shall occur either in beginning or prosecuting work on this well to as rapid a completion as is compatible with safety and success, under a forfeiture of this contract. In consideration for the performance of this agreement the said Charleston Ice Mfg. Company, party of the second part, has agreed, and by these presents does agree, to pay to the said E. F. Joyce or his agent the sum of eight thousand five hundred dollars (\$8,500), as follows, viz.: Two thousand dol-

lars (\$2,000) when the well is six hundred feet (600 f.) deep; twenty-five hundred dollars (\$2,500) when one thousand feet deep (1,000 f.), and four thousand dollars (\$4,000) when it is finished."

Under this contract defendant in error bored the well to the depth of 1,016 feet. Commencing with a somewhat larger bore, and carrying a hole 14 inches in diameter to a depth of 379 feet, he sank a well 12 inches in diameter at the bottom to a distance from the surface of 1,016 feet as aforesaid. At this depth the outside diameter of the hole was 12 inches. But, owing to the nature of the soil through which it passed, the necessity arose of casing the well; and through the hole, for its entire distance, was passed a drive pipe of an inside diameter of 10 inches.

The first error which it is material to consider, alleged by plaintiff in error, arises from these facts. Plaintiff in error's second "request to charge" is as follows:

"That the plaintiff cannot recover under the first contract because he did not perform his contract up to the boring and drilling of the well to the depth of 1,016 feet, as alleged in the complaint, but on the contrary had violated it, and himself rendered its performance impossible, by discontinuing the 12-inch pipe at the depth of 380 feet, and defendant is entitled to recover back whatever he has paid under that contract."

The exception taken to this refusal is intended to raise the question of the proper construction of the written contract. The contention is that a "twelve-inch artesian well" means a well which, if cased, shall thereafter have a diameter inside the casing of 12 inches. In refusing to so charge, and leaving the meaning of the words, as illustrated by the evidence, to the jury, we think the judge below committed no error. The words, "a twelve-inch artesian well," are not conclusive of what was the required flow of water through the well, nor does it appear from the contract that the well would need any casing. Whether a 12-inch artesian well is one which has a bore of 12 inches, or one which after being cased has a flow of 12 inches, is a question depending upon evidence. In this case the parties put their own contemporaneous constructions upon the term. The well was driven with the knowledge of plaintiff in error's agents, and under the supervision of its vice president and chief engineer, to the depth mentioned, without any suggestion that the work was not being done in accordance with the contract. Under these circumstances the jury could have put no other construction upon the contract than they did. The objection first taken, as far as appears at the trial, is evidently an afterthought, and comes too late to be worthy of very serious attention.

When the well had reached the depth of 1,016 feet, it was found, as the evidence of defendant in error tends to show, impossible, owing to the conformation of the earth, to drive the 10-inch pipe further without causing it to collapse. C. L. Parker was the agent of Joyce, the contractor and defendant in error, and had charge of the work. The well was situated on the premises of the ice manufacturing company, in Charleston. On the same premises were the offices and place of meeting of the directors of the corporation. On the 3d of July, 1890, the well having reached the depth above

stated, it became impossible to drive the pipe further with the 1,100-pound maul theretofore used. Besides Parker and Joyce's workmen, there were present the resident acting officers of the ice company, Mr. Lapham and Capt. Whitesides. Mr. Hart, the president, was a nonresident, only occasionally coming to Charleston. Lapham was treasurer and manager of the company. Whitesides was president of the company when the contract in litigation was made, and at the time under consideration was its vice president and chief engineer, and especially in charge of the construction of the well. Both were directors, and as Hart, the president, testified, when he (Hart) was absent from Charleston, Mr. Lapham had charge of the affairs of the company. Hart was absent on the 3d of July. Finding that he could not drive the pipe further, Parker proposed to avail himself of his right under the contract to proceed with an 8½-inch pipe, stating his apprehension that any further attempt to drive the 10-inch pipe would cause it to collapse. Mr. Lapham and Capt. Whitesides, for the company, asked permission to use a heavier maul, weighing 4,000 pounds, at their own risk and expense, agreeing that if they spoiled the well it should be at their loss. Witness Parker says that he thereupon went with Lapham and Whitesides into the derrick, and in presence of the workmen told the latter that the ice company had asked permission to drive the 10-inch pipe at its risk and expense, and that he had consented that they might do so under these conditions; that from "now on" the work was at the risk and expense of the ice company, the understanding being that if they spoiled the pipe it was at the expense of the ice company, and not of Mr. Joyce. "I said, 'Now you are working for the ice company.'" Mr. Lapham said, "Yes, the captain is going to drive the pipe." Capt. Whitesides then took charge of the work. This testimony was controverted by the evidence introduced in behalf of plaintiff in error. The work was continuous until the 9th of July, when the 10-inch pipe collapsed at a place between 600 and 700 feet below the surface. As afterwards appeared, about 16 feet of the 10-inch pipe was crushed and driven together so as to stop up the well. This pipe was subsequently reamed and man-drilled by Joyce's men until it gave room for an 8-inch pipe, but the ragged inside edges of the 10-inch pipe interfered with the new one. At no time thereafter did the company's agent claim that it was possible to continue the work in accordance with the contract with an 8½-inch pipe, and the only thing attempted was to use an 8-inch one. The endeavor to complete the well was continued with great expense for a considerable time, until the company refused to make the payments demanded by Joyce, and the work was abandoned; the well being, as the company's officers say, perfectly useless. Mr. Hart, the president of the ice company, was in Charleston in July, 1890, at the very time that Whitesides was driving the 10-inch pipe with the 4,000-pound maul, and when the pipe collapsed. He testifies that Lapham informed him that Capt. Whitesides was going to drive the pipe, but he says: "My consent was never asked. I did not consent." It thus appears that he did not object, and that his consent was not considered necessary. A meeting of the direc-

tors of the ice company was held in the office of the company on the 9th, Hart being present. The work of driving the pipe was going on during the holding of the meeting, under Whitesides' direction. Hart himself went and looked at the pipe, saw that it was broken, and asked Whitesides whether the well was spoiled, to which the latter answered that it was not. Not a word, however, was said at the directors' meeting about the well. It must be evident from these facts that whatever was actually done in relation to the contract was or might have been within the knowledge of the president and directors of the ice company, and that the jury had evidence upon which they could find that a new arrangement had been made by the company through its agents, Whitesides and Lapham. The first exception to the charge cannot, therefore, be sustained. It is as follows:

"The vital questions in this case begin right here,—24th of June, 1890. When Capt. Whitesides undertook to drive the pipe, did he do this under and in consequence of an arrangement whereby he, in behalf of the company, and by authority of the company, undertook the completion of the well, and rescinded the contract theretofore existing? Did this contract end this day, with the concurrence of both parties, and did each of them so understand? The solution of this question depends entirely upon the credibility you give to the testimony of the witness. To which charge the defendant then and there, and before the jury had withdrawn from the bar, did except, and prayed the court to sign and seal said exception, which was accordingly done."

The plaintiff in error excepts to the following instructions of the court:

"If you come to the conclusion that Capt. Whitesides is responsible for the collapse or the telescoping of the pipe, then the next question is, did this accident render the performance of the contract impossible? If it did, and if Capt. Whitesides caused it, then this rescinded the contract. If it was possible to finish the contract, notwithstanding the accident, then the contract was not rescinded, the plaintiff was still bound to perform it, and the defendant only became liable for the expenses made necessary to repair the damage.

"If plaintiff was in no fault at all, and if defendant broke this contract, and Whitesides, by authority, rescinded and consented to abandon it, plaintiff is entitled to what his work was worth, less the sums already paid him on his account. For all work done while the contract was still executory,—that is, in force and not completed,—he could charge the contract price. For all work done when the contract was at an end, he can get what it was worth, and the cost of the pipe furnished by him,—the actual cost,—and the loss of his profit. Of this last you must decide from the testimony, recollecting that the profit diminished as the well deepened."

Two theories were presented to the consideration of the jury by these instructions. The latter, in the order in which they were given, was contingent upon the jury finding from the evidence that the parties mutually agreed to abandon the original contract when the boring had reached the depth of 1,016 feet and agreed that the work should be continued at the expense of the ice company, without any definite bargain as to price. It is evident that in such case, as the learned judge correctly charged, the contractor would be entitled, for such prospective work, to what that work might be worth, and what the materials might cost him. As the exception taken is to the entire instructions, we need not consider whether he was further entitled to charge anything for loss of profit. We are also of

the opinion that he was entitled to charge the contract price in such case for the work already completed. Such must have been the intention of both parties, there being no evidence to the contrary, and nothing to show that any new arrangement was contemplated with regard to the price of the work already done. That was provided for by the original contract, which was not affected by the new one, except with respect to the unfinished part of the work. The words, "if Whitesides, by authority, rescinded and consented to abandon" the contract, were intended by the judge, and must have been understood by the jury, to refer to its unfulfilled provisions.

But there was another view of the case arising upon the evidence. The jury might find from the evidence that while there was no agreement to wholly abandon, in the future prosecution of the work, the original contract, yet that Capt. Whitesides assumed for the company the responsibility of driving, further than Parker thought safe, the 10-inch pipe, and that the subsequent collapse of the pipe was entirely due to his action in so doing. In such case the judge instructed the jury that if the collapse of the pipe rendered the performance of the contract impossible this rescinded the contract. To this proposition of law plaintiff in error excepted upon the ground that the party in fault cannot by his own action rescind a contract. This is undoubtedly true. Where one party to a contract renders its performance impossible, he has not the right to rescind it without the consent of the injured party, for he cannot be allowed to so deprive the other party of its benefits. But it is for the benefit of the party injured that the contract is kept alive. The injured party has his action for the breach of the contract. As the learned judge who tried this case explains in his elaborate opinion refusing a new trial, to the extent that the company's action rendered the performance of the contract impossible, the company committed a breach of the contract, and for the purposes of a suit founded on this breach the contract is treated as subsisting. In this case there can be no doubt but that up to the time that the well had been driven to the depth of a thousand feet the work had been done in accordance with the contract, and there is no reason why the plaintiff below should be deprived of what he had actually earned, by the fault or error of the other party. He is not seeking to recover for work which he had been prevented from performing, but for work actually done, and done under the contract. There is no reason for applying to this case the rule that one cannot sue under a contract which has been rescinded, but must sue for the value of the work done; and it can make no difference whether the suit on the first ground of action is for the amount due on the contract, or for work and labor done, to be measured by the contract rate. *Butterfield v. Bryon*, 153 Mass. 517, 27 N. E. 667. In *U. S. v. Behan*, 110 U. S. 346, 4 Sup. Ct. 81, Mr. Justice Bradley says:

"It is to be observed that when it is said in some of the books that when one party puts an end to the contract the other party cannot sue on the contract, but must sue for the work actually done under it as upon a quantum meruit, this only means that he cannot sue the party in default upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend.

The distinction between those claims under a contract which result from a performance of it on the part of a claimant, and those under it which result from his being prevented by the other party in performing it, has not always been attended to."

The instruction of the learned judge of the circuit court was not intended to bear the construction that the contract was rescinded, in the sense that it was set aside and annulled as if nonexistent, but that it was rescinded in so far as its performance was impossible. In that part of the charge which speaks of the contract as rescinded by the conduct of the ice company's agent, the jury received no instructions as to the measure of the recovery for the work completed before such agents took control of the work on the well, and no exception is taken to this omission. It seems to be assumed by counsel that the next ensuing instruction, which did cover this point, was also applied to the clause in the charge preceding it. What seems to us a matter of some doubt in the case, whether the contract does really give a measure by which to ascertain the amount due on the work done on the first thousand feet of the well, is not raised by the exceptions taken. This point we do not decide. But we are satisfied that in this respect plaintiff in error has no reason to complain of the verdict. By it, as it stands, he is to pay only \$4,500 for his work. That is the amount which was to be absolutely paid upon the completion of this part of the well. As a rule, contractors are never paid more than a proportionate share of their compensation as their work proceeds. Usually they receive less, something being held back to insure the completion of the contract. Either \$4,500 was to be paid under the contract for the first two installments of the work, in full payment for it, thereby measuring what the contractor was entitled to recover for it, whether suing on the contract or on a quantum meruit, or else he was entitled to a larger sum for his services, which is recoverable by an action for labor and materials.

The questions arising in the pleading, we consider as settled below. The court is of opinion that there is no error, and the judgment of the circuit court will be affirmed, with costs.

PHINIZY et al. v. AUGUSTA & K. R. CO. et al.

CENTRAL TRUST CO. OF NEW YORK v. PORT ROYAL & W. C. RY. CO.

(Circuit Court, D. South Carolina, November 5, 1894.)

1. JUDGMENT AGAINST RAILROAD—PERSONAL INJURIES—PRIORITIES.

Under Act S. C. Feb. 9, 1882, declaring that a judgment against a railroad company for personal injuries shall take precedence of a mortgage to secure bonds, such a judgment will not take precedence of a mortgage given before the act, but will of one given thereafter, and before the injury for which judgment is obtained.

2. RECEIVERS—PAYMENT OF JUDGMENTS.

Where, after the rendition of such judgment, a receiver of the road is appointed in suits to foreclose mortgages, he will not be directed to immediately pay the judgment; the road being utterly insolvent at the time of his appointment, and there being other like claims, and the amount available therefor being uncertain.

Suits by Charles H. Phinizy and Alfred Baker, trustees, against the Augusta & Knoxville Railroad Company and the Port Royal & Western Carolina Railway Company, and by the Central Trust Company of New York against the Port Royal & Western Carolina Railway Company, for foreclosure of mortgages and appointment of receiver. 56 Fed. 273; 62 Fed. 679, 771. Dora Madden petitions for payment of a judgment by the receiver therein appointed.

Haynsworth & Parker, for petitioner.

S. J. Simpson, for respondent.

SIMONTON, Circuit Judge. This is a petition praying payment of a judgment obtained against the Port Royal & Western Carolina Railway Company. The petitioner, a passenger on the train between Greenville and Laurens, was injured in her person, through the alleged negligence of the agents of the company, on the 29th April, 1890. She began her action against the company on 21st January, 1891, in the court of common pleas of the state of South Carolina, at Laurens Courthouse, and obtained a verdict for \$5,000 in February, 1893. Judgment was entered on this verdict and costs on 9th of March, 1893. This judgment was affirmed by the supreme court, 27th July, 1894. 19 S. E. 951. She claims the verdict, with interest from 28th February, 1893, and costs, \$97.45. Judgments in South Carolina carry interest after entry. Gen. St. S. C. § 1289. The prayer of the petition is (1) that the receiver be instructed to pay her the amount of her claims; (2) if he be not now in funds to do this, that he be directed to pay the claim out of any profits which may hereafter come into his hands from the operation of the road; (3) that the said judgment be declared and established as a lien on the profits, property, and franchises of the railroad company, having priority to any mortgage or deed of trust thereon, and for general relief.

The law in South Carolina in force when this action was brought and this judgment was rendered is as follows:

"Whenever a cause of action shall arise against any railroad corporation, for personal injury to property, sustained by any person or persons, and such cause of action shall be prosecuted to judgment by person or persons injured, or his or their legal representatives, said judgment shall relate back to the date when the cause of action arose, and shall be a lien as of that date of equal force and effect with the lien of employees for wages, upon the income, property and franchises of said corporation, enforceable in any court of competent jurisdiction, by attachment or levy and sale under execution, and shall take precedence and priority of payment of any mortgage or deed of trust, or other security given to secure the payments of bonds made by said railroad company: provided, any action brought under this section shall be commenced within twelve months from the time that said injury shall have been sustained." Gen. St. S. C. § 1528.

The Port Royal & Western Carolina Railroad Company was made up of the consolidation of other railroads; among them, the Augusta & Knoxville Railroad, extending from Augusta, Ga., to Greenwood, S. C. At the time of the consolidation, bonds secured by a mortgage of the whole road were issued, which relieved all outstanding obligations thereon, except a mortgage on that part

of it heretofore known as the Augusta & Knoxville Railroad. The date of this consolidated mortgage was 2d May, 1887; that of the Augusta & Knoxville Railroad was July 1, 1880. The act quoted above was approved 9th February, 1882.

There can be no doubt that this judgment, obtained and entered in a court of competent jurisdiction, is entitled to full faith and credit in this court, and cannot here be impeached or modified. The defendant has had its day in court, and the matter is *res judicata*. There also can be no doubt that so far as the Port Royal & Western Carolina Railway, and the bonds and mortgage made by it, are concerned,—chartered, as the company was, and issued, as the bonds and mortgages were, after the passage of the act of 1882,—they are subject to the provisions of this act. The petitioner having fulfilled the requirements of that act, her judgment relates back to the date when her cause of action arose; and it takes precedence and priority over the payment of this mortgage, and the bonds given therefor. But with respect to the mortgage of the Augusta & Knoxville Railroad Company, and the bonds secured by it, these were issued anterior to the passage of the act of 1882; and by them a first lien, by contract, was given over that road, to the bonds secured by this mortgage. It cannot be displaced by this act, for such a construction would impair the obligation of the contract. When this property went into the hands of a receiver of this court, it was, and for a long time had been, utterly insolvent, never having made any earnings sufficient to pay operating expenses. There had been no diversion, and nothing upon which the equity set up in *Fosdick v. Schall*, 99 U. S. 235, could operate, even were this claim among those favored by the court of equity.

These points present no difficulty. The priority of the petitioner over all the property not covered by the mortgage of the Augusta & Knoxville Railroad cannot be disputed. She asks, however, an immediate order for its payment, out of the funds now in the hands of the receiver, or out of such as may come into his hands. As we have seen, the property came into the hands of the receiver utterly insolvent. All earnings he has received are the earnings of the receivership, primarily to be appropriated to the expenses of the receivership. Besides this, the claim of the petitioner is not the only claim on those earnings, entitled to be paid therefrom in preference to all others. The act of assembly gives her a preference and priority over the bonds and the mortgage only. There may be others; indeed, there is a suit now pending of another in her class. They equally can come in with her. The past-due coupons of the Augusta & Knoxville Railroad have their claim upon a part of these earnings, to the extent which that road contributed thereto. The extent of this contribution may be seen from the fact that this Augusta & Knoxville Railroad commands the outlet of the system,—“is the neck of the bottle.” The ascertainment of the proper proportion of these earnings to those coupons is manifestly a matter of intricate and difficult determination. It is impossible, therefore, at this time, to grant the prayer of the petition. The justice and validity of her claim, however, are recognized, and at the earliest

moment it will be provided for. In any event she will be amply secured out of the proceeds of sale. It is ordered, adjudged, and decreed that the judgment held by the petitioner, Dora Madden, is a proper claim against the property and franchises of the Port Royal & Western Carolina Railway Company; that said claim take priority and precedence over the mortgage of the said railway company, executed to the Central Trust Company of New York, bearing date 2d May, 1887, and over the bonds secured thereby; that in any order of sale hereafter to be made of said property and franchises this priority and preference must be provided for and secured; that the amount of said claim is \$5,000, with interest from the 9th day of March, 1893, and costs, \$97.45.

KING v. MOSHER et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1894.)

No. 444.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by Shepherd H. King against Charles W. Mosher and others, commenced in the district court of Lancaster county, Neb., and removed on petition of defendants into the circuit court of the United States for the district of Nebraska. There was an order overruling a motion to remand the cause to the state court and sustaining a demurrer to the complaint, and a final judgment for defendants. Plaintiff brings error. Affirmed.

Allen W. Field and Edward P. Holmes, for plaintiff in error.

T. M. Marquette, J. W. Deweese, F. M. Hall, and F. E. Bishop, for defendants in error Homer J. Walsh and others.

Charles O. Whedon and Charles E. Magoon, for defendant in error Thompson.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This case is similar in all respects to the case of Bailey v. Mosher (No. 418, decided at the present term) 63 Fed. 488, and on the authority of that case the judgment of the circuit court is affirmed.

HARTFORD FIRE INS. CO. v. WILLIAMS et al.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1894.)

No. 454.

1. FIRE INSURANCE—MORTGAGE CLAUSE—ADDITIONAL INSURANCE—PRORATING.

The provision, in a mortgage clause of a fire policy, that the insurer "shall not be liable under this policy for a greater portion of any loss than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein," requires the mortgagee to prorate with all policies on the property, and is not limited to policies covering his interest, notwithstanding a prior general provision in the mortgage clause that "this insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor or owner."

SAME--DESTRUCTION BY MORTGAGOR.

Under the provision in the mortgage clause of a fire policy that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner, voluntary destruction by the owner will not prevent recovery by the mortgagee.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Frederick A. Williams, trustee, and the Philadelphia Mortgage & Trust Company, against the Hartford Fire Insurance Company. Judgment for plaintiffs. Defendant brings error.

Thomas Bates, Sylvester G. Williams, and Henry W. Hobson, for plaintiff in error.

Greely W. Whitford (Frederick A. Williams on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, J. This was a suit on an insurance policy which was issued by the plaintiff in error, the Hartford Fire Insurance Company, to Grace Henderson on the 21st day of July, 1890. The policy insured "a two-story brick dwelling house, * * * No. 1045 Washington avenue, Denver, Colorado," to the amount of \$3,500. On the 8th of September, 1890, Grace Henderson sold the insured property to Bertha Shaw; and, with the consent of the insurer, the policy aforesaid was assigned to Bertha Shaw. On March 25, 1892, Bertha Shaw borrowed \$4,000 from the Philadelphia Mortgage & Trust Company, one of the defendants in error, and, to secure the payment of said loan, executed a deed of trust conveying the insured property to the other defendant in error, Frederick A. Williams, as trustee of the Philadelphia Mortgage & Trust Company, which deed gave the trustee power to sell the property in case the borrower made default in paying the notes that had been given as an evidence of such loan. A mortgage clause was thereupon attached to the aforesaid policy, which was duly signed by the agent of the Hartford Fire Insurance Company, the material parts of which are as follows:

"Loss, if any, on realty, payable to Frederick A. Williams, trustee, mortgagee or trustee, as hereinafter provided; it being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee, only, therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided that, in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same; provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company upon and refusal by the mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy, as stipulated in the printed conditions in said policy; and also to cancel this agreement on giving ten days' notice of their intention

to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that, in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that, as to mortgagor or owner, no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof."

The premises were destroyed by fire on July 31, 1892, and thereupon the defendants in error made claim upon the insurance company for the entire amount of the insurance aforesaid.

The chief question that is presented by this record concerns the proper construction of the aforesaid mortgage clause, and particularly that paragraph which provides that, in case of other insurance on the property, no greater amount shall be recovered under this policy "than the sum insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein." On July 23, 1892, Bertha Shaw, the mortgagor, obtained a policy of insurance for her own benefit, in the sum of \$6,000, in the Palatine Insurance Company, covering the same dwelling house that was insured by the policy in suit, and did so without the knowledge or consent of the plaintiff in error, the Hartford Fire Insurance Company. On the trial of the case, the last-named company offered this policy in evidence, with a view of showing, among other things, that the total insurance on the dwelling house in question was \$9,500 at the time of the loss, and that it was only liable for seven-nineteenths of the loss, or about \$1,400, as the total loss on the dwelling house was about \$3,800. This proof was excluded, the trial court being of the opinion, as it seems, that the clause above quoted, relative to prorating the loss among all policies covering the insured property, only applied to policies covering the interest of the mortgagee therein, and that it did not compel the mortgagee to prorate with policies issued to the mortgagor, which did not contain the aforesaid mortgage clause, and were not intended as an insurance upon the mortgagee's interest. In this we think the circuit court erred. The language employed in the mortgage clause that the insurer "shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein," seems to us to have been inserted *ex industria* for the purpose of making it clear that the mortgagee's policy was entitled to prorate with

policies covering the insured property that at the time of the loss might be held by any person whomsoever who had an insurable interest in the property. We can conceive of no other object that the parties could have had in using the words "issued to or held by any party or parties having an insurable interest therein," unless it was to avoid the very construction of the clause which the circuit court appears to have adopted. In the absence of the words last quoted, it might, no doubt, be fairly argued that it was simply the intention of the parties to reserve the right to prorate with other policies procured by the mortgagee for the protection of his interest, but that construction of the clause seems to us to be inadmissible, in view of the language used, which expressly extends the right to prorate, to policies "issued to any party or parties having an insurable interest" in the property. As before remarked, the concluding words of the paragraph seem to have been added, out of abundant caution, that there might be no ground upon which to insist that the right to prorate was limited to policies held by the mortgagee or for his benefit. It is urged, however, by counsel for the defendants in error, that the foregoing view destroys the efficacy of the first paragraph of the mortgage clause, which declares "that this insurance as to the interest of the mortgagee or trustee * * * shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured," because it puts it in the power of the mortgagor by taking out additional insurance to lessen the amount which the mortgagee might otherwise have recovered. It is doubtless true that the construction above intimated lessens the scope that might otherwise be given to the first paragraph of the mortgage clause, but that it destroys its efficacy as a protection to the mortgagee cannot be admitted. It is obvious that the paragraph in question operates to protect the mortgagee from many acts of the mortgagor which would otherwise render the insurance, as a whole, utterly void, even if be conceded that, under the construction above given, not only the mortgagor, but third parties, have it in their power to lessen to some extent the amount that may be recovered on the mortgagee's policy. In construing a contract like the one now in hand, it is our duty to look to all of the provisions of the agreement, and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument, which is as clearly expressed as language could well express it, merely because it limits to some extent the scope of general language employed in another part of the instrument. It is very common in the construction of contracts and statutes to restrict the meaning of general words and phrases, when it is plain to be seen from particular provisions of the contract or statute that they were not intended to have the broad signification of which they are fairly susceptible. In the case at bar, the first stipulation contained in the mortgage clause, "that this insurance as to the interest of the mortgagee or trustee * * * shall not be invalidated by any act or neglect of the mortgagor or owner of the property," is limited

and controlled, in our judgment, by the more particular provision with respect to prorating in case of loss which declares in very specific terms, as we think, that the right to prorate shall extend to and include all policies covering the particular property that are held by any party or parties having an insurable interest therein. Counsel have not cited, and we have been unable to find, any case in which the particular mortgage clause now under consideration has been judicially construed. The cases of *Hastings v. Insurance Co.*, 73 N. Y. 141, and *Insurance Co. v. Olcott*, 97 Ill. 439, to which our attention has been directed, are not in point on this branch of the case. The mortgage clauses which were under consideration in those cases did not contain the stipulation with reference to contribution which the mortgage clause now in controversy contains, nor any stipulation whatever on that subject. It was held, in substance, in those cases, that the mortgage clause operated to create an independent contract between the mortgagee and the insurance company, which could not be invalidated by any act or neglect of the mortgagor, and, therefore, that the mortgagee claiming under such an independent contract with the insurer was not bound to prorate the loss with policies held by the mortgagor, or with policies covering other insurable interests in the property, whether existing prior to the execution of the mortgage clause or taken out subsequently. We might possibly surmise that the stipulation which we find in the mortgage clause now under consideration was framed with special reference to the decisions last mentioned, and for the purpose of securing to the insurer of the mortgagee's interest, beyond peradventure, the right to prorate with all policies covering any and every insurable interest in the insured property. But, be this as it may, we have felt ourselves constrained, in the absence of any adjudications touching the proper interpretation of the mortgage clause in suit, to adopt the foregoing construction, in the belief that it is rendered necessary by the very specific language which the parties have seen fit to employ.

It is suggested in the brief of counsel for the plaintiff in error, but the point was not pressed on the oral argument, that the first paragraph of the mortgage clause, which declares, in effect, that the policy as to the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, is not adequate to preserve the insurance, even on the mortgagee's interest, if the mortgagor intentionally destroys the insured property. It is claimed that such an act of the mortgagor would invalidate the insurance held by the mortgagee. It is urged in compliance with this view that the circuit court also erred in refusing to admit evidence tending to show that Bertha Shaw intentionally set fire to the insured property. With reference to this contention, it is sufficient to say that, in our opinion, the language of the mortgage clause is broad enough to protect the mortgagee's insurance, and to prevent it from being invalidated even by such a willful act committed by the mortgagor. It is conceded by counsel that the mortgagee

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might recover if the insured property had been destroyed by a fire intentionally kindled by a stranger to the contract, and we think that, in view of the mortgage clause which creates practically an independent contract between the mortgagee and the insurance company, the mortgagee is also protected against a willful act of that character committed by the mortgagor for which the mortgagee was in no wise responsible. The last point urged by the plaintiff in error is not well taken; but, for the error heretofore pointed out, the judgment of the circuit court is reversed, and the cause is remanded, with directions to award a new trial.

NOLAN et al. v. COLORADO CENT. CONSOL. MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 412.

1. WRIT OF ERROR—WHEN LIES — JUDGMENT VACATING AWARD OF ARBITRATORS—BILL OF EXCEPTIONS.

A writ of error will lie in the federal courts to review a judgment setting aside an award of arbitrators made and returned pursuant to a rule or order of court; and a bill of exceptions may be employed to bring upon the record facts that were adduced in the trial court either to support or overthrow exceptions to the award.

2. SAME—EXTENT OF REVIEW—QUESTIONS OF FACT.

The appellate court will not, however, weigh or examine testimony adduced either to sustain or impeach the award, but will confine its rulings to questions of law arising upon the facts shown; and hence, to obtain a review, the ultimate facts must be found, and reported in the bill of exceptions, and merely to report the testimony and affidavits considered below is insufficient.

3. SAME—BILL OF EXCEPTIONS—INTERPRETATION THEREOF.

An exception to an arbitrators' award charged as ground for vacating it that the arbitrators had been unduly prejudiced and biased against the defendant by untrue statements made to them by the plaintiffs' attorney. A bill of exceptions, containing the testimony offered in support of said exception, in its concluding paragraph stated that the court sustained the exception to the award on the sole ground that an attempted revocation of the submission by defendants was improper; that a communication made by the plaintiffs to the arbitrators to the effect that defendants had charged them with misconduct was improperly made; that the subsequent investigation before the court touching the same matter was irregular and improper; and that the taking of affidavits from the arbitrators concerning their conduct in office pending the hearing was also improper,—for all of which the award was set aside. *Held*, that it did not appear from the foregoing statements that the court intended to declare as a matter of law that the doing and saying of certain things which it characterized as improper had vitiated the award, without reference to the effect of those acts and utterances upon the minds of the arbitrators, and without reference to their influence upon the fairness of the award; that the statement in question was in the nature of a commentary on certain evidence offered to sustain the exception; that the said statement in the bill of exceptions must be read in connection with the exception to the award which had been tried and determined; that the court evidently intended to say that the charge contained in the exception to the award, or the substance of it, had been proven; and that the bill of exceptions, taken as a whole, simply disclosed a general finding on an issue of fact raised by the exception to the award, which finding could not be reviewed on a writ of error; that the only questions

of law presented by the bill of exceptions were—First, whether the award was one which the court had power to vacate; and, second, whether the charge contained in the exception to the award, if true, was sufficient to justify the court's action in vacating the award.

4. AWARD OF ARBITRATORS—POWER OF COURT TO SET ASIDE—PREJUDICE AND PARTIALITY.

An award made pursuant to a rule of court may be set aside by the court when it is satisfied that by reason of a communication made to the arbitrators, pending the arbitration, by one of the parties, a feeling of hostility to the opposite party has been engendered, rendering one or more members of the board partial and prejudiced and has very likely affected the fairness of the award.

In Error to the Circuit Court of the United States for the District of Colorado.

L. C. Rockwell, for plaintiffs in error.

Charles J. Hughes, Jr., for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case comes to this court on a writ of error from the circuit court of the United States for the district of Colorado. The primary question for consideration is whether the errors complained of can be reviewed by this court, and a decision of that question involves a statement somewhat in detail of the various orders and proceedings which are disclosed by the record. An action of trespass was begun in the circuit court of the United States for the district of Colorado by James H. Nolan, Stephen W. Kearney, and Lewis Rockwell, the plaintiffs in error, against the Colorado Central Consolidated Mining Company, the defendant in error, to recover damages in the sum of \$100,000 for entering into a mine, which was alleged to be the property of the plaintiffs, and for taking and removing therefrom a large quantity of gold, silver, and lead bearing ore. An answer was filed to the complaint, setting up various defenses, which it is unnecessary to state, and to such answer a replication was filed. Subsequently the parties to the suit filed a written agreement to submit the case to three arbitrators, and thereupon an order of court was made and entered of record, to the effect that the case be referred to Mike P. O'Donnell, Thomas Cornish, and Joseph W. Watson, "as arbitrators, * * * to determine the facts and law in pursuance of the terms, clauses, and conditions of said agreement to arbitrate, and to make their award in writing to this court with all convenient speed." The bill of exceptions discloses that, after the hearing before the arbitrators had been in progress for some time, the attorneys for the respective parties had a private interview with respect to a report, which had come to the knowledge of the defendant company, that two persons by the name of William A. Duff and Frederick S. Johnson had been, and then were, improperly influencing the action of the arbitrators to the detriment of the defendant company. Some correspondence also passed between the attorneys of the respective parties on the same subject after their personal interview. This correspondence appears to have been privately shown to one of the arbitrators, Mr. Joseph W. Watson, who was a partner of William A. Duff, and

who was particularly affected by the report that Duff and Johnson were exercising an improper influence over the board of arbitrators. At the same time that the correspondence was shown to Watson, certain oral statements appear to have been made to him by the plaintiffs' attorney, concerning the nature of the charges that had been made against him. On the hearing of the exceptions to the award, the arbitrator testified, in substance, that he was told by the plaintiffs' attorney, at this interview, that the defendant company, through its counsel, had alleged or charged that "something was going on crooked in reference to the arbitration, and that Duff and Johnson had been accused of bribing him [Watson] and interfering with his straight action," etc. The plaintiffs' attorney, who made the communication in question to the arbitrator, also admitted in his testimony that he knew when he made the communication that it would naturally make the arbitrator unfriendly to the defendant, and that he did not care how unfriendly it made him. Immediately following these occurrences, the defendant company made an effort to revoke the arbitration agreement by serving a formal notice of revocation upon the several members of the board of arbitrators. At the same time the plaintiffs made a formal application to the circuit court for an investigation of the charge of misconduct on the part of Messrs. Duff and Johnson with relation to the board of arbitrators. This latter application for an investigation appears to have been supported by an affidavit of the plaintiffs' attorney, and also by affidavits procured by him from two of the arbitrators, to wit, Messrs. Watson and O'Donnell, which latter affidavits tended to show that the charge of misconduct was groundless. On the hearing of the application to investigate the aforesaid charges, the circuit court appears to have been made acquainted with the effort of the defendant to revoke the arbitration agreement, and to have entered upon an inquiry as to whether the agreement of arbitration could be revoked; whereupon it entered the following order, to wit:

"The court, being sufficiently advised in the premises, doth rule and decide that such right [of revocation] does not exist, and that the defendant's attempted revocation was of non-effect. The court doth decline to enter any order for an investigation of the matters set forth in the said affidavit, but does order and adjudge that said arbitrators, to wit, Joseph W. Watson, Mike P. O'Donnell, and Thomas Cornish, proceed with the hearing and investigation of the matter referred to them in this cause, in and by an order entered in this action on the fifth day of December, A. D. 1892."

Following the entry of the foregoing order, and before any proceedings were taken by the arbitrators, the defendant company filed a formal motion in the circuit court to vacate and set aside the order referring the cause to a board of arbitrators, which motion was forthwith denied by the circuit court. With reference to the grounds of the last-mentioned motion, it is sufficient for the present purposes to say that the defendant alleged—First, that the agreement of arbitration had been legally revoked; second, that Arbitrator Mike O'Donnell was prejudiced and biased against the defendant at the time of his appointment, and that such fact was un-

known to the defendant at the date of his appointment; third, that the board of arbitrators, and particularly said Watson, had been greatly prejudiced and biased against the defendant by a statement which had been communicated to him and to the board by the plaintiffs' attorney, pending the arbitration, which statement was, in effect, that the defendant had directly charged that William A. Duff had bribed one of the arbitrators, to wit, Joseph W. Watson. Shortly after the foregoing proceedings, the arbitrators filed their award in the circuit court, wherein they recommended the entry of a judgment against the defendant in the sum of \$72,549.30. It should be noted in this connection that the agreement of arbitration provided, in substance, that the findings of the arbitrators upon questions of fact should be deemed conclusive, but that the court to whom the award was returned might review the conclusions of the board on matters of law. In conformity with the agreement of arbitration, the award of the arbitrators contained in separate paragraphs a report of their findings upon questions of fact and their conclusions upon matters of law. To the aforesaid award the defendant filed numerous objections and exceptions. It is unnecessary to state the nature of said exceptions further than to say that, among other things, the defendant alleged that the award ought to be set aside for that, pending the arbitration, Joseph W. Watson, one of the arbitrators, had been prejudiced and biased against the defendant by an untrue statement made by the plaintiffs' attorney to said Watson and to the other arbitrators, which statement was, in effect, that the defendant had openly charged that said Watson had been bribed by one William A. Duff; furthermore, that the award was the result of prejudice and passion on the part of said Watson and O'Donnell, which had been induced by the untrue statement aforesaid made by the plaintiffs' attorney to said board of arbitrators with reference to the charge of bribery. The circuit court thereafter sent the exceptions to a master to take and report the testimony in support of that portion of the exceptions which alleged that the arbitrators had become biased and prejudiced against the defendant by the untrue statements made and communicated to them by the plaintiffs' attorney, and a large amount of testimony was taken on this subject, which has been incorporated into the record. The bill of exceptions, from which we have extracted all of the foregoing facts, concludes with the following statement, to wit:

"Upon the coming in of the report of the master, objections and exceptions of the defendant to the award were heard and sustained by the court, on the sole ground that the attempted revocation by defendant of the submission on January 5, 1893, was improper, and that the communication to the arbitrators on January 5, 1893, by one of the plaintiffs and their counsel, as to charges of misconduct on the part of the arbitrators, was improperly made, and that the subsequent investigation in court touching the same matter was also irregular and improper; that taking affidavits from the arbitrators concerning their conduct in office pending the hearing was also improper,—for all of which the award should be vacated and set aside; and this was accordingly done; to which ruling of the court, plaintiffs, by their counsel, then and there excepted. That the court, at the time these objections and exceptions were sustained, dismissed plaintiffs' action."

Counsel for the defendant in error concedes that so much of the foregoing order as directed a dismissal of the plaintiffs' action was erroneous, and he also consents that the judgment of dismissal may be reversed, and the case remanded for further proceedings. He contends, however, that the action of the circuit court in vacating the award was a proper order on the case made by the evidence, or, if it was not a proper order, that the court's action in that behalf was discretionary, and that it cannot be reviewed by this court. In this respect it is said that the action of the trial court was tantamount to granting a new trial for misbehavior of the jury, and the rule of practice is invoked that error cannot be assigned either for granting or denying a motion for a new trial. On the other hand, counsel for the plaintiffs is not content with an order reversing the judgment of dismissal. His contention is that the record discloses a clear error of law in that part of the order which vacated the award. He accordingly insists that the judgment of this court should annul that order, as well as the judgment dismissing the suit, and that it should re-establish the award.

Undoubtedly, the doctrine is well established in the federal courts that the granting of a motion for a new trial for any of the causes usually assigned in such motions is purely discretionary, and that an order of that nature is not reviewable on writ of error. *Freeborn v. Smith*, 2 Wall. 160, 176; *Insurance Co. v. Barton*, 13 Wall. 603; *Railroad Co. v. Howard*, 4 U. S. App. 202, 1 C. C. A. 229, and 49 Fed. 206, and cases there cited. But we are not prepared to admit that an order vacating an award on account of the prejudice or misbehavior of an arbitrator is in all respects analogous to an order granting a new trial; nor is it necessary in the present case to decide, and we do not decide, whether, in view of the charges preferred against one of the parties to the suit and the arbitrators, it rested in the sound discretion of the circuit court to vacate the award the same as if it had been the verdict of a jury. As this case was not tried before a jury, according to the course of the common law, nor before the court on a written stipulation waiving a jury, pursuant to section 649 of the Revised Statutes, we at first entertained some doubt whether the case could be reviewed here on a writ of error, and particularly whether a bill of exceptions could properly be employed to bring upon the record affidavits and other testimony taken before a master, which was taken merely to aid the trial court in passing upon an exception to an award. These doubts were induced by the remarks of Mr. Chief Justice Waite in *Boogher v. Insurance Co.*, 103 U. S. 95, and by the decision in *Campbell v. Boyreau*, 21 How. 223. The practice, however, of allowing a writ of error to review a judgment founded upon an award of arbitrators, which has been made and returned pursuant to a rule or order of court, seems to have been approved in the following cases: *Thornton v. Carson*, 7 Cranch 597; *Canal Co. v. Swann*, 5 How. 83, 86; *Railroad Co. v. Myers*, 18 How. 246, 251, 252; and *Heckers v. Fowler*, 2 Wall. 123. We must accept these authorities as furnishing a sufficient precedent to support the writ of error in the case at bar. The case of *Railroad Co. v. Myers*, 18 How.

251, 252, is also a direct authority in support of the further proposition that a bill of exceptions may be employed to bring upon the record facts that were adduced in the trial court either to support or overthrow exceptions taken to an arbitrator's award. But, while the law is as last stated, it must not be inferred that it is any part of the duty of a federal appellate court to weigh or examine testimony that is offered either to sustain or impeach an award, or to sustain a motion of any other character that may have been made during the progress of a case. It is no more the duty of an appellate court to settle disputed questions of fact arising on the hearing of exceptions to an award than it is to settle questions of fact when they arise on an ordinary trial either before a court or a jury. It is the province of this court to decide questions of law only when they are fairly presented by the record; and, to raise an issue of law founded upon matter of fact, the ultimate conclusion of fact on which the question of law arises must be found and stated in the bill of exceptions. It will not do to merely report the testimony, or even the substance of the testimony, from which the ultimate fact must be deduced. In the case of *Railroad Co. v. Myers*, supra, Mr. Justice Campbell, while holding that a bill of exceptions could be used to bring facts upon the record to sustain exceptions to an award, was very careful to say:

"But, to present a question to this court, the subordinate tribunal must ascertain the facts upon which the judgment or order excepted to is founded; for this court cannot determine the weight or effect of evidence, nor decide mixed questions of law and fact."

See, also, the remarks made to the same effect in *Burr v. Des Moines Co.*, 1 Wall. 99, 102.

Premising this much, we turn to consider whether the bill of exceptions in the case at bar finds or reports any fact, or state of facts, or contains any declaration of law, which will enable us to say that the circuit court erred in vacating the award. As we have before remarked, it contains certain affidavits and the testimony of several witnesses, which appear to have been considered by the trial court when the exceptions to the award were heard and determined; but we find nothing in the bill that is tantamount to a special finding of ultimate facts, such as will suffice to raise a question of law for our determination. It is true that the bill of exceptions concludes with a statement, above quoted, which shows that the circuit court based its action in vacating the award on the testimony that was offered in support of those objections to the award, which alleged that the arbitrators had been unduly prejudiced against the defendant by untrue statements communicated to them as to charges of corruption that had been made by the defendant company. It is also true that the concluding paragraph of the bill shows that the trial court considered that certain things which had been done and said were improper, but we are forced to regard these latter statements as being in the nature of a commentary on certain evidence that had been offered to sustain the exceptions.

It does not appear, we think, that the court intended to declare, as a matter of law, that the doing or saying of certain things, which it characterized as improper, had vitiated the award, without regard to the effect of those acts and utterances upon the minds of the arbitrators and without reference to their influence upon the character and fairness of the award. The concluding part of the bill must be read in connection with the exceptions which had been tried and determined. It is certainly a reasonable presumption that the trial court intended to make a finding which was responsive to the issues. Now, the charge contained in the exceptions on which the court based its action was in substance, as heretofore stated, that the arbitrators had been biased and prejudiced against the defendant by untrue statements made to them pending the arbitration by the plaintiffs' attorney, and that the award was induced by such prejudice, or at least that the statements made had affected the result. The court evidently intended to say that this charge, or the substance of it, had been proven, and that, for that reason, the exceptions had been sustained and the award vacated. In short, we think that the bill of exceptions discloses no more than a general finding on questions of fact raised by the exceptions, and we must accept that finding as conclusive. There can be no doubt, we think, that there was evidence before the court tending to support the court's conclusion on the aforesaid issue, and it is not our province to decide as to the weight that should have been given to such testimony. It results from the foregoing view of the case, which we have felt constrained to take, that the only questions arising upon this record for our consideration are—First, whether the circuit court had power to vacate the award; and, second, whether the exceptions to the award stated facts which were sufficient, if true, to justify the court's action. We do not understand that the plaintiffs in error have contended that either of these questions should be decided in the negative. It is clear, we think, that, inasmuch as the award was made pursuant to a rule of court, the court had power to vacate it, on motion, for cause shown; and with respect to the other question we think it is quite clear that the exceptions contained a statement of sufficient grounds to warrant the court's action; that is to say, we think that an award may be set aside where the trial court is satisfied that by reason of a communication made to one or more of the arbitrators, pending the arbitration, by one of the parties to the controversy, a feeling of hostility to the opposite party has been engendered, which has rendered one or more members of the board partial and prejudiced, and has very likely affected the fairness of the award. Such was the nature of the charge contained in the present exceptions to the report, which the court has sustained, upon the ground, no doubt, that it was well founded in point of fact. In support of the latter proposition, we refer to *Strong v. Strong*, 9 Cush. 560; *Tomlin v. Cox*, 19 N. J. Law, 76; *Cleland v. Hedly*, 5 R. I. 163; *Fox v. Hazelton*, 10 Pick. 275; *Morse*, Arb. pp. 106-108, 533, 534.

The order of the circuit court vacating the award will not be

disturbed, but the judgment dismissing the plaintiffs' suit is reversed, without the allowance of costs to either party, and the cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

CONDIT et al. v. BERGMEIER et al.

(Circuit Court, D. Minnesota. December 26, 1891.)

CONTRACT—NUDUM PACTUM.

A contract relating to an agency for the sale of books *held not to be nudum pactum*.

This was an action by Condit & Co. against Bergmeier & Co. to recover for breach of a contract.

J. B. & E. P. Sanborn, for plaintiffs.

Warner, Richardson & Lawrence, for defendants.

NELSON, District Judge. It is claimed that the complaint does not state facts sufficient to constitute a cause of action, and that the contract set forth therein is void, for want of consideration and lack of mutuality. The contract is designated "Canvassing Agreement and Bond." The defendants F. W. B. & Co., in the agreement, recite that they accept the agency from plaintiffs, Condit & Co., for the sale by subscription of a certain book to be published by Scribner's Sons, and the terms of the agency are stated therein. The plaintiffs allege also that they formed the agency, and appointed the defendants F. W. B. & Co. their exclusive agents for the territory mentioned in the contract for procuring a sale of the book by subscription under the terms thereof, and allege performance on their part. The defendants agreed to take not less than 4,200 copies, and make requisition and remit for the same at a fixed price before June 28, 1891; and the plaintiffs consented to allow them 42½ per cent. as a commission. In case of a breach on the part of the defendants, liquidated damages were to be paid. The plaintiffs allege that the defendants failed to make requisition and remit under the terms of the contract, and that 3,048 copies of the work were not taken, and allege a breach for that and other reasons. The other defendants in the suit guarantied the faithful performance of the contract by F. W. B. & Co., and the punctual payment of the sums that should become due thereon. We think, on examination of the contract, that the point made that it is a nudum pactum is not well taken, and that the complaint sufficiently sets forth a breach of the same.

CAPITAL BANK OF ST. PAUL v. SCHOOL DIST. NO. 26, BARNES COUNTY.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1894.)

No. 449.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF TERRITORIAL STATUTE BY STATE COURT.

A decision of the supreme court of a state construing a statute of the territory from which the state was formed (Laws Dak. 1879, c. 14), on the question of the amount of indebtedness which a school board might contract for the erection and furnishing of a schoolhouse, even if not absolutely binding upon the federal courts within the state, should be followed by them, unless imperative reasons exist for disregarding it.

In Error to the Circuit Court of the United States for the District of North Dakota.

Action by the Capital Bank of St. Paul, Minn., against school district No. 26, Barnes county, N. D. Judgment for defendant, and plaintiff brings error. Affirmed.

William M. Jones (Daniel V. Samuels and W. Irving Culver, on the brief), for plaintiff in error.

George K. Andrus, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit which was brought by the plaintiff in error, the Capital Bank of St. Paul, Minn., against the defendant in error, school district No. 26, Barnes county, N. D., to recover the amount due on nine school warrants, which were alleged to have been duly executed and delivered by said school district in the month of December, 1881, for the building of a school house. The school district pleaded, in substance, and by way of defense to the action, that the warrants were fraudulently issued and put in circulation by certain persons who pretended to be officers of said school district, but who were not such in point of fact; second, that the warrants in suit were barred by the statute of limitations of the state of North Dakota; and, third, that the warrants were void when issued, because each of them amounted to more than 1 per cent. of the taxable value of all the property in said school district for the year 1881; also, because the inhabitants of said district had never authorized the school board to build a school house at any meeting of the inhabitants called for that purpose, and because the inhabitants of the district had never selected a site for a school house. The case was tried to a jury, and at the conclusion of the plaintiff's evidence the court directed a verdict for the defendant, which was accordingly returned.

The facts disclosed by the record, on which the circuit court appears to have predicated its action in directing a verdict for the defendant, are substantially as follows: On the 29th day of November, 1881, the superintendent of schools for the county of Barnes, in the then territory of Dakota, formed a new school district, consisting of township 139 N., of range 59 W., and township 139

N., of range 60 W., to be known as "School District Number Twenty-Six, Barnes County." At the same time he directed five notices to be posted, calling a first district meeting of the inhabitants of the district to be held on the 17th day of December, 1881. The record does not show what was done thereafter by the inhabitants of the district in the way of further organizing the district, and electing officers thereof; but it does show that on the 21st of December, 1881, eight of the warrants now sued upon were executed and delivered. They were each in the following form:

"No. ———. Territory of Dakota.

"Sauborn, Dec. 21st, 1881.

"Treasurer of School District No. 26 of Barnes County:

"Pay to J. W. Shannon, or bearer, five hundred dollars, out of any moneys in the district treasury belonging to the contingent fund not otherwise appropriated, for building school house.

"C. P. Werth, District Clerk.
Jacob Werth, Director."

"\$500.00.

One other warrant in the sum of \$500, which was also sued upon, appears to have been drawn as early as December 3, 1881, before the district was formed. Evidence was offered at the trial tending to show that the aforesaid warrants, amounting altogether to \$4,013.70, were delivered to J. W. Shannon, the payee therein named, for building and furnishing a school house for said district, which he had agreed to erect and furnish, under a contract made with the school board of the district, for the sum of \$4,000 in school warrants. There was evidence further tending to show that after the delivery of the aforesaid warrants, and some time during the early part of the year 1882, Shannon, the payee, had caused a school house to be erected and furnished, which was worth at the time in cash about \$1,600. It was also shown that the warrants had been duly sold and assigned to the Capital Bank of St. Paul, Minn., before the commencement of the action. In the course of the trial it was admitted that the assessed valuation of all the real and personal property situated in said school district No. 26, for the year 1881, was \$25,035, and that the highest valuation placed upon said property for the purpose of taxation during the period of five years thereafter was \$30,540. The foregoing are substantially all of the material facts proven at the trial in the circuit court, on which the plaintiff's right to recover on the warrants then depended, and now depends.

From what has been said it will be seen that the warrants in question were issued when the present state of North Dakota formed a part of the territory of Dakota. The validity of the warrants must therefore be tested by an act of the territorial legislature entitled "An act to establish a public school law for Dakota territory," which was approved on February 22, 1879, and was in force on the 21st of December, 1881, and for some years thereafter. Laws Dak. 1879, c. 14, §§ 16, 25, 29, 39, 56, 57. The supreme court of North Dakota has recently construed the various provisions of this act relating to the selection of school-house sites, the building of school houses, and the issuance of warrants therefor, in a suit which was

brought by this plaintiff. *Capital Bank of St. Paul v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363. That suit, like the one in hand, was founded on school warrants that had been issued by the district, under the territorial law aforesaid, to pay for the erection and furnishing of a school house. The question arose in that case, as in the case at bar, to what extent the school board of a rural school district might contract an indebtedness for the erection and furnishing of a school house by issuing school warrants for that purpose; and it was held, in an elaborate opinion, that the amount of such indebtedness could not exceed the amount of the funds in the hands of the school board, or subject to collection, for the purpose of building a school house, and the amount that could be realized from the maximum tax which could be levied by the inhabitants of the district, for the current year, for the purpose of building a school house. Section 29 of the territorial law above cited provides that:

"The inhabitants qualified to vote at a school district meeting, lawfully assembled, shall have power: * * * (5) To vote a tax annually not exceeding one per cent. on the taxable property in the district, as the meeting shall deem sufficient, to purchase or lease a site, and to build, hire or purchase a school house, and to keep the same in repair."

Section 56 of the same act provides that:

"The district board shall purchase or lease such site for a school house as shall have been designated by the voters at a district meeting in the corporate name thereof, and shall build, hire or purchase such school house as the voters in a district meeting shall have agreed upon, out of the funds provided for that purpose; * * *."

Commenting on these sections of the act, the supreme court of North Dakota said:

"The manifest purpose of this legislation is to prevent the district, unless bonds are issued under chapter 24 of the Laws of 1891, from either mortgaging the future resources, or increasing beyond one per cent. of the assessed valuation the present burden of the inhabitants of the district. The inhabitants, in meeting lawfully assembled, select a site, direct the building of the school house, and levy a one per cent. tax to pay for the same. It is out of the funds provided for that purpose that the board is to build and pay for the house. The funds provided for that purpose are those on hand, or subject to collection for that purpose, and, in addition, the amount which can be raised by the levy of a tax not exceeding one per cent. of the assessed valuation of the district; and the tax must be levied before it can be said that the funds are provided. The inhabitants cannot in any one year levy this maximum tax for any number of years in advance. No funds can be deemed as provided for that purpose which the district has not then on hand for that purpose, or subject to collection, or which it has not levied a tax to raise."

In that case the contract for the erection of the school building, and the warrants issued in compliance therewith, were held void, because the contract price for the erection of the school house was largely in excess of the funds on hand and subject to collection, and the amount that could be raised by the maximum tax for the current year. In the case at bar the contract price for the erection of the school building amounted to about one-sixth of the gross value of all of the property in the district, real and personal, as valued for

taxation for the year 1881; and the maximum tax which the district could levy for that year, for the purpose of erecting a school house, was scarcely adequate to pay one-half of the annual interest on the warrants that were issued to the contractor. It follows that the warrants were utterly void, for want of power in the school board to execute the building contract and to draw the warrants, if we follow the construction of the statute under which they were issued, that has been adopted by the supreme court of the state of North Dakota, and that had previously been adopted by the supreme court of the territory of Dakota in the case of *Farmers' & Merchants' Nat. Bank v. School Dist. No. 53*, 42 N. W. 767. It is strenuously urged, however, that this court is not bound by the decision of the state supreme court construing the act aforesaid, because it was a territorial statute, and not a law enacted by the legislature of the state of North Dakota subsequent to its admission into the Union. We shall not stop to inquire at the present time whether the decision of the state court construing a law of the territory out of which the state had been carved should be given the same force and effect as a decision of that court construing an act of the legislature of the state. We conceive that the present case does not require us to express an opinion on that novel proposition. It is sufficient to say at this time that it is highly important to the due administration of justice that courts exercising a concurrent jurisdiction over the same people and territory should, so far as possible, adopt the same construction of local laws. The many evil results that would surely follow if we should disregard the deliberate judgment of the supreme court of North Dakota construing the school laws of the territory of Dakota, under which the great majority of the school districts of that state have doubtless been organized, and under which they have acted for a period of years, are so apparent that we need not stop to describe them, or attempt to enumerate them. It is obvious, we think, that, without reference to the question whether the decision of the state court is absolutely binding upon us, we ought to follow it, unless imperative reasons exist for disregarding it, and no such reasons are disclosed by the present record. The warrants upon which the suit at bar is founded are not negotiable instruments in the sense of the law merchant. *Board Com'rs of Hamilton Co. v. Sherwood* (decided at the present term) 64 Fed. 103. They were not purchased by the present plaintiff because of any local decisions which had previously upheld their validity, and given them a currency in the market, on the faith of which the purchaser relied when he made the purchase. Neither is the case one in which the federal circuit court was called upon to construe a statute of the state or territory before its meaning had been authoritatively declared by the courts of the state, for the record before us shows that the present action was commenced in the circuit court of the United States for the district of North Dakota nearly two years after the statute in question had received a definite construction by the supreme court of the state in a suit brought by this plaintiff, the Capital Bank of St. Paul, Minn., against another school district, in the courts of that

state. Under these circumstances, it is manifest that one object which the plaintiff had in view in bringing the present action—and so much was admitted at the bar—was to obtain a review of a previous decision of the supreme court of the state, and, if possible, a different construction of a local statute. Moreover, the construction of the territorial act of February 22, 1879, which was adopted by the supreme court of the state, is in itself a reasonable construction. The decision of the supreme court of North Dakota, construing the act, rests upon considerations of public policy which are highly persuasive, if not convincing; and any court might well hesitate before it overruled the decision in question, and the decision of the supreme court of the territory as well, even if it felt itself at full liberty to do so.

The views which we have already expressed render it unnecessary to decide whether, as is forcibly contended by the defendant, the plaintiff's cause of action was barred by the statute of limitations of the state of North Dakota, and no opinion will be expressed upon that point. We think that the circuit court acted properly in following this decision of the supreme court of the state in the case heretofore cited, and, so holding, the judgment of the circuit court is hereby affirmed.

CRANE ELEVATOR CO. v. LIPPERT.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 119.

1. NEGLIGENCE—OBSTRUCTION OF PASSAGEWAY.

One who negligently places obstructions in the hall of a building is liable to an employé of a tenant of the building who is injured thereby, since such obstruction constitutes a breach of the duty of the owner to keep such hallway open to the use of the tenants.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A boy while walking slowly through an unlighted hall, in the dark, stumbled over an obstruction, and was injured. He could not see the obstruction, but he knew it was there, and he tried to go around it, but miscalculated the distance. *Held*, that the question of contributory negligence was for the jury.

3. SAME—REMOTE AND PROXIMATE CAUSE—INJURY TO DISEASED PERSON.

Where a person, at the time of receiving a personal injury, has microbes in his system, which aggravate the injury, that fact does not relieve from responsibility the person whose negligence caused the injury, where it does not appear that the microbes would have done harm by themselves.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by Frank Lippert, against the Crane Elevator Company for personal injuries. Plaintiff obtained judgment. Defendant brings error.

This was an action commenced in a state court, and removed thence into the court below. The defendant in error, through his guardian ad litem, brought suit against the plaintiff in error to recover damages for personal injuries alleged to have been caused by its negligence. The defendant in error, who was 15 years of age, was at the time of his injury, September 12,

1891, employed as a check boy in the office of the Western Union Telegraph Company, which was located in room 6 on the basement or ground floor of the Chamber of Commerce building, in Milwaukee, Wis. The office has two entrances or exits,—one opening from and upon the public sidewalk along Michigan street, and being the only entrance and exit of customers of the Western Union Telegraph Company; and the other opening from and into the main or central hall, located on the basement or ground floor of said building, and being the only mode or way of ingress and egress into and from said office for the servants and employes of said Western Union Telegraph Company. The basement or ground floor of the Chamber of Commerce building is occupied by various offices and rooms used for business purposes, opening into said main or central hall, and from which a stairway ascends to the upper floors of said building. The hall is of the width of about 20 feet, and had been for a long time used as a common thoroughfare for all persons employed in said offices and rooms, and for all persons having occasion to call upon them. It was the only passageway or thoroughfare by which any employes or servants of the Western Union Telegraph Company, or those calling upon them, could enter or leave the office and operating room of said telegraph company. The various offices and rooms on the basement or ground floor of the Chamber of Commerce building are occupied by tenants of the owner of the building. Prior to the 1st day of September, 1891, the plaintiff in error had entered into a contract with the owner of the Chamber of Commerce building to take down and remove the old elevator, and put up a new one in its place. The materials composing the old elevator, by the terms of the contract, became the property of the plaintiff in error. Some two weeks prior to the injury complained of, the plaintiff in error had taken down the old elevator, and placed the materials composing it in the main or central hall. These materials, consisting of timber, iron, and machinery, were placed on the side of the hall adjoining the room occupied by the telegraph company, about 5 or 6 feet from the doorway leading into the telegraph office, and extending thence, in the direction of the exit from said hall, a distance of about 18 or 20 feet, and extending out into the hall from 4 to 6 feet, and they were heaped up from 18 inches to 3 or 4 feet in height. It is not shown whether these materials were placed in the hall with the previous consent of the owner of the building or not, but they remained there for such a length of time before the injury happened that he would be chargeable with knowledge of their presence there. This mass of materials was left in the hall without any guard rail around it, and without any light or warning of any kind being provided by the plaintiff in error, aside from any light which may have been kept there at times by the owner of the building.

The defendant in error was the only witness testifying touching the circumstances connected with this injury. He testified that he had been at work in the Western Union Telegraph office for about 2 years before the time of the accident, and was 15 years of age. He went to work at the usual time, 5 o'clock and 30 minutes, p. m. of September 11th, and left work at 1 o'clock a. m. of September 12th. He further testified as follows: "I took my hat, and went out into the hall. I thought I had gone far enough to avoid the articles lying around the hall. Then I started walking down the hall slowly, until I came to the Board of Trade window. I tripped and fell, and struck my shoulder on some iron material lying around there. Then I got up and walked out; went home, and my mother put some liniment on my shoulder, and all along to the elbow. * * * I went to work the next day at 5:30 p. m. I worked about an hour, and then I could not stand it any longer, and asked to be excused. I remember when the new elevator was put in the Chamber of Commerce building. It was two weeks or more before the 12th of September, 1891. * * * The office of the Western Union Telegraph Company is on the west side of the building, extending from the front to the rear on the ground floor. At the time I fell, there was only one door by which I could go into the operating room, and that was at the end of the corridor. * * * On the evening of the 11th of September, I went into the Chamber of Commerce building by the alley entrance. I walked east, and then turned and walked south, up to the door of the operating

room. There were planks, cables, and iron materials lying on the west side of the wainscoting, and extending at the furthest point about five or six feet from the wainscoting, towards the center of the corridor. * * * The corridor had been piled up this way for two weeks or more. When I came out at one o'clock in the morning, there was no light at all in the corridor. I could not see anything. I knew the rubbish was there, and I thought I went far enough away from it, so as not to be caught on it. I tried to get away from it. I went five feet from the door, towards the east; then I walked nearly down to the turn, and was going to go out to the alley entrance. Before I got there I fell, right near to the Board of Trade window. I walked slow because I knew these things were lying around. So I tried to be careful. There were no red lanterns, or any kind of a light. The gas jet in the hall was not lighted. The gas jet was about four feet from the wall above. I could not reach up to the gas jet." Upon cross-examination he further testified: "So far as I know, the pile was just the same when I went out as when I went in. I cannot tell whether it had been touched for some days or not. It was about the same. There is usually one gas jet burning when I come out at one o'clock. The one at the crossing of the T. * * * I do not remember whether there was a light there or not Friday night, when I went in. * * * The light in the hall was usually lighted, but I often saw it out, too. I don't know who put it out. I never saw them put it out. When the light is burning, I can see the material." In addition to the testimony of the defendant in error with respect to the lighting of the hall, a number of other witnesses testified on that subject. Some of them testified that the hall usually had a light burning at 5:30 p. m., but generally it was not lighted at 1 o'clock a. m. Others testified that a light was kept burning in the hall all night, and if, by accident, the light went out, it was relighted by the watchman of the building. As to the character of his injuries, he testified that he fell, and struck his shoulder upon some iron. He got up, and walked home. He felt some pain in his arm, below the shoulder. It was swollen the next day, but he returned to work, and after working about an hour he went home, and went to bed. About four days after a doctor was called. His arm was then badly swollen. After treatment by two or three different physicians, he went to the hospital, November 19th, where he was operated on by a surgeon. He was in bed at the hospital about a month, and had to carry his arm in a sling until after Christmas. About a week before leaving the hospital, a piece of diseased bone was taken out of his arm. It gradually healed up. His arm has often pained him since he left the hospital. It pains him most when he has taken cold. He cannot bear his weight on the arm. He has a pretty good arm, considering the injury and the amount of destruction of bone. Whether the usefulness of his arm would be permanently impaired or not was a disputed question. Since his discharge from the hospital he has worked about six or seven weeks. The medical testimony tended to show that, when admitted to the hospital, he was suffering from tubercular osteomyelitis, resulting from the presence of microbes or tuberculous germs in his system; that, if these microbes or germs had not been present in his system, the fall and consequent bruise would not have resulted in the serious injury from which he suffered.

George H. Noyes, for plaintiff in error.

Kate H. Pier (Edward S. Bragg, of counsel), for defendant in error.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

After making the foregoing statement of facts, the opinion of the court was delivered by

BAKER, District Judge. The plaintiff in error contends that no contract relation existed between it and the defendant in error, and that the injury complained of did not arise out of, or occur in consequence of, any privity of contract between it and the defendant in

error, and hence that no duty is shown, the violation of which gave him a right of action in this case. It is also insisted that the remedy which the defendant in error might have had against the owner of the building or his employer does not extend to a recovery against the plaintiff in error. It is firmly settled that, in order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to be existing some obligation or duty towards the plaintiff, which the defendant has disregarded or violated. This is the basis on which the cause of action must rest. There can be no fault or negligence or breach of duty where there is no act or service or contract which the party is bound to perform. Whenever a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby an injury has been occasioned to another, the right of action therefor is bottomed on the principle that the negligence complained of consists in doing or omitting to do an act by which a duty imposed by law, or growing out of contract, has been violated. A trespasser who comes upon the land of another without right cannot maintain an action if he runs against an obstruction or falls into an excavation there situated. The owner owes no duty to a wrongdoer to provide safeguards for his protection. So, also, a licensee who enters on the premises of another by permission only, without any allurements, enticement, or invitation being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or excavations. He goes at his own risk, and enjoys the license subject to its attending perils. *Railroad Co. v. Griffin*, 100 Ind. 221; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Byrne v. Railroad Co.*, 104 N. Y. 362, 10 N. E. 539. This is so because no duty is imposed by law or contract on the owner or occupant to keep his premises in a safe condition for those who come there solely for their own convenience or pleasure, and who are not either expressly or impliedly invited or induced to come upon them by the purpose for which the premises are appropriated or occupied, or by such adaptation of the place for use by others as might naturally and reasonably lead them to suppose that they might properly and safely enter thereon. The owner of a building occupied by a tenant owes him and those employed by such tenant the duty not to expose them to a dangerous condition of the place which reasonable care on his part would have prevented. *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399. The telegraph company, and those employed by it, had a right to the use of the hall, for all lawful purposes, free from dangerous obstructions, so far as ordinary and reasonable care could provide against them. It acquired this right as an incident of its tenancy, and this right also inured to the benefit of its employés and servants. Neither the owner of the building, nor another by his authority, had the right to place an obstruction in the hall which would endanger the safety of those having lawful occasion to pass through it while in the exercise of due care. If the plaintiff in error placed the obstructions complained of in the hall

under a grant of authority from the owner of the building, its duties and responsibilities were coextensive with those of its grantor. If it placed the obstructions in the corridor without the consent of the owner of the building, its responsibility to the defendant in error for his injury would assuredly be no less than if it had acquired such consent. These principles are illustrated and applied in many English and American cases, one of which (*Corby v. Hill*, 4 C. B. [N. S.] 562, cited and approved in *Bennett v. Railroad Co.*, 102 U. S. 577) it will be sufficient to examine. That was an action for an injury sustained by the plaintiff while traveling upon a private way leading from a public turnpike to a certain asylum, and over which persons having occasion to visit such building were likely to pass, and were accustomed to pass, by leave of the owners of the soil. The defendant negligently obstructed the way, by placing thereon certain materials, without giving notice or warning of the obstruction by light or other signal, and by reason thereof the plaintiff's horse was driven against the obstruction and injured. One of the pleas was that the defendant had placed the materials on the way by the license or consent of the owners of the soil. Upon the argument of the case, counsel for the defendant contended that the owners of the soil, and consequently, also, any person having leave or license from them, might, as against other persons using the way by the like leave and license, place an obstruction thereon, without incurring responsibility for an injury resulting therefrom, unless in the case where an allurement or inducement was held out to such other person to make use of the way. Upon the general question, as well as in answer to this argument, Cockburn, C. J., said:

"It seems to me that the very case from which the learned counsel seeks to distinguish this is the case now before us. The proprietors of the soil held out an allurement, whereby the plaintiff was induced to come upon the place in question. They held out this road, to all persons having occasion to proceed to the asylum, as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission."

In the same case, Williams, J., said:

"I see no reason why the plaintiff should not have a remedy against such a wrongdoer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it."

The defendant in error, as the employé of the telegraph company, had the right to use the hall, for the purpose of travel to and from his place of employment, free from dangerous obstructions, as against the owner of the building or his licensee, as well as against one obstructing it without any claim of right. The plaintiff in error, in obstructing the hall, was guilty of an invasion of the right of the defendant in error to its free and unobstructed use. The case of

Winterbottom v. Wright, 10 Mees. & W. 109, and other cases cited and relied on by counsel for the plaintiff in error, are not applicable to the present case. That case, and others like it, denied a remedy on the ground that at the time of the happening of the negligent act the defendant owed no duty arising out of contract or imposed by law, in respect to the person injured. There being no breach of duty, it was held that there was no right of action. In the case before us there was a duty owing to the defendant in error, coupled with its breach, from which a right of action arose in his favor, if he was free from contributory negligence. Having placed obstructions in the hall, the duty rested upon the plaintiff in error to exercise reasonable care and prudence to protect from injury those having lawful occasion to use it, by means of lights or other suitable safeguards. This duty required the exercise of care and diligence on its part in proportion to the danger occasioned by the presence of these obstructions. It saw fit wholly to neglect the performance of this duty. It relied upon the lighting of the hall by the owner of the building as the sole means of protection against injury from these obstructions. Having intrusted to another the discharge of a duty resting upon itself, the plaintiff in error is responsible for a failure in its performance. The evidence touching the manner of the performance of this duty was conflicting, and, under instructions as favorable to the plaintiff in error as it was entitled to ask, the jury have found that there was negligence.

It is the settled doctrine of the federal courts that the burden of showing contributory negligence rests upon the defendant. Unless, from the evidence in the case, contributory negligence is affirmatively disclosed, the plaintiff is entitled to recover, upon proof of actionable negligence on the part of the defendant resulting in injury. Contributory negligence is claimed to have been affirmatively shown in the testimony of the defendant in error. It has been well said:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under all the circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms as are applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions of the court. It is their province to note the special circumstances and surroundings of each particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679.

An adult must use that degree of care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. In infants and children of immature judgment, less discretion is required, depending upon age and intelligence in each

particular case. *Railroad Co. v. Gladman*, 15 Wall. 401. Here a boy 15 years of age, having knowledge of the obstruction of the hall, and that it is not lighted, is injured in attempting to pass through it. He was not bound, under the circumstances, to remain shut up in the office all night. He had a lawful right to use the hall for the purpose of exit, notwithstanding its obstruction. He was bound to use due care to avoid injury, in view of all the circumstances and surroundings, taking into consideration his age and intelligence. The jury saw the boy before them, they heard him testify, and were enabled to form a more accurate judgment in regard to his intelligence and capacity to exercise care and avoid injury than we can. He testified that he exercised his best judgment, and traversed the corridor with care. He walked, as he supposed, sufficiently far towards the east side of the hall to carry him beyond the obstructions, which occupied its west side to the distance of four or five feet. The obstruction with which he came in contact was some distance down the hall from the place where he entered it, and he could only be guided by his judgment as to the distance in walking to reach a point to pass it. He moved slowly and carefully. He misjudged the distance, and, as a result, fell upon the iron and material which the plaintiff in error had placed in the hall. We do not think the facts are such that all reasonable men must draw the conclusion that the boy, considering his age and intelligence, was guilty of negligence, under the circumstances. As different conclusions may be drawn as to whether he used due care or not, the question was one whose determination belonged to the jury. The instructions of the court fairly presented this question to the jury, and by their verdict they have found that he was free from contributory negligence. The court having correctly instructed the jury on the subject of contributory negligence, and the question being one for their determination, their verdict is conclusive here, although not in the court below.

The plaintiff in error further contended on the oral argument that the injury sustained by the defendant in error was not the proximate result of his fall, but arose from the presence of tuberculous germs in his system. It was the hurt occasioned by the fall which afforded an opportunity for the active development of the poisonous germs which had theretofore been innocuous. It was the wrongful act which gave rise to the consequent injury, and it is not apparent that the injury would have occurred in the absence of such cause. In the case of *Railway Co. v. Kellogg*, 94 U. S. 469, 475, it is said:

"When there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

The wrongful act of the plaintiff in error subjected the injured party to other and dependent causes, which were set in motion by the original hurt. For this it is answerable. *Ginna v. Railroad Co.*, 67 N. Y. 596; *Drake v. Kiely*, 93 Pa. St. 492; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911; *Railway Co. v. Buck*, 96 Ind. 346.

The plaintiff in error also complains of the refusal of the court to charge the jury, upon its request, as follows:

(1) "We think the decided weight of authority is in favor of the rule that, in an action of negligence, the defendant has the right to have the question submitted to the jury whether the result which is the ground of action might, under all the circumstances, have been reasonably expected, not by the defendant, but by a man of ordinary intelligence and prudence." (2) "It is generally held that, in order to warrant a finding that negligence of an act not amounting to wanton wrong is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances."

It is not necessary to express any opinion in regard to the accuracy of the above propositions of law, or in regard to their applicability to the facts of the case. The plaintiff in error failed to reserve any exception to the refusal of the court to give them in charge to the jury. It will not now be heard to allege error upon any ruling to which it did not, at the proper time, reserve an exception.

The instructions of the court were in harmony with the foregoing principles, and a careful examination of them fails to disclose any substantial error. All of the alleged errors argued by counsel have been considered by the court, and we find no prejudicial error in the record. The judgment below is affirmed, at the costs of the plaintiff in error.

HIRSCHBECK v. UNITED STATES.

(District Court, N. D. New York. October 19, 1894.)

1. UNITED STATES COMMISSIONERS—FEES.

A commissioner is not entitled to charge for making triplicate, instead of duplicate, affidavits to the accounts of special deputy marshals, or for triplicate orders for payment of witnesses.

2. SAME.

A commissioner is not entitled to fees for administering two oaths, when duplicate oaths are required, or for arraigning parties brought before him charged with crime.

3. SAME.

A commissioner is entitled to fees by the folio for drawing recognizances and orders, to the full number of folios employed, in the absence of proof that these papers were unnecessarily prolix.

This was a suit by Caroline G. Hirschbeck, as administratrix of Joseph G. Hirschbeck against the United States, to recover fees alleged to have been earned by the decedent as a United States commissioner.

Joseph G. Hirschbeck was a circuit court commissioner for the Northern district of New York. The plaintiff, as his administratrix, brings this suit to recover various items which were stricken from his accounts by the accounting officers of the treasury department. In making up the accounts of special deputy marshals he had charged for triplicate affidavits and triplicate orders for payment. He had also charged for two oaths in cases where he was required to take an oath and a duplicate thereof. He had made charges also for arraigning parties brought before him charged with crime. In drawing recognizances he had charged by the folio, insisting that he was not limited to two or three folios, but might charge for the number of folios

actually employed. The United States insists that the commissioner might lawfully have charged for duplicate affidavits and orders in making up the accounts of special deputy marshals, but not for triplicates; that when required to take duplicate oaths he could charge for but one oath; that he had no authority to arraign a defendant brought before him in his official capacity and that in preparing recognizances his charge should be confined to three folios. The issues thus raised were the principal matters in dispute between the parties. The other questions are settled in favor of the plaintiff by the authorities cited in the opinion.

Frank P. Murray, for plaintiff.

W. F. Mackey, Asst. U. S. Atty., for defendant.

COXE, District Judge. This action has been submitted without oral argument. The plaintiff has furnished a brief memorandum covering about two pages of legal cap. The defendant has furnished no brief at all. From a letter written by the comptroller to the attorney general and from the plaintiff's memorandum I have done my best to spell out, from the mass of accounts, allowances and disallowances, the points in dispute between the parties. The plaintiff has introduced testimony to prove that the services charged for by the intestate were actually performed. The defendant has introduced no proofs except a treasury transcript containing a statement of the late commissioner's accounts taken from the books of the department.

I find nothing in the law permitting a charge for triplicate affidavits to the accounts of special deputy marshals, or for triplicate orders for the payment of witnesses. The amounts charged for drawing triplicates should be disallowed.

There is no authority bearing directly upon the question whether a commissioner can charge for administering two oaths when duplicate oaths are required, but, by analogy to *U. S. v. Barber*, 140 U. S. 177, 11 Sup. Ct. 751, I shall hold that the transaction constitutes but a single act for which one charge only can be made.

A commissioner sits only as a committing magistrate. His duty is to determine whether there is sufficient evidence against the defendant to warrant his being held for the grand jury. An arraignment is extrajudicial and no fees can be allowed therefor.

The charges for drawing recognizances and orders seem to be sustained by the decisions of the United States courts, especially in the absence of proof that these papers are unnecessarily prolix. *U. S. v. Taylor*, 147 U. S. 695, 701, 13 Sup. Ct. 479; *Crawford v. U. S.*, 40 Fed. 446, 448; *U. S. v. Rand*, 3 C. C. A. 556, 53 Fed. 348.

The other questions in dispute, so far as I am able to understand them, seem to be settled by the decisions of the federal courts in plaintiff's favor. There is nothing to show that the late commissioner did not do the work for which charges are made. *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743; *Hoyne v. U. S.*, 38 Fed. 542; *Clough v. U. S.*, 47 Fed. 791.

It follows that the charges disallowed by the above rulings should be deducted from the account and that judgment should be entered in favor of the plaintiff for the balance.

UNITED STATES v. JOSE.

(Circuit Court, D. Washington, N. D. October 12, 1894.)

No. 257.

1. CONTEMPT—DEGREE OF PROOF REQUIRED.

Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused; and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts.

2. SAME—INTERFERENCE WITH PROPERTY IN RECEIVERS' POSSESSION.

A shipper of logs by rail, being unable to pay the freight in advance, agreed with the receivers of the railroad that after transportation each lot of logs should be held in a boom owned by one P., and while so held should be considered as in the possession of the receivers. The receivers thereafter arranged with P. that he should hold the logs as their agent, and should not release any of them except on notice to the receivers, and with their consent. The shipper thereafter induced P. to release one raft without first obtaining the receivers' consent, and the evidence strongly tended to show that he accomplished this by fraud and false statements, but the proof was not sufficient to convince the court beyond a reasonable doubt. *Held*, that in the absence thereof, and of proof that he had knowledge of P.'s instructions from the receivers, the shipper could not be convicted of contempt of court in interfering with property in the possession of its receivers.

This was a proceeding against Thomas Jose for an alleged contempt in interfering with property in the possession of the court's receivers.

Wm. H. Brinker, U. S. Atty.

Greene & Turner, for defendant.

Carr & Preston, for receivers, Seattle, L. S. & E. Ry. Co.

HANFORD, District Judge. At the instance of the receivers of this court, in charge of the business and property of the Seattle, Lake Shore & Eastern Railway Company, the defendant has been arrested and brought before the court to answer a charge of contempt alleged to have been committed by him, in this: That on or about the 14th day of August, last, said defendant unlawfully, willfully, and clandestinely wrested from the possession of said receivers, and removed out of the jurisdiction of this court, a raft of saw logs which were theretofore in the lawful possession of said receivers. The undisputed facts are that the defendant, prior to the date of the alleged offense, was engaged in cutting saw logs at a place near to the line of said railroad, and dependent on said railroad for transportation of his saw logs to salt water. The logs were delivered to the receivers, and carried upon trucks to Salmon bay, where they were unloaded, and placed in a boom owned and controlled by one A. C. Pates. Timber belonging to other loggers, transported by the same railroad, was also received and cared for by said Pates, who, for a consideration paid by the loggers, attended to the unloading of the logs from the trucks, and placed them in a general boom, and afterwards, as required, sorted them, and made up rafts for towing; having pocket booms, rafting gaps, and

other necessary conveniences for the business. The defendant was unable to prepay the railroad charges for transportation, and it was customary for him to make payments on account after making sale of each raft. In April or May preceding the alleged offense, at the request of the receivers, through the auditor and general traffic manager of the railroad, the defendant, by the firm name of Thomas Jose & Son, in which he was then transacting his logging business, signed a written contract, whereby he consented that the receivers might do the work of unloading the logs from their trucks, and that said logs should be deemed to be in the possession of the receivers so long as the same remained in said boom; the expense of unloading and booming to be borne in the first instance by the receivers, and added to their charges for freight; such expense to be not greater than had been previously charged for the same service. That part of the written contract relating to the payment by the receivers of charges for unloading and booming has not been observed, the fact being that said Pates continued after the making of said contract to do the work, and look to the defendant for payment, as he had previously done. After said contract had been signed, and at least two months before the date of the alleged offense, the receivers, through their employés, entered into a verbal agreement with said Pates, whereby he undertook to receive the logs of the defendant in his boom, and hold the same as agent for the receivers, and promised that he would not permit any of said logs to be taken away without giving notice to the receivers, and obtaining their consent previous to the removal; and in fulfillment of his said agreement said Pates did notify the receivers, and obtain instructions from them releasing each raft taken by the defendant, until the taking complained of in this case. On the afternoon of August 14, 1894, the defendant, without the knowledge or consent of the receivers, or of any agent or employé of theirs, except said Pates, took a raft of logs from said boom to British Columbia, and sold the same, and after returning from British Columbia he called at the office of the receivers, and stated that he wished to make full settlement of his account for transportation of logs, but coupled with the condition that he should receive certain credits, but went away without waiting for his account to be made up, and never afterwards returned, or preferred any other request for a settlement; and he has not paid any part of the money received from the sale of said raft to the receivers, on account of his indebtedness for transportation of said logs, and he has not rendered to them any statement of the particulars or amount of his claims against the railroad. The amounts which he has paid from time to time on account of the freight charges on his logs are not more than the amounts of freight charges on the particular logs which had been marketed, according to the mill's scale, and although approximately 1,000,000 feet of logs have been transported by said railroad, on account of which no payments have been made, the defendant now denies that he is indebted in any sum whatever for freight on his logs transported by said railroad.

In addition to these undisputed facts, the evidence convinces me beyond a reasonable doubt, and I find, that the auditor and general traffic manager of the railroad, after engaging said Pates to keep said logs as agent for the receivers, and two or three weeks previous to the 14th day of August, 1894, distinctly and explicitly informed the defendant that all of his logs which had been transported on said railroad, and which had not been sold, were held by the receivers as security for the amount of his indebtedness for freight charges on the same, and that he would not be permitted to remove any of said logs without first discharging said indebtedness, or making a satisfactory arrangement whereby the amount due should be secured; and the defendant did not then dispute the possession of the receivers, or the fact of his being indebted as claimed. I am likewise convinced, and also find, that the purpose of said written contract was to enable the receivers to transport the defendant's logs without prepayment of the freight charges, and to retain custody of the logs in order to preserve their carrier's lien for said charges, and that the defendant understood that such was the purpose of said agreement at the time of signing it. I am likewise convinced, and also find, that the defendant did ask for and obtain the consent of said auditor and traffic manager to the removal of each of the several rafts which were sold after the signing of said contract, and prior to the taking of the raft on the 14th of August.

I make said findings notwithstanding the testimony to the contrary given by the defendant upon this trial. Testimony was introduced upon this trial strongly tending to prove that, at the time of the taking of the raft on the 14th of August, Mr. Pates made objection to the taking of said raft until he should first notify the receivers and receive their consent, and that his objections were overcome by assurances then given by the defendant to the effect that he had just come from the office of the receivers, and that they understood he was to take the logs, and had assented thereto. I am not, however, convinced beyond a reasonable doubt that any such objections or assurances were made or given, and I give the defendant the benefit of the doubt on this point. As a matter of fact, Mr. Pates was the authorized agent of the receivers to hold possession of said logs; but he had no authority to surrender the possession of said logs to the defendant, or to any one else, except as he should be especially instructed by the receivers or the general officers of the railroad acting under them, and no such special instructions were at any time given for the release of the raft taken by the defendant on the 14th of August. I consider his position to have been similar to that of a warehouse keeper having possession of goods received from a carrier, on which charges for carriage are unpaid, and who, in consideration of the delivery of the goods to him for storage, has undertaken to hold the same for the unpaid freight, or until released by the carrier's order. But the evidence fails to show that the defendant knew the extent of Pates' authority as agent, or knew that he was not authorized to release said logs without special instructions. The evidence fails to prove that the defendant would have willfully taken forcible posses-

sion of said logs, or removed the same, if they had not been actually delivered to him by Pates; and, the evidence being insufficient to convince me beyond a reasonable doubt that such delivery by Pates was obtained by actual false statements and representations made by the defendant, the case against the defendant lacks the element of a willful exertion of force and intentional taking of property from the custody of the receivers against their will.

Section 725 of the Revised Statutes of the United States limits the power of this court to punish for contempts. Persons not parties to litigation pending in the court, and not holding official positions requiring them to yield obedience to the court in their official conduct, can be punished in proceedings for contempt only for acts committed in the immediate presence of the court, or so near thereto as to interfere with the administration of justice, or for willfully resisting the execution of the lawful process or commands of the court. The word "resistance," used in the statute, is to be understood as implying a willful purpose to interfere so as to prevent the execution or enforcement of process or the court's orders. Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts; otherwise, the defendant is entitled to go acquit. In this case, while the proof clearly establishes the fact of an actual interference with the business of the receivers of this court by the taking away of property in their lawful custody, without their consent, and while the prosecution appears to have been founded upon evidence showing just cause for the accusation, I nevertheless am constrained to decide that the accusation has not been proven. Without proof of knowledge on the part of the defendant of the lack of authority in Pates to release the logs, and without convincing evidence that the defendant did fraudulently induce Pates to surrender the logs by falsely representing to him that the receivers had consented thereto, I can find no facts warranting an inference of the criminal intent necessary to justify the infliction of punishment.

GESSNER v. PHILIPS et al.

(Circuit Court, S. D. New York. February 14, 1894.)

1. PATENTS—TESTS OF INFRINGEMENT.

Devices which are not equivalents of those patented, and could not be substituted therefor without the exercise of invention, do not infringe.

2. SAME.

Infringement cannot be safely determined by comparing the two machines, without regard to the claims of the patent.

3. SAME.

Where the spirit of an invention is taken, infringement is not avoided by carrying the invention further than the patentee did.

4. SAME—PARTICULAR PATENTS—CLOTH-PRESSING MACHINES.

The following patents to David Gessner for improvements in cloth-pressing machines explained and construed as to the claims mentioned,

and No. 387,290 *held* not infringed as to claim 10; No. 387,292, *held* valid and infringed as to claims 3 and 10; No. 387,297, *held* not infringed as to claim 1, and infringed as to claim 2; No. 424,971, *held* not infringed as to claims 1, 4, and 11 to 16, and void as to claim 2, because previously patented to the same inventor.

This was a suit in equity by David Gessner against F. Stanhope Philips and others for infringement of certain patents granted to complainant for improvements in cloth-pressing machines.

Livingston Gifford, for orator.

Cansten Browne, for defendant.

WHEELER, District Judge. The questions involved here arise upon four patents for improvements in cloth-pressing machines granted to the orator, and alleged to have been infringed by the defendants, in using a machine subsequently patented to George W. Voelker. Cloth is finished in these machines by being fed between hot surfaces, one having a smooth jacket, under great pressure. The machines of the kind in use in this particular art next before the invention of the first three of these patents were one invented by Ernst Gessner, of Saxony, father of the orator, patented by No. 4,913, in England, December 27, 1877, in which the cloth was passed between a cylinder and two bedplates, one on each side, connected by a continuous jacket below the cylinder, and mounted on supports connected above by pig-tail springs, and screws drawing them towards the cylinder for pressure, which could not be wholly relieved from pressure without wedging them apart; and machines patented in two patents to George W. Miller (No. 257,508, dated May 9, 1882, and No. 352,253, applied for January 6, 1885, and dated November 9, 1886), in which the cloth was passed between cylinders and bedplates below, pressed together by compound levers. In those machines, when stopped in use, the pressing surfaces could not be readily separated, to prevent press marks on the cloth from the hot surfaces, nor for access to keep these parts in order. These inventions were made to relieve those difficulties, and to increase the capacity and efficiency of the machines. The improvements consist largely in mounting the cylinder in fixed bearings on the frame of the machine, and a bedplate on each side in movable bearings sliding on guide ways on the frame towards and from the cylinder; and in mechanism for moving and securing the bedplates evenly in relation to the cylinder for adjustment, pressure, and access. The patents and claims in question are No. 387,290, claim 10, which is for:

"In combination, the cylinder, pressing devices co-operating therewith, a lever at each end of the cylinder for operating the pressing devices, toggle joints adjacent to said levers, and connected therewith, one of the links of each of said toggle joints being provided with a screw-threaded rod, substantially as described, whereby the pressure exerted by the toggle joints may be equalized, and means for operating said toggle joints."

No. 387,292, claim 3, which is for:

"In a cloth-pressing machine, in combination, a frame having fixed bearings for the cylinder, and guide ways for the bearings of the bedplates ar-

ranged on opposite sides of said cylinder bearings, the cylinder, and the bedplates arranged on opposite sides of the cylinder, and each bedplate being provided with bearings arranged to slide in said guide ways, whereby the bedplates may reciprocate to and from the cylinder, substantially as described."

And claim 10, which is for:

"In combination, the feed rollers, the cylinder having fixed bearings, the two bedplates, mechanical means for exerting and relieving pressure on the bedplates, and supports for the bearings of the bedplates, movable relatively to and independently of the bearings of the cylinder and feed rollers, whereby the bedplates may be moved back from the cylinder without disturbing the position or operation of the cylinder or feed rollers, substantially as described."

And No. 387,297, claim 1, which is for:

"In a cloth-pressing machine, the combination, with the bedplate and the cylinder and the sheet-metal jacket, of means, substantially as described, whereby the ends of the sheet-metal jacket are secured to the bedplate, and the margins thereof are prevented from springing into contact with the cylinder, as set forth."

And claim 2, which is for:

"In combination with the cylinder and the bedplate, a sheet-metal jacket secured at one edge to the bedplate, and extending between the bedplate and the cylinder, and the clamp overlapping the opposite edge of the sheet-metal jacket, and holding it in place, substantially as described."

All of which are dated August 7, 1888.

The Voelker machine, used by the defendants, has, on a frame of two ends connected together, a cylinder, in raised, fixed bearings, driven by a gear wheel; bedplates in bearings sliding on guide ways back of the frame, on each side of, and towards and from, the cylinder, movable by levers at each end pivoted on nuts connected by a threaded rod below the cylinder, with their short arms connected to the bearings, and their long arms connected below by toggle joints operated by cams to move the levers, and produce powerful pressure on the bedplates equalized by a rod between the cams, and thereby dispensing with connections between the bedplates; and feed rollers mounted on the frame, out of the way of the motion of the bedplates. The questions made arise principally upon the construction of the claims with reference to infringement.

The lever of claim 10, No. 387,290, is pivoted on the shaft at each end of the cylinder, and has two short arms each attached to trunnions on the ends of the bedplates, and a long arm, connected by toggle joints to the frame below, which, when moved downwards by the operation of the toggle joints, produces, by moving the short arms, powerful pressure of the bedplates towards the cylinder, which is equalized between the ends by a screw-threaded rod in one of the links of each of the toggle joints. The combination of this claim includes a lever at each end of the cylinder for operating the pressing devices, and toggle joints having one link each provided with a screw-threaded rod for equalizing their exertion of pressure. The machine used by the defendants has all the other elements of the

combination, but no lever at or connected with either end of the cylinder, or with the cylinder anywhere, or link of a toggle joint provided with a screw-threaded rod for equalizing exertion of pressure, or other purpose. The two levers of this machine, with their connections, toggle joints, and cam movements, could not be substituted for the three-armed lever, its connections, toggle joints, and screw-threaded rod movement, without invention of respectable, if not high, order. They do the same things, but not in substantially the same way, and do not appear to be equivalents in this combination, or, with the other elements, to infringe this claim. *Eames v. Godfrey*, 1 Wall. 78.

Claim 3 of No. 387,292 is spoken of for the defendants as if it took in the means whereby the bedplates are made to reciprocate to and from the cylinder as an element of the combination, and that defendants' machine does not have such a combination. But such means do not appear to be so mentioned. Under the "whereby" appears to be stated an advantage, not an element, of the combination. The defendants' machine appears to have what are included as elements of the combination producing that advantage.

Claim 10 of the same patent leaves out of the combination the frame, as such, and the specific arrangement of the bearings of the bedplates on opposite sides of the cylinder, and brings in mechanical means for pressure, and supports for the bearings of the bedplates, movable relatively to, and independently of, the bearings of the cylinder and feed rollers. The effect of this combination is stated to be that the bedplates may be moved back from the cylinder without disturbing the position and operation of that, or of the feed rollers. Reference is made, against this claim, to prior patents, showing feed rollers mounted on stationary parts of the machine, and to the Ernst Gessner machine, as anticipations showing want of invention. The movement of the bedplates from the cylinder, in the sense of this claim, seems to be such as would wholly free them from the effect of each other. The bedplates of the Ernst Gessner machine do not appear capable of such movement back from the cylinder. When wedged apart, the operation of the cylinder would be seriously disturbed. If the use of feed rollers so mounted was old, the bringing them into this new combination would be producing a new combination, and not merely making a new use of an old device.

Claim 1 of No. 387,297 is for means for securing the ends of the sheet-metal jacket to the bedplates, and preventing them from springing against the cylinder when narrow cloth, not reaching to the ends of the jacket to hold them down, is being pressed. In the machine used by the defendants the ends of the jackets, from their form, in two arcs, need not be, and are not, secured to the bedplates, any more than their interior parts are; and no means are used for securing the ends of the jackets, as such, to the bedplates. This claim, therefore, does not seem to be infringed.

Claim 2 of this patent is, in substance, for a clamp over one edge of the jacket, permitting easy removal, in place of a bend over the

edge of the bedplate, preventing it. In the machine used by defendants, both edges appear to be secured by such a clamp, permitting the same thing. By this the spirit of the invention of this claim seems to have been taken, and carried further. This extension of it does not cure the infringement in taking it.

In the machine of the fourth patent, No. 424,971, which is dated April 8, 1890, the bearings of the bedplates rest on guide ways below, and preferably descending from, the bearings of the cylinder, and are movable by hand wheels connected with nuts on opposite threaded screws in toggle joints, one on each side, between the bedplate and a projection on the frame, and having sprocket wheels, to be connected by a sprocket chain, for moving the bedplates in unison. In the machine used by the defendants, the bearings of the bedplates are movable by levers pivoted on nuts connected under the end of the cylinder by an opposite threaded screw turned by a hand wheel, and worked by a cam on toggle joints between their long arms below. Turning the screw one way or the other moves the upper ends of the levers, and by them the bedplates towards or from the cylinder; and moving the cam on the toggle joints, one way or the other, moves the long arms of the levers to or from each other, and thereby moves the upper ends of the levers, and by them the bedplates further towards or from the cylinder. These connections between the bedplates do not interfere with the removal of the cylinder, and this arrangement leaves a third side of the cylinder open for its removal laterally. The claims of this patent alleged to be infringed are the first, second, fourth, and eleventh to sixteenth. The first is for:

"In a rotary cloth-pressing machine, in combination, a cylinder, stationary bearings therefor rigidly secured to the frame, and the following parts arranged upon two sides of the cylinder, leaving a third side for the lateral removal of the cylinder, viz. two bedplates arranged on opposite sides of the cylinder, and an independent power-imparting mechanism, substantially as described, for each bedplate, each of said power-imparting mechanisms abutting at its rear end against the frame, whereby connections between the bedplates interfering with the removal of the cylinder may be dispensed with."

The power-imparting mechanism for the bedplates of the machine used by defendants is connected by a screw between the nuts at the ends of the short arms, and a toggle joint between the long arms, of the levers. If the screw or the toggle joints should break or be removed, it would not work at all, or, if the toggle joints should be disconnected on either side, it is not adapted to work on the other, and is not shown to have been used so. The strain of the mechanism is not borne at all by the frame, but by the screw; and the mechanism rather holds itself together, than abuts against anything; but, if anything on each side, it is the nut on the screw, or, if all together, it is the screw. Each of these is a part of the mechanism, and not of the frame. As these things are understood, that machine has not power-imparting mechanism adapted to be independent, or so used, nor such mechanism abutting at its rear end, or otherwise, against the frame, nor anything answering these de-

scriptions. Therefore, it does not appear to have the combination of this claim, or in any way to infringe it.

The second claim is for:

"In a rotary cloth-pressing machine, in combination, a cylinder having its bearings in the frame, whereby it is supported independently of the bedplates, and the following parts arranged on two sides of the cylinder, leaving a third side for the lateral removal of the cylinder, viz. two bedplates arranged on opposite sides of the cylinder, and provided with carriages for moving on the slides, and slides in the frame supporting each bedplate, whereby the bedplates may be slid to and from the cylinder, on the frame, without affecting the support of the cylinder, substantially as described."

The only difference between this claim and the third claim of No. 387,292, on its face, is that here the bearings of the cylinder are to support it independently of the bedplate. That patent, however, shows bearings of the cylinder so supporting it, and that difference disappears. The orator could not have a second patent for the same thing. *James v. Campbell*, 104 U. S. 356.

The fourth claim is for:

"In a rotary cloth-pressing machine, in combination, a cylinder, means for driving the same, and means for supporting the same independently of the bedplate, two bedplates, one arranged on each side of the cylinder, and supporting and power-imparting mechanism, whereby the bedplates are supported and actuated, said supporting and power-imparting mechanism being arranged wholly out of the path of removal of the cylinder, whereby the cylinder may be removed without either dismounting the bedplates or disconnecting their actuating mechanism, substantially as described."

The power-imparting mechanism of this claim seems to be required to be so arranged that the cylinder can be removed without disconnecting it. This mechanism of the machine used by the defendants does not appear to be so arranged for use, or so used, and it does not appear to have the combination of, or to infringe, this claim.

The eleventh and twelfth claims are for combinations of the parts of those mentioned and some others; and, in the eleventh, "all said parts being arranged on two sides of the cylinder, whereby the cylinder may be removed laterally to a third side"; and, in the twelfth, all being arranged on three sides of the axial line of the cylinder, whereby it "may be removed laterally to the fourth side." The arrangement of these parts in the machine used by the defendants does not appear to answer this description as to the removal of the cylinder, and therefore the machine does not appear to infringe these claims.

The thirteenth and fourteenth claims are for combinations including "an actuating mechanism interposed between each bedplate, and stops on the frame." As shown with reference to the first claim, the machine used by the defendants does not have such actuating mechanism so interposed, and so does not appear to have the combination of, or to infringe, either of these claims.

The fifteenth and sixteenth claims are for combinations of such parts like those of the fourth, arranged so that the cylinder may be removed. The machine used by the defendants does not more appear to infringe these claims than that.

Upon these conclusions, the orator appears to be entitled, in this case, to a decree establishing the validity of claims 3 and 10 of No. 387,292, and claim 2 of No. 387,297, and to no more. This may not cover all that he invented which the defendants use; but infringement cannot be safely determined, by comparing a patented machine with an infringing machine, without comparing the infringing machine with the claims of the patents. When the machine used by the defendants is compared with the claims, this seems to cover all that the orator invented and claimed in these patents, which the defendants use; and the patents cannot be extended beyond the bounds of the claims to cover anything outside, however meritoriously it may have been invented. Decree for orator on claims 3 and 10 of No. 387,292, and 2 of No. 386,297.

On Rehearing.

(May 22, 1894.)

WHEELER, District Judge. This cause has been further heard upon a petition for rehearing as to the validity of claim 2 of the patent No. 424,971, as compared with claim 3 of No. 387,292, and for a decree that it is valid, upon the filing of a disclaimer limiting it to a combination with guide ways always supporting the bedplates; and for a rehearing as to the infringement of claims 11, 12, 13, and 14 of that patent, and also claim 16 of No. 469,372 by the toggle mechanism moving the bedplates of the defendant's machine.

The guide ways of claim 3 of No. 387,292 would always support the bedplates if the latter were located one on each side of, and horizontally, or nearly so, with, the cylinder, as in 424,971, instead of vertically above and below it. Nothing in the claim itself requires them to be located vertically, and the specification merely says, as to this, at line 84, that they "are preferably arranged one above and the other below the cylinder, as shown in the drawings." The bedplates and cylinder operate in respect to each other precisely the same in either way; and the guide ways guide the bedplates to and from the cylinder in the same manner, but supporting their weight wholly or in part when they are horizontal to the cylinder, or nearly so, and without supporting it when they are vertical. The guide ways, as supports to the cylinder, do not appear to constitute any material part of the invention of claim 2 of 424,971. These claims, as again compared, therefore, appear to be for combinations of the same elements operating in substantially the same way in respect to each other, although they are operated by different means, not the subject of this, but of other claims. This seems to be fatal to the validity of this claim 2 as it is, and would seem to be equally so if the claim should be limited by disclaimer as proposed. *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310.

Each toggle mechanism of each bedplate of the machines of the plaintiff's patents abuts against what is sometimes called

a "bracket," and sometimes a "stop," on each side of each frame, for support of the pressure by the toggle mechanism against the bedplates. The toggle mechanism of the bedplates of the defendants' machine opposite to each other, as before described, abut against each other for support in operating between the long arms of two levers moving them, and thereby the short arms, carrying the bedplates to and from the cylinder. A stud on the frame steadies the action of the mechanism, producing simultaneous movement on each side, which friction or other slight obstruction might prevent; but this stud does not appear to take the place of the bracket or stop of the patent in supporting the pressure of the bedplate against the cylinder, but rather that of the sprocket wheel and chain of the patent, which produce simultaneousness in movement of the bedplates. This re-examination of these parts of the case leads to the same conclusions reached before, and leaves no ground for granting the motion, which must therefore be denied. Motion denied.

GESSNER v. GLOBE WOOLEN CO. et al.

(Circuit Court, N. D. New York. September 6, 1894.)

No. 6,266.

This was a suit in equity by David Gessner against the Globe Woolen Company and others for infringement of certain patents issued to complainant for improvements in cloth-pressing machines. The patents and claims in controversy were as follows: No. 387,292, claims 3 and 10; No. 387,297, claim 2; No. 469,372, claims 1 and 3.

Livingston Gifford and J. T. A. Doolittle, for complainant.
Causten Browne, for defendants.

COXE, District Judge. The patents, upon which this action is based, have all been adjudicated, and the claims relied on sustained in suits brought by the complainant against Phillips et al. in the southern district of New York, 63 Fed. 954. A machine similar in all respects to the machine now sought to be enjoined was in evidence in that litigation, but there is a disagreement between counsel as to whether or not the court held it to be an infringement. All other questions are res judicata. Assuming that the question of infringement, as to some of the claims, is still open, I am of the opinion that the decision in Gessner v. Phillips is broad enough to cover the present structure. A holding that the defendants' machine infringes follows as a necessary deduction from that decision. The changes introduced since the commencement of that action are of form and not of substance. Concededly the defendants' machine produces no new result. It operates on the same principle and, substantially, in the same way. The third claim of No. 387,292 certainly covers the defendants' machine. The construction asked for by the defendants is narrower than the construction already placed upon the claim and is not required by anything in the patent or in the prior art. There may, perhaps, be sufficient doubt regarding the infringement of the tenth claim of this patent to justify the court in withholding the injunction at present. Should occasion arise the motion may be renewed as to this claim. It follows that an injunction should issue restraining the infringement of the third claim of No. 387,292, the second claim of No. 387,297 and the first and third claims of No. 469,372.

v. 63F.no.7—61

**WESTINGHOUSE AIR-BRAKE CO. v. NEW YORK AIR-BRAKE CO.
et al.**

WESTINGHOUSE et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. October 15, 1894.)

Nos. 4,976, 4,977, and 5,315.

1. PATENTS—AIR BRAKES—CONSTRUCTION—PIONEER INVENTION—INFRINGEMENT.

The improvement in quick-acting automatic air brakes, consisting of a supplemental chamber having direct connections to the brake cylinder and brake pipe, with a valve controlling communication between these connections, and an emergency piston independent of and unconnected with the triple-valve piston, and actuated by pressure from the auxiliary reservoir in a direction to impart opening movement to the valve, for which a patent (No. 376,837) was granted to George Westinghouse, Jr., January 24, 1888, by which the problem of immediate stoppage of long trains of cars in time of danger was successfully solved, after many years' experiments, is to be liberally construed, as a pioneer invention; and its claims will not be limited to the precise mechanical means described in the specification by which the supplementary piston is actuated, but compel it to be disconnected with and to be independent of the triple-valve piston, and to be actuated from an auxiliary reservoir by some means equivalent to the means described in the specification; and, as thus construed, the patent is infringed by defendants' device of a supplementary chamber, whose piston is actuated by different mechanical means.

2. SAME—ANTICIPATION.

The Westinghouse patent, No. 448,827, for a valve controlling communication between a supply passage from the train pipe and a delivery passage to the open air or a brake cylinder, etc., whose distinctive feature is that the emergency valve is actuated to open the exhaust port "independently of the action of the triple-valve device," is invalid, as covered by the broad claims of patent No. 376,837.

3. SAME—CONSTRUCTION—SUBORDINATE PATENT.

Patent No. 393,784, to Harvey S. Park, granted December 4, 1888, which merely substituted train-pipe pressure to move the emergency valve in the supplementary chamber for the auxiliary reservoir pressure which Westinghouse used, being a subordinate patent, will not be so construed as to include the various devices which may actuate an emergency valve in a supplemental chamber by train-pipe pressure, and is not infringed by a device in which the valve is not held to its seat and not restored to its place by the piston, as in the patented device.

4. SAME—INFRINGEMENT.

A claim in an air-brake patent (No. 172,064) for a combination containing a port through the center of the piston, described as substituted for a side port, with which the patent dispenses, is not infringed by defendants' device, having no such center port, but using a side port in combination with different elements, which are admitted by the patent to be a part of the prior art.

5. SAME—PIONEER INVENTION—MECHANICAL EQUIVALENTS.

The Westinghouse invention (patent No. 222,803), to be used in connection with an air brake, consisting of an engineer's valve, which, by the movements of a single stem or lever, should admit, and automatically stop admitting, fluid pressure to the brake pipes, by means of a charging valve, automatically retain such pressure, and permit its escape by an exhaust valve, with means of automatically closing either valve when the desired pressure has been charged into or withdrawn from the train pipe to which the device was connected, being construed as a pioneer invention, is infringed by defendants' device,

the only difference in which is the substitution for the direct action of the piston through the interposed stem in opening the valve, as used in the patented device, of the action of a bell-crank lever, pin, and lever.

8. SAME—ANTICIPATION.

Such patent (No. 222,803) was not anticipated by the Westinghouse patent, No. 128,015, or by the Fay & Cairns patent, No. 141,685, for an apparatus for regulating the flow of water in houses, and shutting it off when there is an excess of pressure.

These were suits by the Westinghouse Air-Brake Company against the New York Air-Brake Company and others, and by George Westinghouse, Jr., and the Westinghouse Air-Brake Company against the New York Air-Brake Company and others, for the infringement of certain patents for improvements in railroad brakes. The bills were dismissed as to some of the patents, and decrees granted as to certain specific claims in the rest of the patents. 59 Fed. 581. Complainants and defendants respectively appeal from these decrees.

George H. Christy, Frederic H. Betts, and J. Snowden Bell, for complainants.

J. E. Maynadier, Fred'k P. Fish, Esek Cowen, and Edward C. James, for defendants.

Before WALLACE, LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The various appeals in these three cases are from decrees of the circuit court for the southern district of New York upon three bills in equity for the alleged infringement of letters patent. No. 4,977 was founded upon letters patent No. 376,837, dated January 24, 1888, and letters patent No. 172,064, dated February 11, 1876, each issued to George Westinghouse, Jr. The circuit court decreed that the defendants should be enjoined against their infringement of the first, second, and third claims of No. 376,837, and that the bill should be dismissed as to No. 172,064. No. 5,315 was founded upon letters patent No. 448,827 to George Westinghouse, Jr., dated March 24, 1891. The circuit court decreed that the defendants should be enjoined against the infringement of the first and second claims of this patent. No. 4,976 was founded upon letters patent No. 393,784, dated December 4, 1888, to Harvey S. Park, and No. 222,803, dated December 23, 1879, to George Westinghouse, Jr. The circuit court dismissed the bill as to No. 393,784, and decreed that an injunction should issue against the infringement by the defendants of the second, third, and fourth claims of No. 222,803. The complainants and defendants have respectively appealed from the decrees which were respectively adverse to them.

These patents are for improvements in railroad brakes by fluid pressure, and will be better understood if they are considered in the order of their relation to each other, rather than as they are grouped in the bills in equity; and therefore Nos. 376,837 and 448,827, which was originally applied for in the application which resulted in No. 376,837, naturally take precedence. It is necessary to give the history of the development by the patentee of the au-

tomatic, "Quick-Action" air-brake system, because the construction of the important claims of the two patents now under consideration, and of the patent to Park (No. 393,784), depends, to a great degree, upon a knowledge of this history, which was accurately condensed by Judge Townsend, as follows:

"The first practical air brake is known as the 'plain brake,' and is described in patent No. 88,929, granted to George Westinghouse, Jr., April 13, 1869. It consisted of a pump operated by steam from the locomotive boiler, which compressed air into a reservoir located under the locomotive cab, which reservoir communicated by a pipe with a cock or valve in said cab, called the 'engineer's valve,' which was so located as to be readily manipulated by the engineer. From this valve a pipe extended back under the tender, and was connected to a similar pipe under the entire length of the first car by a flexible hose. Each of the succeeding cars had a similar pipe, similarly connected. This pipe was called the 'train pipe.' From the train pipe of each car a branch pipe communicated with the forward end of a cylinder called the 'brake cylinder.' This cylinder was provided with a piston, the stem of which was connected with the brake levers on the car. When the engineer wished to apply the brakes, he opened the engineer's valve, and the compressed air from the main reservoir flowed back through the train pipe and branch pipes into the brake cylinder on each car, pushing the pistons backward, causing the piston stems to operate the brake levers, and force the brake shoes against the wheels. When he wished to release the brakes, he so shifted the valve as to shut off the flow of compressed air from the main reservoir, and to open a port or vent leading from the train pipe to the open air. Thereupon, the compressed air in the brake cylinders escaped into the open air, the pressure of the pistons was removed, and the pistons were forced forward again by means of springs, thus moving the brake shoes away from the wheels. The validity of this patent was sustained in *Westinghouse v. Air-Brake Co.*, 9 O. G. 538, Fed. Cas. No. 17,450. The operation of this plain brake was open to certain objections. It was too slow, and was attended by danger of collision in case one part of the train became detached from the other part.

"The next brake to be considered is known as the 'automatic brake,' which appears to have been patented by George Westinghouse, Jr., about 1872 or 1873. It embodied the addition of an auxiliary reservoir and a triple-valve device to each car. Each reservoir was of sufficient capacity to operate its brakes once, thus to provide for automatic action in case of accident. The triple-valve device was located at the junction of connections between pipes leading to the train pipes, the brake cylinder, and the auxiliary reservoir. In addition to these three ports, there was a fourth port leading to the open air. The operation of this brake was radically different from that of the plain brake. In the former, the compressed air was stored in the main reservoir until required for the application of brakes; in the latter, the main and auxiliary reservoirs and train pipe were always charged with compressed air at working pressure, to prevent the application of the brakes. When the engineer wished to apply the automatic brake, he shifted the engineer's valve so as to cut off the flow of compressed air from the main reservoir, and open a port from the train pipe to the open air. The effect of this was to reduce the air pressure in the train pipe, and cause a back pressure from each auxiliary reservoir through the triple valve, which shifted it so as to close the port from the branch pipe to the train pipe, and stop the escape of air from the auxiliary reservoir, to close the port leading from the brake cylinder to the open air, and to open the port leading from the auxiliary reservoir, and connect it with the port leading to the brake cylinder. Thereupon, the compressed air in the auxiliary reservoir flowed into the brake cylinder, and applied the brakes. It will thus be seen that, while the former system was operated by pressure from the main reservoir, the

latter was operated by withdrawal of pressure. The result was automatic action in case of accidents, whereby air was caused to escape from the train pipe, as by bursting of hose, or the train breaking in two. In such cases the release of pressure operated the triple valve, and automatically applied the brakes. It is necessary here to consider 'train-brake graduation' or 'service stops,' as distinguished from 'emergency stops.' While, for the latter, it may be necessary to admit to the brake cylinder the full pressure of compressed air, say seventy or eighty pounds, yet, where it is desired merely to slow up without stopping, it may be necessary to admit only, say, ten or twenty pounds, graduating the amount of flow according to the character of service desired. It is important to bear this distinction in mind, because the appliances hereafter to be considered have been so devised as to provide therefor, and that such graduation shall be under the control of the engineer.

"The chief objection to this automatic brake lay in the fact that it was not capable of successful operation on long trains of freight cars. The time consumed by the progressive operation of the brakes between the grip on the first and last car allowed of so much slack motion between them as to cause violent shocks. This automatic brake was publicly tested near Burlington, Iowa, in 1886. The growing importance of the subject of automatic freight graduation, the inadequacy of existing systems to protect the lives of railroad employes, and the disastrous results therefrom, had become so evident that in 1885 the Railway Master Car-Builders' Association arranged for a series of experiments known as the 'Burlington trials.' The Westinghouse Company, and several other companies engaged in the manufacture of brake apparatus, competed at these trials. None of the competitors succeeded in stopping long trains of freight cars without violent and disastrous shocks. In 1887 the trials were renewed. There were five competing parties, including one of the leading experts for the defendants and the complainant company. The latter then presented an improved apparatus covered by patent No. 360,070, granted to George Westinghouse, Jr., March 29, 1887. The report of the committee of the Car-Builders' Association shows that they considered 'the field for improvement open as wide as in 1886,' and concluded that air brakes actuated by electricity were the only ones likely to be capable of successful operation on long trains of freight cars. The improved Westinghouse apparatus, while it reduced the length of time between the application of the first and last brakes, produced greater shocks than did the automatic apparatus of the preceding year. In this condition of affairs, George Westinghouse, Jr., set himself to work to obviate these difficulties. Upon the conclusion of the 1887 trials, he renewed his investigations and experiments, and by certain changes and improvements in the old apparatus, and the introduction of new elements, he succeeded in the latter part of the year 1887 in constructing a quick-action automatic brake, capable of being successfully applied to a train of fifty freight cars, and operative under all conditions of practical railway service. On October 1, 1887, he applied for a patent for this apparatus, and on January 24, 1888, the patent was granted. Said patent, No. 376,837, is the first of the patents in suit. Before proceeding to consider in detail the claims of this patent, it should be stated that the following were among the requirements for the practical operation of air brakes: (1) The regulation of the force to be applied to the brake shoes so as to secure all necessary graduations, from the mere slackening of speed to the service stop, and from the service stop to the emergency stop. (2) The automatic operation of the brakes in case of accident. (3) The practically simultaneous operation of the brakes on each car, so that, in long trains of freight cars, shocks might be avoided. (4) The control of all these operations by the engineer. (5) Certainty of operation under all conditions."

The automatic brake system constructed in general accordance with the invention described in No. 376,837 complies with all these

essential conditions. It was unquestionably the first system which practically solved the problem of immediate stoppage of a long freight train in time of danger, in connection with and supplemental to "train-brake graduation," and so promptly was its success recognized that 125,000 of this kind of brakes were bought and used by the railroad companies of this country within a period of little more than three years. It is therefore important to understand the nature of the improvement which created success. The promptness with which an automatic air-brake system could be made effectual depended upon the promptness with which air pressure in the train pipe could be reduced, and the equalization of pressure could be changed. Before the series of inventions originated by the Burlington trials, this reduction had been effected in passenger trains of ordinary length by "venting" the train pipe, or opening a port from the train pipe to the open air, which was initiated by a turn of the engineer's valve on the locomotive. Westinghouse, in his attempt to create efficient and immediate service upon each car of a long train, enlarged the venting system, so that, when the reduction of train-pipe pressure had commenced by the turn of the engineer's valve, the triple valve under each car should also vent the train pipe of that car. Each car therefore contained its own venting mechanism, and, as the mechanism did its work upon its own car, it hastened the work upon the car next in the rear. Westinghouse also sought to save and did save power by compelling the compressed air thus vented to pass into the brake cylinder, instead of into the open air. But sudden and large reduction of pressure is only to be used in a case of emergency, and therefore means for such reduction must be made supplementary to the means for the ordinary service of the brakes, so that ordinary and extraordinary use of the brakes can each be made available as necessity arises. The method in No. 360,070 was to make the ordinary range of motion of the triple-valve piston, which was produced by a reduction of train-pipe pressure of a few pounds, do the ordinary work of "braking" a train, and to make an extraordinary range of motion throughout the entire length of its capacity for travel, which was produced by a reduction of 15 or 20 pounds, do the extraordinary work which gave to the brake the name of "quick action." When the piston of the triple valve moved through the entire length which it could travel, the stem of the piston came in contact with the stem of the emergency valve, opened it, which uncovered a port, and thereby the train-pipe pressure was vented into the brake cylinder. The claims of the patent call the first or ordinary range of motion of the piston "a preliminary traverse," which admits air from the auxiliary reservoir to the brake cylinder, and the second range of motion "a further traverse," which enables the piston to admit air directly from the main pipe to the brake cylinder. This invention, palpably and confessedly, lacked success in the Burlington trials. The reason of its failure, and its remedy in No. 376,837, are described by Mr. Massey, a competent expert for the defendants and the patentee of the infringing valve, whose

testimony upon this subject is admitted to be correct. He said, upon direct examination, in reply to the question:

"What is the practical objection, if any, to the quick-action triple valve of 360,070, and how is that remedied by the apparatus of 376,837? Before answering, state what is meant by the 'Westinghouse Quick-Action Automatic Brake.' Ans. The term 'Westinghouse Quick-Action Automatic Brake,' as used by Mr. Stone, undoubtedly refers to the quick-action triple valve described in patent 376,837, and illustrated on sheet 2 of that patent. It is also the quick-action triple valve which is illustrated in the Westinghouse catalogue of 1890. In the quick-action triple valve described in 360,070, in addition to the triple valve, the stem of the piston came in contact with an emergency valve, and the extreme motion of the triple-valve piston caused the emergency valve to open a small passage between the train pipe and the brake cylinder; thus causing a local exhaust of the air from the train pipe, and therefore reducing the pressure in the train pipe quicker than would be done by the vent through the engineer's valve. The port which was opened by the emergency valve was necessarily restricted in size, as, in order to be effective, the piston of the triple valve must be able to open it within a moderate reduction of train-pipe pressure, and therefore with but little force in addition to that consumed by the piston in moving the ordinary triple-valve mechanism. If the emergency valve had been arranged to open a very large port, the time required to exhaust the train pipe through the engineer's valve sufficiently to allow the piston to open the emergency valve would be materially increased. This defect in the emergency valve of 360,070 would not be serious in trains of moderate length, as under, say, twenty-five cars; but in the 50-car train used at Burlington in May, 1887, the effect was disastrous. This defect is remedied in 376,837 by using a supplemental piston to open the emergency valve, and actuating that piston by fluid pressure from the reservoir through a passage controlled by a valve which is actuated by the triple-valve piston. In this case the triple-valve piston has only to open a comparatively small port in addition to its regular function, and fluid pressure in the auxiliary reservoir then causes the supplemental piston to open the emergency valve. The length of time required, in the use of the single valve of patent No. 360,070, to open a sufficiently large port, above referred to, appears to have been in the mind of Westinghouse, in providing a separate piston of the patent in suit to open the emergency valve, for in the description of this improved invention, it will be remembered, he states that 'its object is to facilitate the application of brakes with great rapidity, and full, or approximately full, force, as from time to time required, by the provision of means whereby the admission of air from the brake pipe to the brake cylinders may be effected as directly as practicable, and through passages of as large capacity as may be desired.'"

No. 376,837 abandoned reliance upon the piston of the triple valve as the means of opening the emergency valve, and used a supplementary piston, contained in a supplementary chamber, and actuated by pressure from the auxiliary reservoir. The port through which, when uncovered, this pressure passes, is, in the mechanism shown in the specification, uncovered by the excess stroke of the triple-valve piston. The description of the mechanism, which is contained in the next paragraph, is in the language of the opinion in the circuit court; and, inasmuch as the intricate mechanisms of the various devices which are the subject of discussion in the three cases now grouped together were accurately described by Judge Townsend, his language will be used, instead of attempting to formulate independent descriptions of the same series of devices:

"This emergency action is secured, in the patent in suit, by means of a separate, supplemental piston and valve, in a supplemental valve cham-

ber, below the main slide valve of the triple-valve device. This chamber connects the train pipe with the brake cylinder, communication between them being regulated by the supplemental valve, opening outwardly, or downwards, and a check valve opening inwardly, or upwards. These valves are held upon the seats, under ordinary conditions, by a spring bearing upon their stems. In the bushing which forms the valve face of the main slide valve are four ports, governed by said slide valve. One of these ports leads to the brake cylinder, two lead to the supplemental valve chamber on the upper or inner side of the supplemental piston, and one leads to an exhaust port. When an emergency stop is to be made, the engineer throws his engineer's valve wide open, thereby causing a sudden and material reduction of pressure. The excess of auxiliary reservoir pressure then forces the main piston stem against said other stem, overcoming the tension of its spring, drives the main piston to the extreme limit of its stroke, and thereby uncovers the ports leading from the auxiliary reservoir to the supplemental valve chamber. This pressure drives the supplemental piston outwardly, or downwards, against the stem of the supplemental valve, and forces it from its seat. Thereupon, the preponderance of train-pipe pressure in the brake pipe opens the check valve, and the air from the train pipe rushes directly from the brake pipe to the brake cylinder. The result of this operation is twofold: It hastens the application of the brakes on the car on which it is operated, and by venting the train pipe it hastens a similar reduction of pressure and consequent similar operation in the next succeeding triple-valve device on the next car. The release of the brakes is accomplished by the admission of air from the main reservoir."

The three claims which were found to have been infringed are as follows:

"(1) In a brake mechanism, the combination of a chamber or casing, having direct connection to a brake cylinder and to a brake pipe, respectively, a valve controlling communication between said connections, and a piston or diaphragm which is independent of and unconnected with a triple-valve piston, and is actuated by pressure from an auxiliary reservoir in direction to impart opening movement to said valve, substantially as set forth. (2) The second claim includes a check or nonreturn valve controlling communication between said valve and the brake-pipe passage of the chamber, substantially as set forth. (3) In a brake mechanism, the combination with a triple valve of a supplemental chamber or casing having passages leading to a brake cylinder and to a brake pipe, respectively, a supplemental piston operating independently of the triple-valve piston, and adapted to impart opening movement to said supplemental valve, and a passage establishing communication between said supplemental piston and an auxiliary reservoir, substantially as set forth."

The vital parts of this mechanism are the supplemental chamber having direct connections to the brake cylinder and the brake pipe; the valve, 41, which controls communication between these connections; the emergency piston, 63, independent and unconnected with the triple-valve piston, and actuated by pressure from the auxiliary reservoir in a direction to impart opening movement to the valve. To these essential parts the defendants would add another,—the particular means by which, in the specification, the emergency piston is actuated,—viz. the excess stroke of the triple-valve piston, which uncovers the port, 61, through which the auxiliary reservoir pressure passes. Upon the scope of the invention the question of infringement depends. The defendants insist that the only invention "resides in the use of an emergency piston, which is open to the exhaust port on one side, and to the brake cylinder on the other side, and which is not subject to operative pressure from the reservoir

except by the extreme stroke of the triple-valve piston." The assignments of error are confined to this question, and the consequent construction of the first three claims, and to the question of infringement. The defendants' theory mistakes the character and scope of the invention, which was another and successful way to accomplish the work designed to be accomplished by No. 360,070, and to be effected upon the same general plan of instantaneous brake-pipe venting, by the new means contained in the supplemental chamber, which have been named. In No. 360,070 the stem of the triple-valve piston directly engaged with the stem of the emergency valve, and consequently its action directly depended upon the movement of the piston. The invention in 376,837 radically departed from this method of actuating the emergency devices, by making a new piston, independent of and unconnected with the triple-valve piston. It was to be actuated by auxiliary reservoir pressure, but the particular means by which this pressure was to be permitted to exert itself, whether continuously, or only when a port should be opened, do not constitute an essential part of the invention. Means must necessarily be shown in the specification, but the identical means or the special devices were not, in the language of *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, "necessary constituents" of the invention, either in the specification or in the claim. The skill and mechanical ingenuity of constructors of locomotives can, as will be seen hereafter, in the examination of other patents and of the infringing devices, arrange different details of mechanical construction, by means of pistons, valves, ports, and springs, which, adopting the supplemental chamber system, first conceived and embodied by the patentee, and a kindred, but not precisely the same, mechanical method for the movement of the piston, will accomplish the same result. The patentee was a pioneer, in that he designed, in No. 376,837, a new way to accomplish a desired result, but upon the same general idea which he had unsuccessfully tried to work out in the earlier patent. His later patent was the bridge, and not a mere step, which carried railroad car builders from failure to success. It is not important now to determine the grade of its pioneer-ship, and whether it may be classed in the list of those inventions which are of the highest rank; but it was an invention created to achieve great necessities, and overcome great hindrances, and was one of wide breadth. A court would not be justified in adopting "a narrow or astute construction," which should minimize the character of the invention, leave its real scope open to trespassers, and thus "be fatal to the grant." The claims of the patent do not contract the grant to narrower limits than those which the invention, as made by the patentee, actually covered; and the claims, therefore, are not limited to the precise mechanical means described in the specification, by which the supplementary piston is actuated. They compel it to be disconnected with and to be independent of a triple-valve piston, and to be actuated by pressure from an auxiliary reservoir by some means equivalent to the means which are described in the specification. The rule which permits, and indeed compels, courts to give a wide range to the equivalents which a

broad or pioneer patent can include, is thus expressed in *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310: "If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions."

The defendants use two forms of devices, known respectively in the case as "Defendants' Quick-Action Triple Valve," and "Defendants' Modified Quick-Action Triple Valve." Each has the supplementary chamber, with its contents, and in each the various elements conform to the general phraseology of the claims; but in neither does the movement of an emergency piston have any relation to the extreme movement of the triple-valve piston, and herein is contained what is claimed to be the essential difference between the patented device and the defendants' valves. In the defendants' modified valve, the pressure upon opposite sides of the emergency piston, numbered 13, which corresponds in function with emergency piston, 63, of the patent, is always counterbalanced when quick action is not desired, whereas emergency piston, 63, of the Westinghouse valve, is not subjected to auxiliary pressure until its action is required, when port, 61, is uncovered. In the defendants' modified valve, train-pipe pressure is reduced when quick action is wanted; the auxiliary reservoir pressure becomes controlling, forces down emergency valve, 20, which corresponds in function with the Westinghouse emergency valve, 41, and which, when unseated, opens direct communication between the train pipe and the brake cylinder. This difference between the means which are used to actuate the pistons is not of patentable importance. The operative features of the invention which are described in the three claims are the same, whether auxiliary pressure is permitted to exert itself continuously or intermittently when a port is opened. The defendants' earlier device uses two pistons. The first, No. 13, is forced down by auxiliary reservoir pressure, but does not act directly upon the emergency valve. When forced down, "it opens a port, whereby train pressure is admitted to the upper side of the other piston, No. 17, which, being thereby forced down, imparts opening movement to an emergency valve leading to the brake cylinder." It is true that piston, 13, which is the one actuated by auxiliary reservoir pressure, does not, directly and of itself, impart opening movement to the emergency valve, but uncovers a port which admits train-pipe pressure to the brake cylinder; and it is true that piston, No. 17, is actuated by the train-pipe pressure thus admitted. These two pistons do the work of the one piston of the defendants' modified valve. Auxiliary reservoir pressure moves the piston, which, through the intervention of piston, 17, imparts opening movement to the emergency valve. Mr. Massey states the difference between the two valves of the defendant to be that in the "quick-action triple valve the initially operating piston, 13, actuates the emergency valve indirectly,—that is to say, through the intermediation of the piston, 17,—while in the other valve the initially operating piston, 13, actuates the emergency valve directly, as in patent 376,837." This is not a material difference, of a patentable character, when

considered with reference to this patent, and the result is that each of the defendants' valves is an infringement. The quick-action valve infringes the first three claims, while the second form, not having the additional check valve of the second claim, infringes the first and third claims.

No. 448,827 will next be considered. The form of automatic air-brake apparatus shown in this patent was originally included in the application for No. 376,837, which also included the form which has been already described, in which port, 61, was uncovered by the excess stroke of the triple-valve piston. But the applicant was precluded by a rule of the patent office from adding to his generic claims a specific claim for the form which is now described in No. 448,827, and therefore a subordinate patent was applied for. The details of the device are described by Judge Townsend as follows:

"The alleged invention consists of a valve controlling communication between a supply passage from the train pipe and a delivery passage to the open air or a brake cylinder. This valve is held in position by a spring, so as to close ports leading to the delivery passage, and not to be moved from its seat by ordinary reductions of pressure for service stops. There is also a diaphragm and valve stem interposed between the supply passage and a passage to a special reservoir, or an auxiliary reservoir. Said controlling valve is connected to said valve stem. Train-pipe pressure passes through a small passage in said diaphragm into said reservoir, thus equalizing pressure on the opposite sides of said diaphragm. Upon a sudden reduction of pressure, sufficient for an emergency stop, the excess pressure on one side of said diaphragm moves it and its valve stem and the said controlling valve downwardly, so as to open said ports, and allow the compressed air to pass through the delivery passage to the open air or brake cylinder."

The two claims of the patent which are said to have been infringed by the defendants' two valves which have been before described are as follows:

"(1) In a fluid-pressure brake apparatus, normally operated by a triple-valve device, the combination with such an apparatus of a valvular appliance having a casing provided with supply and discharge passages or connections, and a valve controlling an exhaust port from the supply passage to the discharge passage for quickly releasing pressure in the supply passage, said valve being actuated to open the exhaust port by a greater than normal reduction of pressure in the supply passage independently of the action of the triple-valve device, substantially as set forth. (2) The combination with a triple-valve mechanism of a discharge valve controlling an exhaust port from a supply passage to a discharge passage for quickly releasing the pressure in the supply passage, said valve being actuated to open the exhaust port by fluid pressure in an auxiliary reservoir on reduction of pressure in the supply passage below the normal degree, in whatever position the slide valve of the triple-valve mechanism may be brought by such reduction, substantially as set forth."

Infringement of these claims is admitted, and the only question is in regard to their validity. The distinctive feature of the alleged invention is that the emergency valve is actuated to open the exhaust port "independently of the action of the triple-valve device." The theory of the complainants is that, whereas the leading characteristic of novelty in patent No. 376,837 is the "utilization of auxiliary reservoir pressure operating a supplemental piston in proper direc-

tions to impart opening movement to the emergency valve," the invention of No. 448,827 was the means of imparting movement to the valve by "auxiliary pressure, so applied that the action or nonaction of the triple-valve piston shall be eliminated as an element of control," and that its distinctive feature was "the removal from the apparatus of all obstructive mechanical connection between the triple piston and emergency valve, whereby the latter may be impeded in its movements by the former." This theory omits an important characteristic of the novelty of No. 376,837, which is the independency and disconnection of the supplemental piston from the triple-valve piston. In the form left in the application for the patent, after the divisional application was made, there was no mechanical connection between the two pistons; but the stroke of the triple-valve piston exercised a control over the movement of the supplemental piston, by uncovering the port which admitted auxiliary reservoir pressure. The form in 448,827 permits, as do the defendants' valves, auxiliary reservoir pressure to be present at all times, and to act upon the piston, but counterbalanced during ordinary service stops. It was included in the generic claims of No. 376,837, and, in view of those claims, no invention could consist in the mere fact of the elimination of the action of the triple-valve piston as an element of control. When the patentee obtained the broad claims of No. 376,837, he exhausted his powers to obtain additional patents for mere modifications of means by which the piston should be made independent of the triple-valve piston, unless the modification contained a patentable improvement upon the form disclosed in that patent. For any new and useful improvement which contained also the element of invention, or for a separate invention, a subordinate patent could be obtained. Were the changes made in 448,827, after the idea of 376,837 had been embodied in its original form, the work of invention? So far as the first two claims are concerned, the changes consisted in a port from the auxiliary reservoir to one side of the emergency piston, which port was always open, and the counterbalance to reservoir pressure by a spring on the opposite side of the piston, so that ordinary variations of pressure would not destroy the equilibrium necessary to be maintained until excessive reduction of pressure should take place. In view of the various forms and modifications and improvements of automatic brakes and brake mechanism which had been made known before the date of this invention, and which are a part of the record in these three cases, there was no patentable invention in this modified form, apart from the invention shown in No. 376,837. It was simply what the patentee first deemed it to be,—a form of the invention of that patent and covered by it. The first two claims of No. 448,827 contain no patentable improvement upon the form specifically described in the claims of its predecessor, and are void. We omit any description of the other grounds upon which the invalidity of these claims is placed by the defendants.

No. 393,784: This patent is subordinate to 376,837. The device which it describes has the supplemental chamber, with the emergency piston and valve, and the important elements of the Westing-

house patent, except that the emergency valve is moved by train-pipe pressure, instead of by auxiliary reservoir pressure.

"This result was accomplished by providing a separate emergency piston and valve, ordinarily exposed to train-pipe pressure above said piston, which pressure served to hold the valve on its seat, and was not affected by ordinary reductions of pressure for service stops. But the considerable reduction of pressure necessary for an emergency stop carried air from the train pipe to be vented into the space below said piston, equalizing the pressure on both sides, and acting on the under side of said valve, causing it to be unseated, and to thus allow the train-pipe pressure to be vented directly into the brake-pipe cylinder."

The claims said to be infringed are as follows:

"(1) In a brake mechanism, the combination of a valve controlling the direct passage of pressure from a train-pipe to a brake cylinder, a piston connected to said valve and actuated wholly by train-pipe pressure, and a valve controlling the train-pipe pressure on the piston for opening and closing the communication between a train pipe and a brake cylinder through the direct action of train-pipe pressure, substantially as specified. (2) In a brake mechanism, the combination of a train pipe, a brake cylinder, an interposed chamber communicating with the train pipe and brake cylinder, a piston in said chamber, a piston stem, a valve on the piston stem controlling the passage from the interposed chamber to the brake cylinder, and a controlling valve and passages for the admission of pressure from the train pipe to move the piston and open the valve, substantially as and for the purposes specified."

The emergency piston, 13, in the defendants' modified valve, is actuated wholly by reservoir pressure, and this valve is therefore not claimed to be an infringement. The emergency piston, 13, in defendants' quick-action valve, is forced down by reservoir pressure, but when it is pressed down it causes train-pipe pressure to be admitted, which acts upon and presses down piston, 17, whose spindle presses upon and unseats the emergency valve. Inasmuch as the valve is disconnected from piston, 17, it is returned to its seat when train-pipe pressure is removed from the upper side of the piston, mainly by the elastic force of a spring. This patent is a subordinate one, and must receive a narrow construction. It is not permissible to give to the terms of a patent of that class so wide a sweep as to include the various devices which may actuate an emergency valve in a supplemental chamber by train-pipe pressure, and the range of its monopoly is a limited one. The language of each claim indicates that a connected valve and piston were to be employed, and Parks' method of opening and closing the valve required that they should be mechanically connected. A mechanical connection would not be indispensable, unless there was a necessity for it, or unless a mechanical separation created a difference in the means by which the result was accomplished, which, in view of the narrowness of the invention, was a radical difference. The Park piston holds the valve to its seat, in the normal condition of pressure. It is lifted up when the valve is lifted by train-pipe pressure, and, when extraordinary pressure is removed, it restores the valve to its seat. It does not unseat the valve. The defendants' piston does not hold the valve to its seat, and does not restore it to its place. When train-pipe pressure comes upon the upper side of the piston, and forces it down, it unseats the valve; and after pressure has been removed the spring, as it resumes its shape, returns the valve to its seat. The differ-

ence in the way in which the two pistons accomplish the general result would not be a substantial one in a primary patent. It is substantial with respect to an invention which merely substitutes train-pipe pressure for the auxiliary reservoir pressure which Westinghouse used. The circuit court properly held that neither claim was infringed.

No. 172,064: The invention of this patent was an improvement upon the improvement patented to Mr. Westinghouse by patent No. 168,359, and was a part of the brake apparatus used before the invention of the quick-action brake. It related to the direct admission of air from the brake pipe to the brake cylinder. The defense that the defendants use the original and not the later improvement was satisfactorily sustained. The peculiarity of the patented invention and of the device used by the defendants is shown in Judge Townsend's description, as follows:

"Patent No. 168,359 provides for a piston and slide valve so arranged that air pressure transmitted through the train pipe shall pass on the under side of the piston, and hold it in an upward position, and thence pass through a side port in the piston-valve case, and certain other ports and passages, into the auxiliary reservoir. The effect of this pressure is to hold the slide valve in position above two connected ports,—one leading to the brake cylinder, the other to the open air,—so that any pressure in the brake cylinder will escape to the open air, and the brakes will be off. When the pressure is reduced in order to apply the brakes, the back pressure from the auxiliary reservoir depresses said piston so that it passes down, and closes the supply ports and shifts the slide valve, so as to open the port leading to the brake cylinder, and exposes it to auxiliary reservoir pressure, and so as to close the port leading to the open air. In patent No. 172,064, the inventor dispensed with said side port in the valve case, and substituted therefor a port through the piston itself. The piston was so arranged, in connection with this port, that said port could be opened or closed without moving the slide valve. This was accomplished by having the stem of the piston fitted to the port in the piston, so that it would close the port when moved into it, and open it when removed, and by further providing that the slide valve should be made shorter than the distance between the collars on its stem, thus insuring the necessary slack motion for closing the supply port before the slide valve begins to move. Claim 3 is as follows: '(3) The slide valve, H, made shorter than the distance between its end bearings, in combination with the port, s, and stem, c, relatively arranged with reference to the operation of the valve, H, while the port, s, is closed, substantially as set forth.' Defendants' device, as illustrated by 'Defendants' Plain Triple Valve,' contains the slide valve, made shorter than the distance between its end bearings on the piston stem. It is also provided with two ports, one of which leads from the train pipe through the piston chamber, and by other passages to the auxiliary reservoir. The other port leads from the auxiliary reservoir to the brake cylinder. This port is closed by having the end of the piston stem slide onto it, and cover it, like a valve upon its seat. There is no port through defendants' piston, and consequently no piston stem fitted to enter such port."

The claim is for the valve made shorter than the distance between its bearings with the specified improvements upon 168,359, viz. the air port through the piston, which is opened and closed by the stem. The effect of this arrangement is stated in the specification as follows:

"The port, s, will be closed before the valve, H, begins to move for applying the brakes, and will be kept closed until the valve, H, shall have been brought back to the proper position for a full release of the brakes.

Consequently, the valve, H, can be operated as may be desired in applying and releasing the brakes, and in graduating the brake pressure, without leakage or loss at the air-supply port, s, and with such port always closed."

It is undoubtedly true that the two devices accomplish the same result, and close the supply port before the valve begins to move; but infringement can only be found by giving a construction to the third claim which disregards the fact that No. 172,064 substitutes the air port, s, with its plug, c, for the side port of 168,359. The conclusion which the circuit court reached was the correct one. It was stated as follows:

"Inasmuch as complainants claim a combination which contains a port through the center of a piston, described as substituted for a side port, with which said improvement dispenses, and as defendants' device depends upon the use of a side port, and has no port through the piston, but is made up by a combination of different elements, which are admitted in patent No. 172,064 to be a part of the prior art, the combination claimed in claim 3 of said patent is not infringed. A correct construction of the claim must include the port through the center of the piston, substituted for the side port of patent No. 168,359."

The invention of No. 222,803 was an engineer's valve, which, speaking in very general terms, should by the movements of a single stem or lever, admit, and automatically stop admitting, fluid pressure to the brake pipes, by means of a charging valve, automatically retain such pressure, and permit its escape by an exhaust valve, with means for automatically closing either valve when the desired pressure had been charged into or withdrawn from the train pipe to which the device was connected. The patentee summarized, in his specification, his invention, as follows:

"It will now be seen that I provide for operating both the supply and the exhaust valves by a single stem; that only one can be opened at once; that either may be opened separately (much or little); and that both may be closed simultaneously and automatically, and kept closed, whether the brakes are on or off."

This automatic closing of the charging and exhaust valves was a very important part of the invention. The patented valve, so far as the second, third, and fourth claims are concerned—

"Consists of piston case containing a piston governing a charging valve held up to its seat partly by fluid pressure and partly by a spring, and an escape valve held down to its seat partly by gravity and partly by a preponderance of fluid pressure on its upper end. This governing piston is exposed on its under side to fluid pressure, and on the upper side to pressure from a spring. A screw stem worked by a crank arm is so arranged, in connection with said spring, that by the revolution of the crank arm the downward pressure of said spring upon said piston is increased or lessened. The effect of such change of pressure is to cause the piston to be moved upwards or downwards, according as it is acted upon by an excess of fluid or of spring pressure, and to open or close the charging and escape valves. Beneath the lower end of the escape valve, provision is made for a certain amount of slack motion, so that the governing piston may be moved up or down for a short distance without unseating the escape valve. The effect of this arrangement is to prevent the possibility of both valves being open at the same time. The operation of said apparatus is as follows: In order to apply the brakes or to open the charging valve, the crank arm is screwed down, and this increase of pressure, transmitted through the stem of the piston head to the charging valve, unseats it, and permits fluid pressure to pass from the boiler or storage reservoir to the train pipe and brake cylinders. The fluid pressure

also passes upward to the space below the piston head, and exerts the same pressure upon it as in the train pipe or brake cylinders. The engineer knows, from his engineer's gauge, just how far to screw down his crank, so that when the necessary amount of pressure has passed through to the train pipe or brake cylinder the same pressure will automatically lift the piston and close the charging valve. The crank arm is screwed up in order to open the escape valve, and after the proper amount has been discharged the escape valve automatically closes in the same way as already shown in the case of the charging valve."

The three claims which the circuit court found were infringed are as follows:

"(2) As a means for automatically cutting off the fluid-pressure supply when the desired pressure has been charged into the brake cylinders, a piston head, P, movable by the operative brake pressure or any excess thereof, in combination with the charging valve and a connection from one to the other, substantially as set forth, whereby such movement of the piston head will result in the automatic closing of the charging valve, substantially as set forth. (3) The combination of piston head, charging valve, interposed stem, and escape valve, substantially as set forth with reference to the opening and closing of the charging valve, without necessarily opening the escape valve, substantially as set forth. (4) The combination of piston head, charging valve, interposed stem, escape valve, and a single operating stem, adapted by independent connections with both valves to shift both by independent, successive motions, substantially as set forth."

The defendants' valve has a single lever, which is moved from side to side by a single handle having a reciprocating motion. The valve has also a piston exposed to fluid pressure on both sides, which controls a charging and an escape valve, which performs the same functions as in the patented valve.

"The main lever, which is fastened to said handle, carries an eccentric pin, which passes through said lever, and which moves in the arc of a circle. The right end of the lever is held stationary by a jaw and fulcrum pin; the left end, when said handle is moved to the right, is lifted by the rock-shaft motion imparted by said pin, and strikes against another pin attached to the escape valve, and raises and opens said escape valve. This lever has also an upper jaw, which moves in a pin attached to a bell-crank lever, the arm of which is directly beneath the charging valve. In order to open this valve, the handle is moved to the left, which causes the main lever and pin to move to the left, and to raise the arm of the bell-crank lever and open the charging valve. Provision is made for slack motion by a space between the top of the escape valve and said pin attached thereto, whereby the left end of the main lever is permitted to have a certain amount of play before it strikes said pin."

In addition to fluid pressure, the piston is "acted upon from below by a bell-crank lever, or bent lever with vertical arms, connected by links to the piston and to a second lever, which second lever is connected with a light spring."

An attempt was made in the testimony to claim that the patented valve lacked novelty, or that its descent could be traced from patents No. 128,015, dated July 16, 1872, issued to Fay & Cairns, and No. 141,685 dated August 12, 1873, issued to George Westinghouse, Jr. The Fay & Cairns patent was for an apparatus for regulating the flow of water in houses, and shutting it off when there is an excess of pressure, so as to prevent the bursting of pipes. The Westinghouse patent was for a triple valve, and it was admitted in the course of the testimony that the patent described nothing designed for

or capable of performing the functions of the engineer's valve. The Fay & Cairns invention was a pressure regulator, contained no exhaust valve, and could not be an engineer's valve. The idea that either of these patents anticipated or restricted the patentable character of the whole invention is not now entertained. The defendants are, however, of opinion that No. 141,685 is an anticipation of the second claim. The importance of this suggestion will be considered hereafter. The invention, as a whole, is thus conceded to be without a predecessor, and the importance of an invention by which both valves could be automatically closed upon the desired amount of pressure being charged into or exhausted from the train pipe is manifest. The object of the defendants' valve is, by the movement of a single handle, to accomplish the same results which the patented valve attains; and it is conceded that the valve has a piston head movable by operative brake pressure, or any excess thereof, a charging valve, an escape valve, and interposed connections, so arranged that the charging valve may be opened and closed without necessarily opening the escape valve, a connection between the piston head and charging valve, consisting of a bell-crank lever, a pin and lever, and a projection on the piston head, and that by reason of this connection a movement of the piston head under the operative pressure, or any excess thereof, will result in the automatic closing of the charging valve. But it is contended that the second claim of the patent is void by reason of the Fay & Cairns patent; that the defendants' valve has not the interposed stem of the third and fourth claims, because the motion of the complainants' piston always acts through the stem to open the valve; that the defendants' piston does not open the charging valve, as required in the third claim, and does not open either valve, except only that the pin carried by its piston is the fulcrum of the lever when the escape valve is opened, whereas neither of the valves in 222,803 can be opened except by moving its piston, and therefore that the true construction of the third and fourth claims is as follows:

In regard to the third claim:

"The combination of a piston for opening and closing two valves by reverse motions of the piston; those valves; and a part interposed, whereby the motion of the piston in one direction from its position with both valves closed opens one of the valves, and its return motion allows that valve to close, while its motion in the opposite direction opens the other valve, and its return motion allows that valve to close."

In regard to the fourth claim:

"The above combination, with the addition of a single handle, by means of which the engineer can vary the pressure on one side of the piston."

The second claim of the patent contained the case provided with a piston chamber and valve chamber in addition to the three elements which are specifically named.

The Fay & Cairns patent was a water-pressure regulator. The specification says that it consisted of a hollow cylinder attached to a valve, and communicating at one end with the water pipe into which the water flows through the valve. In the cylinder is a piston whose rod is connected to the valve. A coiled spring is

behind the piston, under such tension as to hold the valve open until the pressure becomes too great for the pipe beyond the valve, when the water pressure on the piston closes the valve, and keeps it closed until the pressure on the piston and in the pipes falls below the power of the spring, when it will open the valve cylinder. There is no exhaust valve, but claim 2 does not include an exhaust valve, and the valve is connected with the piston, whereas in No. 222,803 the charging valve is closed by a separate spring; but this is thought by the defendants to be immaterial in a structure not having an exhaust valve, "the purpose of separation being to permit a further upward movement of the piston so as to open the exhaust valve after the charging valve has been seated." The needs of a water-pressure regulator to be attached to a water pipe which conveys water into a house, and an engineer's valve, in which there must be a charging and an escape valve, are very different. In an engineer's valve, opened by a single stem, the charging valve must be separated from the piston, or the device would be useless; and it is no answer to the validity of the claim to say that some other fluid regulating device was operated by a different arrangement of valve and piston, which, though it might come within the general terms of that claim, would be useless in the device which was the subject of the patent. The great dissimilarity in form and appearance between the patented valve and the defendants' valve tends to confuse the mind when the question of the infringement of the third and fourth claims is first looked at. The defendants' valves and piston are not arranged in the same axial line. Motion is not communicated to the piston in an endwise direction, but through a series of bell-crank levers, which at first seem to be operating upon a different system from that of the patent. A closer examination shows that the series of operations in the patented valve is substantially reproduced in the defendants' valve by like instrumentalities. It is not denied that the defendants' valve has a series of levers and pins, which may be called an "interposed stem," and which communicate motion somehow; but it is said that its piston and its stem do not correspond with these elements in the third and fourth claims, mainly because in the Westinghouse device the motion of the piston acts through the stem to push the valve open, and the defendants' piston does nothing to open either valve. It is true that in the Westinghouse valve there is a direct connection between the piston and the charging valve, and that the movement of the piston opens the valves, and that in the defendants' valve the charging valve is opened by the manual movement of the handle and lever, 49, and the piston at the time remains stationary. By the subsequent movement of the piston, when sufficient train-pipe pressure has been admitted, the charging valve is closed automatically. It is also said that the defendants' piston does not open the escape valve, except that the pin carried by the piston is the fulcrum of the lever when the escape valve is opened. This may also be considered as true, but it should also be said that there is an upward movement of the piston before the valve is opened. As explained by Mr. Barnes, for the complainant, the

movement of the handle to the right raises the fulcrum of the lever, which imposes upward pressure upon the piston. It moves upward until the elastic resistance below the piston is reduced so much that the train-pipe pressure on top of the piston can lift the escape valve by means of the lever known as "43." If the third and fourth claims require that one or both valves must be both opened and closed by the motion of the piston, and that the interposed stem must move with the piston to open one or both valves, then there is no infringement. The third claim, for example, is for the combination of piston head, charging valve, interposed stem, and escape valve with reference to the opening and closing of the charging valve. As the invention did not consist in the particular way in which the elements of this combination co-operated, in reference to the mere opening of the valve, and as the language of the claim is not limited to anything more narrow than the actual invention, the construction which the defendants seek is not necessary. The only question is whether the differences which have been stated, and which are in substance the difference between the direct action in the patented device of the piston, through the interposed stem, in opening the valves, and the action of the bell-crank lever, pin, and lever, which are the interposed stem of the defendants' device, constitute such a departure from the means which the patentee used and described as to constitute new and different means, which escape a just charge of infringement. The question of infringement is controlled by the principles restated in *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, and confirmed in subsequent and recent cases (*Miller v. Manufacturing Co.*, *supra*), and which makes these actual differences, which would be important in a subordinate patent, unessential when a patent for a pioneer invention is under examination. If such differences should be regarded by courts as essential, when the claims do not make the specific devices essential, patents for pioneer inventions would ordinarily have but little value.

All the decrees of the circuit court in case No. 4,976 and in case No. 4,977, which have been appealed from, are affirmed, with costs of this court. The interlocutory decree of the circuit court in case No. 5,315 is reversed, with costs of this court, and the cause is remanded to that court with instructions to dismiss the bill, with costs of that court.

ACCUMULATOR CO. v. EDISON ELECTRIC ILLUMINATING CO. OF NEW YORK.

(Circuit Court, S. D. New York. October 8, 1894.)

1. PATENTS—PROCESS AND PRODUCT—INFRINGEMENT — SECONDARY BATTERIES.
Reissue No. 11,047, of the Swan patent for a secondary battery, in which the active material is packed in and confined to perforations extending through the plate, is a patent for a product, and not for a process; and hence infringement is not avoided by arranging pastilles or buttons of the material in molds, and then casting the plate around them, instead of first making the plate, and then packing the material in the perforations.

2. SAME—INFRINGEMENT SUITS—LACHES—EXCUSE FOR DELAY.

Delay in suing an infringer may be excused on the ground that the infringing article, as at first constructed by defendant, was not believed by complainant to be commercially harmful, the grounds for such belief being reasonable.

This was a suit in equity by the Accumulator Company against the Edison Electric Illuminating Company of New York, impleaded with the Electric Storage Battery Company.

Betts, Hyde & Betts, for complainant.

Eaton & Lewis and J. R. Bennett, for defendant.

LACOMBE, Circuit Judge. The Battery Company, which is named as a defendant, but which, being a nonresident, has not been served, and does not appear, manufactures the articles alleged to infringe. The Illuminating Company has contracted to purchase a large number of them, and is about to put them to use in this city. Complainant is the owner of letters patent, reissue No. 11,047, December 17, 1889 (original No. 312,599, February 17, 1885), to J. W. Swan, for "secondary battery,—a variety of electric storage battery. The original patent, No. 312,599, was considered by this court in *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. 117, and held invalid, as it described and claimed more than the inventor discovered. Thereupon, reissue was obtained, and such reissue was considered by this court, and sustained, in *Electrical Accumulator Co. v. New York & H. R. Co.*, 50 Fed. 81 (opinion by Judge Coxe). In an application therefore for preliminary injunction on the same patent, the construction laid down in that opinion will be adhered to.

The claim of the patent is for "a perforated or cellular plate for secondary batteries, having the perforations or cells extending through the plate, and the active material, or material to become active, packed in the said perforations or cells only, substantially as described." Judge Coxe held that although the art already showed plates in which the active material was packed into grooves or holes not extending through the plate, and also plates where the active material filled, not only the perforations, but also the entire surface of the plate itself, Swan's combination, in which the perforations extended through the plate, and the material filled the perforations only, was original with him; that it was not only new, but useful,—an important advance in the art; and that "the idea which has made these plates a commercial success was first given to the world, in a practical embodiment, by Mr. Swan." No new evidence tending to modify Judge Coxe's opinion being introduced, it settles the law of this case, and the only question here is whether defendant's plates infringe.

These plates, which are for secondary batteries, are perforated plates. The perforations extend through the plate. The active material is found in the said perforations, and in them only. Infringement by the completed structure is so plain that defendant has been constrained to insist that Swan's patent is practically for a process, and therefore, as defendant's process of making the plates

is a different one, there is no infringement. Thus, Swan constructed a plate with perforations or cells extending through it, and then packed the material in the perforations. Defendants arrange pastilles or buttons of the material in a mold, and then cast the plate around them. Manifestly, the result is the same whether the material is packed within the bounding walls of the perforations, or whether the bounding walls of the perforations are packed around the material. Defendants also insist that the material which they use is not active when the process of packing antimonious lead around it is complete, and that it does not become active the moment it is placed in the battery fluid, but requires further electrolytic treatment before it becomes active. But the patent is not confined to active material; it includes "material to become active;" and whether it becomes active by one process or another is apparently immaterial. The gist of Swan's invention, as found by Judge Coxe, was the confining of the material which was to do the work within perforations which extended completely through the plate. The advantages of such plates is pointed out in his opinion, and those which defendant threatens to use are plainly such plates. There is nothing in the patent, or in Judge Coxe's opinion, which supports the contention that the claim is other than what it appears to be,—a claim for a completed article, not for a process of manufacture. Infringement is clear.

It is further contended on behalf of the defendant that complainant has been guilty of such laches as should preclude the granting of a preliminary injunction. In a case where this defendant, or its allied corporation, was complainant, the court of appeals, in this circuit, held that the owner of a patent was under no obligation to sue every infringer forthwith upon discovery of the infringement, provided he proceeded with due diligence against the one whom he did sue. *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 592, 3 C. C. A. 605. There is no suggestion of any unreasonable delay in prosecuting the test suits against the Julien Company and the New York & Harlem Railroad Company. Judge Coxe's decree in the last-named suit is dated April 12, 1892. The present action was begun in August, 1894. During the intermediate period, and for some years before,—certainly, since 1889,—the Storage Battery Company made plates which differed from those sold to the Illuminating Company, both in the size of the plate and in the size of the buttons. The plate now complained of is 15 inches square, and contains 256 buttons of active material. The older plates were 6 by 8 inches, and contained 9 or 12 buttons. Both were equally infringements of the patent, which is not confined to plates or buttons of any particular, absolute, or relative size. Complainant insists that it did not prosecute for infringement by the earlier plates for the reason that it did not believe them to be commercially harmful. The grounds for that belief are said to be the relative size of plate and button. In the later plates the loss by accident, while in use, of the contents of a single hole, would not, it is asserted, practically destroy the usefulness of the plate, being only a loss of 1-256 of the active material. A similar

accident to the older plate, however, would destroy its usefulness, as the single perforation holds 1-9 or 1-12 of the active material. This explanation seems a reasonable excuse for failing to prosecute against the older plates, and I find nothing in the transactions between the complainant's officers and those of the Storage Battery which should estop complainant from maintaining this action. In April, 1893, certainly, both sides understood, and expressed their understanding in writing, that the question of infringement of the several patents owned by complainant would be tested by suit. As to the Danish patent, the conclusion reached by Judge Coxe, without argument, viz. that "it is not for the same invention as the Swan reissue," is concurred in by this court, after argument. Motion for preliminary injunction granted.

WHITCOMB ENVELOPE CO. v. LOGAN, SWIFT & BRIGHAM
ENVELOPE CO. et al.

(Circuit Court, D. Massachusetts. July 17, 1894.)

No. 2,738.

1. PATENTS—INFRINGEMENT—ENVELOPE MACHINES.

In a patent for improvements in the drying apparatus of an envelope machine, a claim for a revolving drum having fingers projecting from its rim, with intervals between them slightly greater than the thickness of the envelope, so that it may be retained by pressure between the fingers, is not infringed by a drum in which, instead of fingers, there is a plate with a rib extending across its face, against which the flap of the envelope catches, and the envelope is thus held in position.

2. SAME.

The Swift reissue, No. 9,800, for an improvement in the drying apparatus of an envelope machine, limited, and ~~had~~ not infringed by a dryer retaining the envelope in position by means different in operation and result from the bulged finger described in the patent; but infringed by the so-called "basket dryer."

This was a suit in equity by the Whitcomb Envelope Company against the Logan, Swift & Brigham Envelope Company and others for infringement of a patent.

George O. G. Coale and Elmer P. Howe, for complainant.
Causten Browne and William W. Swan, for defendants.

COLT, Circuit Judge. The Swift reissued patent, No. 9,800, upon which the present suit is brought, is for an improvement in the drying apparatus of envelope machines. In place of a flexible belt with pockets, which is found in the old dryer, Swift substitutes a revolving drum with rigid fingers projecting from its rim, so arranged "that an envelope may be held in the space between two consecutive fingers, and no pressure be exerted on the recently gummed parts while the gum on the seal flap is drying." The fingers are provided with a bulge, and the interval between the adjacent fingers is slightly greater than the thickness of the envelope, and the envelope is held between the adjacent fingers by the pressure resulting from contact with the sides of the fingers. The specification also describes guard flanges surrounding the ends of

the drum, with lips projecting slightly over the ends of the fingers, which, "if desirable," may be used to retain the envelopes in the spaces between the fingers.

The two claims in controversy are as follows:

"(1) In an envelope machine, a revolving drum having fingers projecting from its rim, the interval between adjacent fingers being slightly greater than the thickness of the folded envelope to be held, whereby folded envelopes may be held between adjacent fingers by pressure resulting from contact of the sides of the envelopes with the fingers, substantially as shown and set forth.

"(2) The fingers, F, F', etc., rigidly fixed on the lateral surface of a drum, made of such form, and placed at such a distance from one another, that folded and gummed envelopes will be held between them by the elasticity of the paper, substantially as shown and described."

The first claim, as originally drawn, covered a revolving drum with projecting fingers rigidly fixed on its rim; but this claim was rejected on reference to the Waymoth patent, No. 58,327, for a belt dryer, on the ground that "an endless belt or chain and a drum are often substituted for each other as equivalent means." It is evident, therefore, that the Swift patent cannot be extended to embrace generally a revolving drum with rigid projecting fingers, but must be limited to the particular form of revolving drum and fingers found in the patent, or their equivalents.

In place of the bulged finger, the defendants use a plate with a rib extending across its face, attached to flanges at the sides of the drum. The contention of the defendants is that the Swift patent is for a device in which the envelope is held in position, in the narrow space between the fingers, against the force of gravity, by the friction caused by the elasticity of the paper, while in their apparatus the envelope is held against the action of gravity by the rib extending across the surface of the plate. To understand the defendants' position it must be borne in mind that in their machine the envelope is inserted with its flap end towards the axis of the drum, so that, when the drum is revolved, the end of the flap will be caught on the rib, while in the plaintiff's device the envelope is inserted with its flap in the opposite direction, or towards the ends of the fingers, and that consequently it must be held in position, during the rotation of the drum, by the friction created by the contact of its sides with the fingers. From a careful consideration of the Swift patent in connection with the whole evidence, and without giving undue weight to the correspondence between the applicant's attorney and the patent office, I think the word "held" in the Swift patent must be construed primarily to signify that the envelope is retained in position against the action of gravity as the drum revolves; and that, while it may also mean that the envelope is retained in position in relation to the inserting and withdrawing mechanism, this latter feature is merely incidental and subordinate to the main result contemplated by the Swift mechanism. The defendants' dryer does not infringe because the envelope is "held" by other means than those described in the Swift patent; in other words, the ribbed plate in defendants' dryer is different in mode of operation and result from the bulged finger

of the Swift patent. This conclusion applies to the dryer as now constructed by the defendants, but not to the so-called "basket dryer," one of which the defendants now use, and which, in my opinion, is clearly an infringement of the Swift patent. A decree may be drawn in conformity with this opinion.

DIAMOND MATCH CO. v. OSHKOSH MATCH WORKS et al.

(Circuit Court, E. D. Wisconsin. October 1, 1894.)

PATENTS—ACTION FOR INFRINGEMENT—PRODUCTION OF DRAWINGS AND MODELS
—DRAWINGS IN PENDING APPLICATIONS AT THE PATENT OFFICE.

The defendants concealed their machines, so that the complainant could not make satisfactory proof of infringement. Complainant thereupon called one of the directors of the defendant corporation, and proved by him that the defendants' machines contained the elements mentioned in certain claims of complainant's patents, and then moved the court for an order requiring the defendants to produce drawings or a model of said machines, or to permit complainant's experts to visit their shops, and make such drawings from the machines. *Held:*

1. That although such order should not be granted upon mere suspicion or allegation of infringement, yet here, as the complainant had shown probable cause for believing that infringement was going on, the order should be granted.

2. That the fact that an application for a patent on one of the defendants' machines was pending was no ground for denying the order, the rule of secrecy in the patent office having no application to investigations of causes by the courts.

3. Rule entered for the defendants to produce drawings of the alleged infringing machines upon payment of the cost thereof by the complainant.

Two actions in equity by the Diamond Match Company against the Oshkosh Match Works and others for infringement of a certain patent. Heard on complainant's motion for an order requiring the production of certain drawings by the defendants.

Prindle & Russell, L. Hill, and H. G. Underwood, for complainant.
A. E. Thompson, C. T. Benedict, and Harshaw & Davidson, for defendants.

SEAMAN, District Judge. The complainant is prosecuting two actions in equity against the defendants, alleging infringement in each case of certain letters patent, and the defendants answer in each, under oath, denying infringement. The complainant was proceeding with the taking of testimony before a notary acting as examiner pursuant to stipulation, and produced as a witness in its behalf William H. Wyman, who was superintendent and director of the Oshkosh Match Works, and inventor of the alleged infringing machinery used by the defendants. It is sufficient to state that this witness testifies that applications are pending in the patent office for patents upon one of these machines; that full and complete drawings have been made of each of the machines, but were delivered to their solicitor for use with applications for patents, and are not in possession of the witnesses; that he is not sufficiently

skilled to make drawings or sketches which would accurately represent the machines, and has no model of them. His answers to certain of the direct interrogatories, which are framed in the precise language of claims set out in complainant's patents, tend to show that there is present in the defendants' machines, in each case, at least a similar combination of elements for a similar purpose. There is sufficient in some of these answers to show ground for suspicion of infringement, and to demand accurate information of the means or elements employed in order to determine the question of conflict. In this state of the inquiry, it is not "a mere fishing excursion" for evidence against the defendants, or a move upon bare suspicion. The case differs materially from that presented in *Dobson v. Graham*, 49 Fed. 17, and comes clearly within the rule announced in *Edison Electric Light Co. v. United States Electric Lighting Co.*, 44 Fed. 294, 45 Fed. 55; *Coop v. Development Inst.*, 47 Fed. 899; *Johnson S. S. R. Co. v. North Branch Steel Co.*, 48 Fed. 195.

The complainant is not entitled to the aid of the court, upon a suspicion or an allegation of infringement, to pry into the business, operations, or appliances of the defendants, either to the end of making out a case against them, or for any other object. The defendants are entitled to protection in their rights and property, and will not be required to make premature disclosure of their matters of defense. But the answers above referred to so far establish ground for a *prima facie* case of infringement that it is fairly opened for inquiry, and the complainant is entitled to accurate information of the constituents and mode of operation of the alleged infringing machines. That information can be readily furnished. It is a part of the complainant's case, but cannot at this stage be withheld upon the ground simply that it is under the control of defendants. I doubt whether the question of identity could be determined satisfactorily without the aid of drawings, models, or inspection; and I am unable to find any reason for the fear expressed by the defendants that some harm, aside from the issues in this action, might result from disclosure while the application in the one case is pending in the patent office. Any invention it may show cannot be forestalled at this time. The rule or practice of the patent office, which withholds the drawings and papers from the public eye until the case is disposed of, is salutary there, but is not applicable to the investigation of causes by the courts. The application in the other case is stated to be in readiness for filing, and disclosure obtained in this public manner cannot be presumed to imperil any invention it may contain. The drawings must be produced, if in existence and within control of the defendants or their counsel, for use before the examiner, upon payment by the complainant of such sum for their use as shall be reasonable. A rule will be entered accordingly, with leave to complainant to apply for further relief upon default, or insufficiency of the information.

ADAMS ELECTRIC RY. CO. v. LINDELL RY. CO.

(Circuit Court, E. D. Missouri, E. D. September 17, 1894.)

1. PATENTS—INVENTION—ELECTRIC STREET CAR MOTORS.

Making changes in the method of communicating power from the armature of an electric motor to a street-car axle, as between well-known devices, such as friction bearings, cog gearing, and pulleys, involves no invention.

2. SAME—CHANGES IN FORM, ETC.

Changing the form, proportion, and size of an electric motor, so as to admit of putting it under an ordinary street car, in conjunction with the axle thereof, involves no invention.

3. SAME.

There is no invention in so mounting an electric motor upon a street-car truck that it has a positive connection with the driven axle only, and merely a spring connection, through the truck frame, with the other axle, thus permitting a torque movement of the motor in starting and stopping the car, and allowing the wheels to pass over curves and inequalities with greater facility.

4. SAME.

The Adams patent, No. 300,828, relating to improvements in electric street car motors and trucks, is void for anticipation and want of invention.

This was a suit in equity by the Adams Electric Railway Company against the Lindell Railway Company for infringement of a patent relating to improvements in electric street car motors and trucks.

Given Campbell and Upton M. Young (Robert H. Parkinson and A. C. Fowler, of counsel), for complainant.

Eaton, Lewis, Boyle & Adams (Frederic H. Betts and Samuel R. Betts, of counsel), for defendant.

HALLETT, District Judge. Complainant's patent, No. 300,828, was issued June 24, 1884, upon an application filed December 15, 1883. The claims of the patent, three in number, are as follows:

"(1) The combination, with the axle which carries the driven wheels, the axle boxes or bearings, and a frame secured to, or formed in one with, said boxes or bearings, of an electric motor, whose armature is mounted to revolve on said axle, and whose field is attached to and carried by said frame, substantially as and for the purposes hereinbefore set forth. (2) The combination, with the driven wheels, their axle and axle boxes or bearings, and a field-supporting frame secured to, or formed in one with, said boxes or bearings, of an electric motor, whose armature and field are carried by said axle and frame, respectively, and intermediate motion-transmitting gearing, also carried by said frame, and meshing on the one hand with a gear on the driven wheels, and on the other with a gear on the armature hub. (3) The driven wheels, their axle and axle boxes or bearings, and the supporting frame secured to, or formed in one with, said boxes or bearings, in combination with the armature mounted to revolve on said axle, and the field magnets, commutator brushes, and intermediate motion-transmitting gearing mounted in and carried by said supporting frame, under the arrangement and for operation as hereinbefore set forth."

None of the elements of the combination described in the claims was new at the date of the application. The motor and its several parts, the car axle, the axle boxes, the field-supporting frame, and all

other things mentioned in the claims, were in use at and before that time. The form of some of the elements was changed in the Adams combination, as we shall have occasion to point out in the course of this opinion, but it is clear that none of them were new at that time. And the arrangement of the several parts with reference each to the other is not regarded as of substance in the invention. For illustration: In complainant's patent the armature was made to revolve on the driven axle, as stated in the first and third claims, and there were two fields in perspective, one on each side of the axle and armature. In respondent's patent (the Sprague motor) there is but one field in perspective, and the armature is put in front of the field, and the whole is journaled on the driven axle. It is conceded that such differences in the conjunction of parts does not affect the quality of the machine. Its essential feature is stated by the inventor, at page 450, vol. 2, of complainant's testimony, in the following language:

"The device shown and described in complainant's patent embodies an electric motor rigidly mounted on a single railway car axle, which it is intended to drive, by means of axle boxes or bearings upon such driven axle, the whole forming a supplemental structure separate and distinct from the car frame or truck frame, with which it is only flexibly or nonrigidly connected."

In another place (page 355) the inventor says:

"It should also be observed that it is nowhere stated in this patent that the object of the invention is to provide a suitable type of electric motor for an electric railway, or to provide a suitable form of gearing for an electric railway, or to provide a special and particular way of mounting an electric motor upon the single driven car axle, but that the object is, broadly, the provision of an arrangement by which the field and rotating armature (that is, both elements, the moving part and the stationary part) of an electric motor, and the gearing or transmitting devices (which includes all methods of mechanically transmitting motion from the driving shaft or armature spindle to the driven car axle), through which motion is communicated from the armature to the wheels of the car or vehicle, can be supported in such manner as to be independent of the body of the car or truck, with a view to permitting the latter to move freely without disturbing the relations of the motor and transmitting devices to the driven wheel or wheels, whereby the field and all other parts carried by the frame always occupy the same relative position to the wheels and armature, and are not affected or disturbed by the spring connection between the body of the car, or between the truck and the wheels, while at the same time the field is held from revolving with the axle by elastic restraint."

Accepting this explanation of the plan and purpose of the invention, there is little to distinguish it from other devices of earlier date. In the year 1880, at Menlo Park, N. J., Mr. Edison built and used, in an experimental way, a locomotive which was operated by electricity, and which embraced all the elements of complainant's patent. It was a locomotive, in the sense of a traction engine, distinguishable from a passenger car, which may be moved by power within or under it; but, in essential features, it was much the same as complainant's device. There was an electric motor geared to the driven axle, and resting on a frame attached to the axle boxes. All kinds of gearing for transmitting the power of the armature to the driven axle were successively adopted, but the change from

one to another of such well-known appliances was not in the way of modern invention. Given the power of a revolving shaft, whether produced by water, steam, or electricity, to center it upon another place of usefulness, by friction, cog gearing, or pulleys, is entirely within the range of ordinary skill. This device was the subject of British patent No. 3,894, of date September 25, 1880. Some changes in the form of the motor and the carrying frame were desirable, and probably necessary, to admit of mounting the body of a passenger car on the Edison locomotive, and thus to change that vehicle to the car of the present time, which carries its own motor. But it is doubtful whether there was anything like invention in making such changes. A motor consisting of many coils of wire combined in a form suitable for an armature to revolve rapidly in a frame, and of other coils of wire combined in a form suitable for a fixed magnet in another part of the same frame, may be built in any desired shape and size. The matter of reducing the Edison apparatus of 1880 to a size and shape which would admit of putting it under an ordinary passenger car in conjunction with the car axle was no great achievement. If, however, it was something more, and of the highest art, the result was produced long before the date of complainant's invention. Carl Heinrich Siemens, under date February 10, 1880, obtained British patent No. 583, in which the motor was carried under the car in the manner now practiced. He says, on page 4 of the specifications:

"Vehicles provided with dynamo-electric machines operating according to the above-described invention may either serve only as locomotive engines for hauling along other carriages, or they may themselves constitute passenger carriages, as shown at Figs. 1 and 2 of the drawings. The before-described system of electric railways may also be employed as auxiliary traction power for ordinary railways at inclines, the arrangement indicated at Figs. 5 and 6 being assumed to be so applied; the rails being the ordinary ones of the railway, and the vehicle an ordinary railway van."

The same result was produced by Joseph R. Finney in the year 1882, as shown by letters patent No. 285,353, issued September 18, 1883, upon application filed February 15, 1882. He also put the electric motor under the car, and had positive gearing to connect with the driven axle. There is therefore nothing new in complainant's patent, in respect to getting the motor under the car body, so as to make the locomotive a carriage for passengers.

It is contended, however, that in the earlier devices, of which only two have been mentioned, the motor was rigidly attached,—one end to the driven axle, and the other end to the frame, or to the body of the car,—in a manner to forbid the torque movement of the motor in stopping and starting the car. It seems that the motor, unrestrained, under an electric current would revolve on the car axle, and this movement, to a very limited extent, aids in starting the car. To enable the motor to respond to the turning movement, the outer end—that which is not connected with the car axle—must be, in some measure, free. To meet this condition, complainant's patent calls for a frame supported on the axle boxes of the driven axle, which shall carry the motor and the power-transmitting gear-

ing, and respond to all its movements. The language of the patent on that subject is as follows:

"It is my object to provide an arrangement by which the field and rotating armature of an electric motor, and the gearing or transmitting devices through which motion is communicated from the armature to the wheels of the car or vehicle, can be supported in such manner as to be independent of the body of the car, with a view to permitting the latter to move freely without disturbing the relations of the motor and transmitting devices to the driven wheel or wheels. To this end I mount the armature upon the axle of the driven wheel or wheels, and I support the field in a frame, which is rigidly secured to, or found in one with, the axle boxes or journal boxes of said wheels, said frame also carrying the intermediate gearing through which the armature is connected to the wheel or wheels to be driven. In this way the field and all other parts carried by the frame always occupy the same relative position to the wheels and armature, and are not affected or disturbed by the spring connection between the body of the car or truck and the wheels."

Complainant's motor, having fields on both sides, and the armature centered on the driven axle, would probably be well balanced on the axle; but the oscillating motion of the ends would be very strong, and it would be necessary to restrain it in some way; otherwise, the frame and the motor would be destroyed by contact with the track and with the car body. It is said that this condition was recognized, and the proper remedy applied, in the following suggestion found in the specifications:

"With a view to preventing injurious thrusts of or upon the field-supporting frame, I prefer to interpose between its ends and the body, A, springs, 1."

This, however, cannot be regarded as part of the invention, for several reasons, and principally because it is not claimed as such. Articulate connection between the motor and the body of the car or the truck frame is not demanded or suggested in any of the claims, and the language quoted is in recommendation of spiral springs; that is to say, an instrument of connection, and not a statement of the kind of connection to be made, as flexible or yielding or positive. Clearly enough, the inventor intended to separate the motor from the car body, as shown in the next paragraph taken from the specifications:

"Under the arrangement described, it will be seen that the field of the motor, although it does not revolve, is, in effect, carried directly by the wheels and their bearings, and retains the same relative position at all times with respect to the same, so that motions of the body of the car on its springs will not complicate or interfere with the transmission of power from the motor to the wheels."

But I do not see that he was impressed with the idea of giving play to the free end of the motor in order to avail of some part of the torque movement in stopping or starting the car.

Aside from this, and looking to the office of the field-supporting frame of complainant's patent, we see that it is a necessary part of that device. But when the form of the motor came to be changed, as in the Sprague and other plans, one end of the motor was journaled on the driven axle, and the other end was supported by a spiral spring which rested on a crossbar of the truck frame. Thus, the problem

of allowing torque motion at the free end of the motor was entirely separated from the field-supporting frame, and that frame became useless. The motor has a frame of itself, which holds all parts in fixed relation, and is capable of carrying the gearing which transmits the power to the axle. The free end is supported or suspended on a spring which is attached to the truck frame, and the latter is carried on the axles in the usual way. I do not find anything of that kind in complainant's patent. As I understand it, the patent is silent on the subject. Furthermore, if we take the field-supporting frame to be an element of the Sprague plan, as adopted and used by respondent, there seems to be but one feature in which it differs substantially from the Edison and Finney devices. In the latter, the motor is carried on the truck frame, which is attached to both axles of the car, and in the former the connection with the driven axle is positive, and only a spring connection through the truck frame with the other axle. The change thus made, from a fixed and positive connection between the two axles of the vehicle in the Edison and Finney plans, to an articulate connection, as in complainant's plan, is not, in my judgment, a modern invention. Articulate connection between the axles has been used from the earliest times in the common lumber wagon, and in many other road vehicles of four wheels. Several patents in which an effort was made to apply steam power to ordinary wagons are in evidence, and they show this connection in one form or another. Whatever power may be used to drive four-wheel vehicles, a flexible connection between the axles, so that each may rise and fall independently of the other, has long been in common use. If, therefore, we accept the field-supporting frame of complainant's patent as a short truck frame adapted to oscillate upon one axle so as to yield to the torque motion of the motor, we have nothing more than a change in connection with the other axle, and an adaptation of an old device to new conditions. This is the point discussed at length at the hearing, and indeed the only point in the case worthy of serious consideration.

Upon full examination of the record, and the very able arguments of counsel, I am not convinced of the merits of the patent. Much was said at the hearing about the efficiency of complainant's construction, in allowing the car wheels to pass over curves and inequalities of track with greater facility than was theretofore possible, which I cannot go over at length. However the fact may be in relation to those matters, I do not find anything in the patent which can be recognized as an invention, and therefore I am constrained to dismiss the bill, with costs.

EBERHARD MANUF'G CO. v. ELBEL et al.

(Circuit Court, N. D. Ohio, E. D. August 8, 1893.)

No. 5,009.

PATENTS—ANTICIPATION—HARNESS TRIMMINGS.

The Zeller patent, No. 207,791, for an improvement in harness trimmings, is not anticipated by the Hinman patent of February 25, 1868, or the Zeller patent of September 15, 1874.

Suit by the Eberhard Manufacturing Company against Elbel & Co. Decree for complainant.

Thos. W. Bakewell and E. A. Angell, for complainant.

M. D. Leggett and Chas. R. Miller, for respondents.

RICKS, District Judge. The bill is filed for infringement of letters patent No. 207,791, granted on September 3, 1879, to Melancthon E. Zeller, for an improvement in harness trimmings. The complainant has given to the public a very simple device, which combines several elements that are all calculated to make it acceptable and useful. Though it presents no single element evincing great invention, it combines several new features, which, taken together, make it a successful device, which has rapidly won its place among articles of useful manufacture. It is easily and cheaply made, so designed and constructed as to be easily put together. Each part performs the function claimed for it, and when put into use it is superior to any other article made or designed for the same purpose. It can be made and sold separately, can be readily attached to any kind of harness, and it fulfills the uses for which it was designed. In it the patentee developed as to its leading features that "last step" which completes invention, and makes the device a success. This is particularly striking in comparing the device of the patent in suit with the device of the same patentee in the patent designated "the Zeller patent of 1874." That device was practically inoperative, both because of the expense and difficulties connected with its manufacture, and more particularly because the falling hook, which was designed to receive the check rein, had such a long vertical end projecting through the elevated plate or passage that when the strain on the check rein was lessened so as to permit the hook to slip back, or to force it back towards or over the crupper loop, the ring, instead of falling easily and surely, would catch and remain rigid. One of the principal features claimed for the hook so constructed was that it would readily fall and prevent its destruction in case the horse or mule should fall or roll with the harness on it; so that for the chief advantage claimed it was inoperative. The chief defense against this patent is that it was anticipated by the manufacture and sale of various articles of common use by nine prior United States patents. The two chiefly relied upon as showing an anticipation are those of J. W. Hinman, February 25, 1868, and of M. E. Zeller, of September 15, 1874, just referred to. The Hinman patent, while it involves the drop hook and drop ring in a device intended for an entirely different use, did not disclose those uses in a way to make them any more conspicuous

than had been done in other devices in which they had been previously employed, or than would suggest such use in a drop hook such as used in complainant's patent. I do not, therefore, think that the Hinman patent was an anticipation. For the reasons stated before, I do not think the earlier Zeller patent is an anticipation. It is intimated in brief of defendant's counsel that the claim in the earlier patent, abandoned by Zeller, viz.: "A harness finding consisting of the plate, A, upon which is formed the elevation, a, having an eye or passage, A' to receive a terret or ring, a hook, or other harness attachment, substantially as and for the purpose set forth," —is substantially the same as the claims of the later patent, and should estop him from setting up the same in his present suit. The essence of the later invention is that the parts are cast separately, and so made as to be easily and cheaply made and put together, and, when so combined, to furnish a stronger and more satisfactory product. All this is accomplished. And there is no ground for estoppel on the plea that the former claim abandoned is the same device. The defendant has not seen fit to use any of the devices set out in the nine patents pleaded. It has, however, patterned the article it manufactures exactly from that of complainant. It has done this after correspondence, and with full information as to complainant's claims. The hook is a clear infringement of the first and third claims of the patent, and the terret is of the second claim. The complainant is entitled to a decree sustaining its patent, finding infringement, and for an accounting.

LEVY v. DATTLEBAUM et al.

(Circuit Court, S. D. New York. October 4, 1894.)

1. PATENTS—ISSUANCE TO JOINT INVENTORS.

Issuance of a patent to "T. and L., of the firm of T. & L.," puts the legal title in the parties jointly, and not in the firm.

2. SAME—REQUISITES OF ASSIGNMENT.

Where the legal title to a patent used in the business of a firm is in the partners jointly, an assignment by one partner to the other of all goods and machinery, etc., "and all other property whatever belonging to said firm, and all his rights, title, and interest therein," does not convey the legal title to the patent. An instrument assigning a patent should distinctly describe the patent, though description by name, number, and date is not indispensable.

3. SAME—PRACTICAL CONSTRUCTION OF ALLEGED ASSIGNMENT.

One of two joint patentees, who were partners in business, gave to the other, on the dissolution of the firm, a writing which the latter claimed operated as an assignment of the patent. It appeared, however, that after the execution of that instrument each gave the other a license under the patent. *Held*, that this was a practical construction of the prior instrument, and implied that each still owned an interest in the patent.

This was a bill by Charles M. Levy against Dattlebaum & Friedman for infringement of a patent.

H. A. West, for complainant.

Arthur Murphy, for defendants.

TOWNSEND, District Judge. This is a bill in equity for the infringement of letters patent No. 389,776, granted September 18, 1888, to Otto Thie and the complainant, as joint inventors of an interchangeable ring. The defenses are invalidity of patent, and license from Otto Thie. At the time of the application for the patent, said Otto Thie and the complainant were partners in the jewelry business, under the name of Thie & Levy. The application for the patent describes them as "Otto Thie and Charles M. Levy, of the firm of Thie & Levy." The fees for procuring the patent were paid by the firm. The firm used the invention in its business. On January 21, 1890, the firm was dissolved by a written agreement, which included an assignment from Thie to Levy of the goods, machinery, etc., "and all other property whatever belonging to said firm of Thie & Levy, and all his rights, title, and interest therein." Levy assumed the payment of certain obligations of the firm. Afterwards, on June 5, 1890, Levy and Thie made a settlement, in which Thie gave Levy an instrument called a counterbond. This was a bond by Henry Jaeger and Thie, containing, among other things, the following:

"Whereas, certain controversies have since arisen between them (Thie and Levy), &c.; and whereas, certain claims have been made as to the rights of said Levy to manufacture under certain United States letters patent, heretofore taken out in the name of Thie and Levy: Now, therefore, if the said Otto Thie and the said Henry Jaeger shall indemnify and hold the said Charles M. Levy, his heirs, executors, and administrators, free and harmless from the payment in whole or in part of any claim against the aforesaid firm, &c., or from any claim of said Otto Thie or his assigns against said Levy, by reason of his manufacturing under said letters patent, then this obligation to be void; otherwise, to remain in full force and virtue."

The patent referred to in said counter bond is the one in question. Levy testified, and it was not denied, that he at the same time gave Thie a license to manufacture under the patent. Thie, when testifying for the defendants, declined, upon cross-examination, under advice of defendants' counsel, to produce the license. Defendants produced in evidence a license from Thie, dated January 10, 1890, 11 days before the dissolution of the partnership, to manufacture under patent No. 389,779, no royalty to be paid for two years. The number of the patent is manifestly a clerical error, and the patent referred to is the one in question. Dattlebaum, one of the defendants, testified that they obtained this license before the dissolution of the partnership, but after he had heard that it was to be dissolved. Complainant claimed the said license was not in fact made until after the dissolution of the partnership, and that, if made at the time of the date, Thie had no right to make it, and that under the circumstances it was not taken bona fide. Complainant testified that the patent was partnership property. Thie testified that he alone made the invention, and that the patent was his own personal property. Complainant claimed that the legal title to the patent was originally in the partnership, that Thie's interest passed to Levy by the assignment "of all other property whatever belonging to said firm," and that the license to Thie was conclusive proof that Thie's only interest in the patent after the dissolution of the part-

nership was as licensee from Levy. Defendants claimed that the patent was void, as having been fraudulently obtained as a joint patent, when it was the sole invention of Thie; that it was void by reason of prior use; that Thie was a joint owner, and had a right to license.

I do not think it necessary to pass upon the various charges of fraud, or the question of the validity of the patent. I hold that the legal title to the patent, when issued, was in Levy and Thie jointly, not in the partnership, and that, as the legal title was never conveyed to the partnership, the assignment of "all other property" of the partnership did not convey the legal title to the patent. Assignments of patents ought always to distinctly describe the patent assigned. It is the duty of assignees of patents to see that their assignments do distinctly describe the patents, and if the language of the assignment contains no reference to the patent, but leaves in doubt the question of whether the patent was intended to be included, I think the doubt ought to be resolved against the assignee, in suits between him and third parties, until he has obtained a clear conveyance.

I do not assent, however, to the claim of the defendants that an assignment which does not identify the patent by name, number, and date cannot convey a title to the patent. If the legal title to the patent had been assigned to the partnership, as such, the conveyance by Thie would have been sufficient. *Railroad Co. v. Trimble*, 10 Wall. 367.

Furthermore, in the present case, I think the acts of the parties decide the question against the claims of the complainant. The "counter bond," so called, of June 5, 1890, clearly contains a license from Thie to Levy to use this patent. Thie and Levy on that day, in settlement of their difficulties, gave each to the other a license to use this patent. The fact that the license was given by each to the other seems to me to have precisely the contrary effect to that claimed by complainant's counsel for the license to Thie. It was a practical interpretation by the parties of their prior agreements, and implied that the whole title to the patent was not in the complainant. I think this practical construction should prevail, even if there were serious doubt as to where the legal title rested. Such practical construction is now recognized by the courts as controlling wherever the intent is doubtful, and is sometimes allowed to prevail even against the literal terms of the instrument. *District of Columbia v. Gallaher*, 124 U. S. 506, 8 Sup. Ct. 585; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 254. If complainant has an equitable title, I think he should make Thie a party to his suit. If judgment were rendered for the complainant in this action, Thie might still sue Levy for his royalties, and other evidence might be presented in such suit. Also, there is no evidence that the assignment which it is admitted Levy gave to Thie was not transferable; and, if Thie had no other title, it may be that defendant would be entitled to the benefit of it, especially as complainant has never recorded his alleged assignment. Let a decree be entered dismissing the bill.

FRONT RANK STEEL FURNACE CO. v. WROUGHT IRON RANGE CO.

(Circuit Court, E. D. Missouri, E. D. October 19, 1894.)

1. PATENTS—INVENTION—IMPROVEMENTS IN DEGREE.

An apparatus constructed upon the same operative principles as a prior one, differing therefrom only in slight particulars, and which, if an improvement at all, is merely one of degree, and not of kind, possesses no patentable invention.

2. SAME—ANTICIPATION—PRIOR CONCEPTION—REDUCTION TO PRACTICE—PRIOR USE.

Priority of conception, without reduction to practice, and without filing an application until more than two years after the device has been made and put in use by another, will not sustain a patent, when no sufficient excuse for the delay is shown.

3. SAME—HOT-AIR FURNACES.

The Campbell patent, No. 414,018, for improvement in hot-air furnaces, is void because of anticipation by the Powell furnace.

This was a suit in equity by the Front Rank Steel Furnace Company against the Wrought Iron Range Company for infringement of a patent for hot-air furnaces.

B. F. Rex, for complainant.

George H. Knight and H. G. Ellis, for defendant.

PRIEST, District Judge. This case comes before me on an order sustaining a petition for review, and is placed in very narrow lines by the order. The cause was heard by Judge Hallett, who ordered an interlocutory decree, adjudging the complainant's patent valid, and awarding an injunction and accounting against the defendant for infringement of letters patent No. 414,018, to Francis M. Campbell, inventor, and William Thuener, assignee, for an improvement in hot-air furnaces. No written opinion was filed by Judge Hallett. While submitting his oral views, which were very imperfectly reported, he observes:

"I shall not discuss this matter at great length, but I must say, again, I think the complainant's device, comprehending, as it does, the location of the several flues, the upward and the side, and the manner of connecting with the fire chamber, and the introduction of the cold air, may be of the nature of invention."

Judge Hallett had before him several furnaces of similar construction, and involving much the same principle of action, as that of complainant's. A petition was filed upon the ground of newly-discovered evidence, and the attention of the court was called particularly to the Powell and Krause furnaces, the former of which was put in use as early as 1884, and the latter in 1888. Upon this showing, Judge Hallett ordered—

"That a rehearing be allowed at the next term of the court upon the question of the novelty of complainant's invention with reference to the Powell furnace and the Krause furnace, mentioned in respondent's affidavits filed June 24, 1893."

The necessary steps marked out in the order have been taken to present the question thus reserved. Whatever might be my disposi-

tion otherwise, I felt constrained to the consideration of this single question and such others only as are strictly incidental to and necessarily grow out of it, though counsel have given attention in their respective arguments to quite all the issues involved in the contest as it originally stood. The respondent mainly relies, so far as this hearing is concerned, upon the Powell furnace as an anticipation of the complainant's furnace. The number of anticipations is not material. If one perfected and used has preceded, it is sufficient to defeat the validity of the patent relied upon. This, then, at once introduces the question whether the Powell furnace was an anticipation of the complainant's. The Campbell patent, under which complainant claims, is for an improvement in hot-air furnaces, "which relates especially to the system of flues traversed by the products of combustion in their escape from the combustion chamber." The arrangement of complainant's furnace is thus described:

"Leading from the upper portion of the combustion chamber, which is practically an upright chamber, in the customary form, are two horizontal escape flues, B, B', which lead, respectively, into two vertical flues, C, C', at and towards the upper portion thereof. The upright flues at the lower end thereof connect with a horizontal chamber, D, towards the ends of it. The exit from the horizontal chamber is by means of an upright flue, E, which rises from the center of the chamber midway between the vertical flues, C, C', and at its upper end connects with any suitable escape flue. Cold air is admitted into the hot-air chamber at the rear of the furnace, and directly to the rear and under the chamber to which the two upright flues unite."

The operation of the furnace is described in the specifications as follows:

"The heated products of combustion escape from the chamber A into descending flues, C, C', which are quite large in diameter and larger than the flue E. Owing to their size and the use of the pair of them, the flues C, C', are sufficient for the chamber A, and no direct escape is needed. The course from the flues C, C', is downward into the chamber D, which serves not only to provide an additional heating service, but also as a dust chamber, and as a guard to favor the delivery of the incoming cold air towards the central portion of the hot-air chamber. From the chamber D the escape is as stated upward through the flue E."

Three claims are predicated on these specifications, the first and third of which are necessary to notice:

"(1) In a furnace the combination with the hot-air chamber, having an air inlet in one side near its bottom, of the combustion chamber, situated eccentrically within the hot-air chamber, and adjacent to the side thereof, opposite that having the air inlet, the flues B, B', extending from the inner side of the combustion chamber near the top thereof, the descending flues C, C', communicating at the top with the flues B, B', respectively, the chamber D communicating with the lower ends of the flues C, C', and the ascending flue E rising centrally from the chamber between the flues B, B', substantially as specified."

"(3) In the furnace the combination with the hot-air chamber and the combustion chamber, situated eccentrically therein, of the flues B, B', extending from the top of the combustion chamber, the descending flues C, C', of large diameter, communicating respectively with the flues B, B', the heating chamber D communicating with the lower ends of the flues C, C', and the ascending flue E rising from the chamber D between the flues C, C', of much smaller diameter than the latter flues, as and for the purpose set forth."

The virtues of this special mode of construction or system of escape flues are particularly dwelt upon in the specifications. Of the vertical flues C, C', it is said, owing to their size and the use of a pair of them, they are sufficient for the combustion chamber, and no direct escape is needed. Of the horizontal chamber it is claimed that it not only provides additional heating service, but also a dust chamber and a guard to favor the delivery of the incoming cold air through the central portion of the hot-air chamber. In addition to this the dust chamber is not connected with the combustion chamber, and the space between the two affords an opportunity for the air to rise. The ascending flue E is smaller than the descending flues C, C', which is for the purpose of retarding the descent through the flues C, C', and increasing the heating service thereof, and, by means of the retardation of the product of combustion, the greatest possible amount of heat will be thrown out from the descending flues into the hot-air chamber; and, because of this difference in size between the flue E and the flues C, C', the air will pass much more rapidly upward through the flue than it can descend through the flues C, C'. I assume that this arrangement of flues has in it the quality of an invention. The Powell furnace is constructed upon the same operative principle as that of the complainant's, the mechanical structure differing only in a few slight, and, to my apprehension, unimportant, particulars. In other words, if the complainant's furnace be an improvement on the Powell furnace, it is one of degree, and not of kind; and as was said in the case of *Burt v. Evory*, 133 U. S. 349, 358, 10 Sup. Ct. 394:

"The test is that the improvement must be the product of an original conception (*Pearce v. Mulford*, 102 U. S. 112, 118; *Slawson v. Railroad Co.*, 107 U. S. 649, 2 Sup. Ct. 663; *Munson v. Mayor, etc.*, 124 U. S. 601, 8 Sup. Ct. 622; and many other cases); and a mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention."

The same idea was more fully expressed by Mr. Justice Strong in *Smith v. Nichols*, 21 Wall. 112, as follows:

"But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing, in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike whether what preceded was covered by a patent, or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found therein. In one case, everything belongs to the prior patentee; in the other, to the public at large."

Counsel for complainant insists that complainant's furnace, as described in the specifications and claims of the Campbell patent, differs from the Powell furnace in the following particulars: First. That, unlike complainant's furnace, its parts were not intended to operate with a single cold-air inlet at the rear, but with two cold-air inlets at the sides. Second. The lower horizontal chamber was located on an ash-pit extension, whereas in the Campbell patent an air passage exists between the ash pit and the horizontal chamber D. Third. In the Powell furnace the down flues are constructed

so as to be smaller than the up flues. The method of introducing the cold air at the rear is not an essential claim of the Campbell patent. If so, it appears that the patent would have been refused, because that method of introducing cold air had long prior been in use. Complainant's claim must rest upon the arrangement of a system of flues for the product of combustion. To such a design the specifications limit and commit it. The place of introducing the cold air is a nonessential. The attachment of the horizontal chamber to the ash pit in the Powell furnace, whereas in the Campbell furnace it is independent of such connection, does not destroy the identity of principle in operation or design. It may be conceded, because of the nonattachment of this chamber to the combustion chamber or ash pit, the hot air would rise more freely than in the Powell furnace; yet this does not impeach the identity of principle in the operation of the two, but only the degree, and is not the product of inventive skill. It is manifest, not only from the physical structure of the Powell furnace, but the fact is clearly emphasized by the testimony, that there is a free circulation upwardly of air between the combustion chamber and the down flues in the Powell furnace. Moreover, just such an independent arrangement of the horizontal chamber D is found in the Ringen furnace of 1885. In the Powell furnace the two vertical chambers or flues are contracted at the lower end, but the body of these flues are larger in diameter than the escape flue located between them. They operate precisely alike and upon the same principle. An equivalent of this is found in the smaller horizontal flues B, B', of the Campbell furnace.

Counsel for complainant seems to realize that the Powell pattern of furnace stands conspicuously in the way of the Campbell patent, and, to overcome this impediment, strives, for the first time on this rehearing, to show that Campbell completed and perfected his invention as early as January, 1884, but was prevented, by lack of pecuniary means, from pressing an application for grant of letters patent. If I am right in concluding that the Campbell furnace is an essential duplicate of the Powell furnace, this argument cannot avail the complainant. The Powell furnace was put in public use in 1884, and to a limited extent has been in service ever since. The Campbell patent was applied for in February, 1889.

Section 4886, Rev. St., provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof not known or used by others in this country or any foreign country * * * not in public use or on sale for more than two years prior to his application, * * * may * * * obtain a patent therefor."

The interpretation of this statute by the supreme court in the case of *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101, clearly defeats this contention of complainant. In a case to which reference is made in the opinion just referred to, and speaking with reference to the policy of the statute, it is said—

"That the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it,

and that if he does not apply within such time, but applies after the expiration of such time, and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent, or allowance, and even though he was in fact the original and first inventor of the thing patented and so in public use."

If Campbell's plans of furnace were complete in conception in January, 1884, it was his duty to give it to the public for use at the earliest practicable time. Inventive talent is encouraged that public comfort, utility, and convenience may be augmented. It has been well said:

"Justice requires that the public should reward those only who keep faith with it, who apply their creative energies to the promotion of the public good, and who, having generated ideas, reduce them as speedily as possible to practical and beneficial public use." 1 Rob. Pat. p. 546.

We are entitled to presume that the conception is contemporaneous with the application; but, waiving this and the further presumption that a failure to apply for a patent evidences an incomplete and imperfect conception, the circumstances that would justify the inventor in withholding his invention from public use for a period of four or five years must be of a more immoderate character than I find to exist in this case. But conception alone, although complete, is not sufficient; for, when the patentee proposes to assert that his invention was anterior to the date of his application, he must not only prove that he made the invention at the period suggested, but that he reduced it to practice in the form of an operative machine. *Johnson v. Root*, 2 Cliff. 116, Fed. Cas. No. 7,409. No effort has been made to prove the construction of a furnace prior to 1888. Complainant's counsel cites us to those cases which seem to encourage experimental tests in order to perfect the instrument before applying for patent, as if, by such reference, to lead us to suppose that Campbell was demonstrating the value or perfecting the detail of his invention through such actual experiments. Of this I find no evidence in the record. If, however, he were thus engaged, he assumed the chances of the field being occupied by other and more diligent designers, more prompt to supplement their creative efforts by a reduction to practice. The fact is, the Powell furnace was constructed and satisfactorily employed in 1884, incorporating all of the mechanical elements of construction and arrangement, and combining all of the operative principles, obtaining in the Campbell furnace.

The bill will be dismissed, at complainant's costs.

CONSOLIDATED VAPOR-STOVE CO. v. NATIONAL VAPOR-STOVE & MANUF'G CO.

(Circuit Court, N. D. Ohio, E. D. May 12, 1893.)

No. 4,800.

PATENTS—VAPOR STOVE BURNERS.

The Whittingham patent, No. 235,600, for a vapor-stove burner, *held* valid, as covering a novel and patentable device, and also *held* infringed by defendant's burner.

This was a suit in equity by the Consolidated Vapor-Stove Company against the National Vapor-Stove & Manufacturing Company for infringement of letters patent No. 235,600, issued December 14, 1880, to Charles and Joseph Whittingham. A full description of this patent will be found in Consolidated Vapor-Stove Co. v. Ellwood Gas-Stove & Stamping Co., 63 Fed. 698.

Sherman, Hoyt & Dustin, for complainant.

W. M. Lottridge, for respondent.

RICKS, District Judge. This is a bill filed by the complainant, alleging that the defendant infringes patent No. 235,600, dated December 14, 1880, for a vapor-stove burner. The complainant makes the usual allegations that it has a patent issued to it for an improved vapor burner used on stoves commonly known as gasoline stoves. The defendant denies infringement, and claims prior use. The only proof taken is as to the novelty and patentability of the complainant's device, offered on its behalf, and proof denying infringement, offered on behalf of the defendant. I have inspected complainant's exhibit of defendant's device, and also the testimony of the experts, and the testimony of the manager of the defendant. From this testimony it seems to me clear that the complainant, under its first claim, has a combination of devices which results in a novel and patentable process for generating gas and consuming the same. The defendant's burner is certainly an infringement of the complainant's device. The only difference I can discover is that the cap, S, in the defendant's burner, has different shaped offices; but in both devices it acts as a burner. In the defendant's combination it may be a better burner, but the function it performs is the same as cap S in the complainant's combination, as described in claim 1. The conducting pipe, F, as given in the exhibit (which is the defendant's stove), which corresponds to complainant's tube, F, is given a horizontal position, because such position answers defendant's purpose better, inasmuch as its conducting tube performs other functions in connection with outer or auxiliary burners. But it performs the same, though additional, functions as tube F in complainant's device. In the latter it is heated from the heater plate; in the defendant's combination, through the central burner. But in both it acts as a conductor, commingler, and heater. For these reasons I think it a clear infringement of the first claim in complainant's patent, and a decree may be accordingly entered.

SESSIONS v. GOULD et al.

(Circuit Court of Appeals, Second Circuit. October 16, 1894.)

PATENTS—INFRINGEMENT—TRUNK FASTENERS.

The Taylor patent, No. 203,860, for trunk fasteners, construed as to the second claim, which is *held* to be valid, and to have been infringed by defendants. *Sessions v. Gould*, 49 Fed. 855, 60 Fed. 753, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill by John H. Sessions against William B. Gould and others for infringement of letters patent No. 203,860, issued May 21, 1878, to Charles A. Taylor, for an "improvement in trunk fixtures," assigned to complainant June 1, 1878; and letters patent No. 255,122, issued March 1, 1882, to John H. Sessions, Jr., "for trunk fasteners," assigned to complainant July 1, 1888. The case was heard on motion for a preliminary injunction before Judge Lacombe, who granted an injunction under claim 2 of the Taylor patent of 1878, and the Sessions patent of 1882. 49 Fed. 855. On final hearing, the case was heard before Judge Coxe, who found the Sessions patent of 1882 invalid, and sustained the Taylor patent, allowing a decree on claim 2. 60 Fed. 753. From the interlocutory decree granting a permanent injunction under claim 2 of the Taylor patent, defendants appealed to this court.

Arthur v. Briesen, for appellants.

Charles E. Mitchell (John P. Bartlett, of counsel), for appellee.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. We fully agree with the opinion of Judge Lacombe upon the motion for a preliminary injunction in the circuit court in regard to the construction of the second claim of the Taylor patent, and deem it unnecessary to add anything to his observations. As, under that construction, the defendants' trunk fasteners concededly infringe the claim, and the only errors assigned by the appellants are in respect to the questions of construction and infringement, the interlocutory decree appealed from should be affirmed, with costs.

SESSIONS v. GOULD et al.

(Circuit Court of Appeals, Second Circuit. October 16, 1894.)

APPEAL—JUDGMENT IN CONTEMPT PROCEEDINGS.

An appeal from an order compelling defendants to pay a fine made upon motion to have defendants punished for contempt for violating an interlocutory injunction must be dismissed; for, if the order is to be treated as part of what was done in the original suit, it is interlocutory, and can only be corrected upon an appeal from the final decree, or, if such order is to be treated as an independent proceeding, it is, in effect, a judgment in a criminal case, reviewable only upon writ of error.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill by John H. Sessions against William B. Gould and others for infringement of letters patent. A preliminary injunction was obtained (49 Fed. 855), and, on motion to have defendants punished for contempt for violating the same, defendants were ordered to pay a fine of \$500. From such order defendants appealed to this court.

Arthur v. Briesen, for appellants.

Charles E. Mitchell (John P. Bartlett, of counsel), for appellee.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The complainants in an equity suit in the circuit court to restrain an infringement of a patent obtained an interlocutory injunction, and subsequently, insisting that the defendants had violated the injunction, proceeded by a motion in the cause to have the defendants punished for contempt. The circuit court, after hearing the parties, made an order, entitled in the cause, that the defendants pay a fine of \$500. The defendants, by an appeal from that order, seek to review and reverse it, upon the ground that the court erred in finding them guilty of disobeying the injunction.

If the order complained of is to be treated as part of what was done in the original suit, it is interlocutory in the cause, and can only be corrected in this court upon an appeal from the final decree. *Hayes v. Fischer*, 102 U. S. 121; *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814. If the order is to be treated as an independent proceeding, it is, in effect, a judgment in a criminal case. *New Orleans v. New York Mail S. S. Co.*, 20 Wall. 387; *Ex parte Kearney*, 7 Wheat. 39. While there is no doubt of the jurisdiction of this court, under section 6 of the act to establish circuit courts of appeals (26 Stat. 826), to review a criminal judgment, not a conviction of a capital or otherwise infamous crime, it can only do so upon a writ of error. A judgment in a common-law proceeding is not removed by an appeal, and a bill of exceptions is necessary to procure a review on a writ of error of any errors which do not appear on the face of the record. *Saltmarsh v. Tuthill*, 12 How. 387; *Kearney v. Denn*, 15 Wall. 51; *Knapp v. Railroad Co.*, 20 Wall. 117; *Kerr v. Clappitt*, 95 U. S. 188. As there is no writ of error or bill of exceptions in the record, we are not called upon to decide whether the order is a criminal judgment.

We are without jurisdiction to entertain the appeal, and it must accordingly be dismissed.

CUERVO v. LANDAUER et al.

(Circuit Court, S. D. New York. September 7, 1894.)

1. **TRADE-MARK—INJUNCTION AGAINST INFRINGEMENT—INNOCENT INFRINGER.**
Injunction will not be refused because defendants bought boxes with infringing labels on them without knowing of the infringement.
2. **SAME—DEFENSES.**
Injunction will not be refused because defendants have made no sales, where it appears that they bought for the purpose of selling, and would have done so but for complainant's suit.
3. **SAME—ORIGIN OF COMPLAINANT'S OWNERSHIP.**
Injunction will not be refused because complainant was not the original designer or owner of the trade-mark, but succeeded to the rights of a firm which owned it.

This was a suit by G. Garcia Cuervo against Julius Landauer and others to enjoin the infringement of a trade-mark in certain cigar-box labels. Heard on motion for preliminary injunction.

Jones & Govin, for complainant.

Weed, Henry & Meyers, for defendants.

LACOMBE, Circuit Judge. This is an application to enjoin violation of complainant's trade-mark in certain labels for cigar boxes. That the alleged infringing labels are imitations of complainant's is self-evident upon inspection. In fact, so close is the resemblance that, in the absence of any affidavit by the designer of the labels found in defendants' possession, it may fairly be assumed that they were intentionally devised to simulate the complainant's labels, and thus confuse the identity of the goods sold under their cover. That defendants did not know that the labels, which they bought, as they aver, from a cigar-box maker, were infringements, is no reason for refusing the relief prayed for. The owner of a trade-mark is entitled to protection against ignorant as well as against malicious infringers. Nor is the fact that no actual sale is shown material. It is manifest on the papers that defendants bought the boxes thus labeled to sell with their cigars, and that, but for complainant's appeal to the courts, they would have offered them for sale. Nor is there any force in the defendants' contention that complainant is not the original designer and owner of the trade-mark. The cases cited, viz. *Stachelberg v. Ponce*, 23 Fed. 430; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436,—do not apply. In the case at bar, complainant, at the time of the adoption of the trade-mark, was the manager of the business, and continued in that position until 1872, when he became a partner in the firm, and continued as such partner with the original Manuel Garcia until 1878, when the latter retired from business, leaving complainant as sole proprietor thereof. Why these circumstances should deprive him of the protection of the courts when the trade-mark, which is a part of the assets of the business to which he succeeded, is infringed, it is difficult to perceive. See *Fulton v. Sellers*, 4 Brewst. 42. Preliminary injunction is continued until trial.

BIRTWELL v. SALTONSTALL, Collector.

(Circuit Court, D. Massachusetts. September 28, 1894.)

No. 377.

CUSTOMS DUTIES—EXCESSIVE EXACTIONS—TIME OF MAKING PROTEST.

Rev. St. § 3011, provides that "any person who shall have made payment under protest," in order to obtain possession of goods, may maintain an action to recover back any excess paid, "but no recovery shall be allowed * * * unless a protest and appeal shall have been taken as provided in section 2931." *Held*, that the reference to the latter section is for the time as well as the form of the protest, and hence that it need not be made before or at the time of the payment of the duties, but is good if made within 10 days thereafter.

This was an action by Joseph Birtwell against Leverett Saltonstall, collector of the port of Boston, to recover duties paid under protest. There was originally a judgment for plaintiff (39 Fed. 383), but this was reversed, on defendant's appeal, by the supreme court (150 U. S. 417, 14 Sup. Ct. 169), and a new trial ordered. A new trial having been accordingly had, the opinion below was filed.

Josiah P. Tucker, for plaintiff.

Sherman Hoar, U. S. Atty., and Wm. G. Thompson, Asst. U. S. Atty., for defendant.

COLT, Circuit Judge. The position taken by the United States attorney in behalf of the defendant is that where an importer, in order to obtain possession of his merchandise, pays the duties under section 3011, Rev. St., he must, at or before the time of such payment, make a written protest; and that a protest made within 10 days after the ascertainment and liquidation of duties under section 2931 is insufficient, because too late in point of time; and that, therefore, such protest, although complying with the provisions of section 2931, cannot be admitted in evidence as a legal protest in a suit brought by the importer against the collector to recover back the excess of duties.

It must be remembered at the outset that the whole subject of the right of action by an importer to recover duties illegally exacted by a collector, which includes, of course, the question of protest, is now purely statutory. This has been so decided by the supreme court in *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, and *Porter v. Beard*, 124 U. S. 429, 8 Sup. Ct. 554. The old common-law right of action recognized and applied in *Elliott v. Swartwout*, 10 Pet. 137, and which rests upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law did not authorize him to exact, has been superseded by an action based exclusively on a statutory liability. Mr. Justice Matthews, speaking for the court in *Arnson v. Murphy*, says:

"From this review of the legislative and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott v. Swartwout*, 10 Pet. 137, has been converted into an action based entirely on a different principle,—that of a statutory liability, instead of an implied promise,—which, if not originated by the act

of congress, yet is regulated, as to all its incidents, by express statutory provisions. * * * Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive."

The protest, therefore, which we have to consider in this case, is not the old common-law protest, but the protest provided by statute. More specifically stated, the question is not at or within what time a protest at common law must be made to entitle a person to recover back money illegally exacted, but within what time does the statute declare a protest must be made in order to give to an importer a right of action against a collector for duties claimed to be in excess of law, where such duties are paid in order to obtain possession of the merchandise. If the first part of section 3011, which says that "any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him," was the whole statutory law on the subject of protest, I admit the force of the government's position; but I cannot admit, taking the whole of section 3011, in connection with section 2931, as they exist in the Revised Statutes, as amended and corrected by the act of March 2, 1877, that the argument of the government is sound. Section 3011, which is taken from the act of February 26, 1845 (5 Stat. 727), provides that "any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him" may maintain an action at law against the collector to ascertain the validity of such payment, and to recover back any excess so paid; "but no recovery shall be allowed in such action unless a protest and appeal shall have been taken as provided in section twenty-nine hundred and thirty-one." Section 2931, which is taken from section 14 of the act of June 30, 1864 (13 Stat. 202), provides as follows:

"On the entry of * * * any merchandise, the decision of the collector * * * as to the rate and amount of duties to be paid * * * on such merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner, * * * shall within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation appeal therefrom to the secretary of the treasury. The decision of the secretary on such appeal shall be final and conclusive; and such * * * merchandise * * * shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary of the treasury, on such appeal."

It is perfectly clear that these two sections of the statute are to be construed together. When section 3011 declares that no recovery shall be allowed unless a protest and appeal shall have been taken as prescribed in section 2931, it makes the provisions respecting protest and appeal contained in that section a part of section 3011, and the result is the same as if those provisions had been actually inserted in the latter section. The act of 1845, which has now become section 3011, contained specific provisions respecting the form and time of protest. It declared that no action can be

maintained for receiving back duties "so paid under protest, unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." But these provisions respecting the form and time of protest which are found in the act of 1845 have been eliminated from section 3011, and there has been substituted therefor the kind of protest called for by section 2931. Surely, the only conclusion that can fairly and reasonably be drawn from this is that the protest provided for in section 2931 is to take the place of the protest described in the act of 1845, as applied to those who pay duties under protest for the purpose of obtaining their merchandise.

The argument of the government is that while the act of March 3, 1839 (5 Stat. 348, § 2), as construed by the supreme court in *Cary v. Curtis*, 3 How. 236, took away the old common-law right of action by the importer against the collector for illegally exacted duties, the act of February 26, 1845 (5 Stat. 727), now section 3011, was simply declaratory of the old common-law right which had previously existed; and that, consequently, as a protest at common law must be made at or before the time of payment, so the words "payment under protest," in the act of 1845 and in section 3011, must and do signify that the protest must be made at or before the time of payment. If the act of 1845 had limited itself merely to the restoration of a previously existing common-law right, and had left the law of protest as it stood at common law, there would be much force in this argument. But the trouble is that the act of 1845 changes the old common law on the subject, and creates a new and statutory protest. To be sure, it uses the language "paid money under protest" in the beginning of the section; and, if it had left the matter there, it might properly be said that these words are merely a statement of the old rule, and signify a protest at or before the time of payment; but, at the close of the act, congress goes on to define what shall constitute a payment under protest in order to entitle a party to recover, by declaring that no action shall be maintained for the receiving of duties "so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." Payment under protest in the act of 1845 signifies a payment under the statutory protest prescribed in the last part of the act. A protest at common law might be by parol, but this statutory protest must be made in writing, and must set forth distinctly the grounds of objection. As the words "paid money under protest" in the act of 1845 are controlled by the closing words of the section describing the form and time of protest, so in section 3011 the words "payment under protest" should be interpreted in the light of the closing portion of the section, which says: "But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as provided in section twenty-nine hundred and thirty-one." To hold otherwise would be

to divorce the words "payment under protest" from the rest of the section, and to interpret them as if they stood alone and were all that was said on the subject. It would be to declare that the protest required in the first part of the section must be one kind of protest, and the protest mentioned in the last part of the section must be another kind of protest as applied to the same subject-matter. If we take the words "payment under protest" by themselves, and as having reference to the old common-law protest, I do not see why a parol protest is not sufficient to answer the requirement of the statute as to this protest, because there is nothing to show that anything more is required, and therefore it is only by connecting together the first and last parts of section 3011 that any additional statutory requirements respecting protest become necessary. But the government insists that the protest must be in writing; and, if so, it must be from something which is found in the statute, and that something is found in the closing part of the act of 1845 and the closing part of section 3011, in which reference is made to section 2931. If the protest must be in writing, by virtue of the force of these provisions, then it should conform to these provisions in other respects. The only logical conclusion from this position of the government is that "payment under protest" means payment under the statutory protest as first described in the act of 1845, and as now set forth in section 2931, Rev. St.

The position of the government is that these statutory regulations on the subject of protest govern as to form, but not as to time; and the argument seems to be this: To entitle a person to this right of action at common law, payment must be made at or before the time of protest. The act of 1845 (section 3011) merely restored the old common-law right of action, and is the enabling act conferring this right, as distinct from section 2931, which merely limits and restricts the right. "Payment at or before the time of protest" is synonymous with "payment under protest." The words "payment under protest" appear in the act of 1845 and in all subsequent statutes which deal with this right of action. When congress amended section 3011 by the act passed in 1877 for the corrections of errors in the Revised Statutes, it struck out the protest requirements found in the act of 1845, but still left remaining the words "payment under protest;" and that it follows from these propositions that the old common-law rule still prevails as to the time of protest when the person makes payment to obtain possession of his merchandise. But, admitting the premises to be true, I do not think the conclusion follows, and for the reasons I have already given. The question of protest is now purely statutory. The protest mentioned in the first sentence of section 3011 means the protest referred to in the last sentence, and the protest referred to in the last sentence is the protest found in section 2931, where both the time and the form of protest are given.

There are no reported cases in which this identical question has been determined, but an examination into the legislative and judicial history of the law of protest and of the practice which has pre-

valled in the treasury department in respect thereto does not, in my opinion, assist the contention of the government. We have first the act of 1845 (5 Stat. 727), in which the provisions of the protest which must be filed by persons who make payment under protest in order to obtain their goods are for the first time defined by statute. Then follows the act of June 30, 1864 (13 Stat. 202), which was passed to correct certain evils arising under the act of 1845, and which, among other things, extends the time for making protest to 10 days after liquidation. Next, we have the Revised Statutes of 1875, in which the act of 1845 appears in section 3011, and the act of 1864 in section 2931. In this edition of the Revised Statutes both forms of protest appear,—that of the act of 1845, which requires the protest to be made before or at the time of payment; and that of the act of 1864, which allows a protest to be filed within 10 days after liquidation. Then follows the act of 1877, for the correction of errors in the Revised Statutes. Under this act, congress struck out the provisions relating to protest found in section 3011, and taken from the act of 1845; and in place of what was repealed it declared the protest and appeal required should be in accordance with section 2931. I think this shows a clear expression of legislative intent to make the protest described in section 2931 the only statutory protest necessary to be made.

Under the act of 1845, it was decided by Chief Justice Taney in *Brune v. Marriott*, Taney, 144, Fed. Cas. No. 2,052, which decision was affirmed by the supreme court in 9 How. 619, that the protest is not required to be made on or before the payment of what is called "estimated duties," and that the protest is legally made when the duties are finally determined and the amount assessed by the collector. The court says: "The payment of the money upon the estimated duties is rather in the nature of a pledge than a payment." This authority has been questioned, and upon the point under consideration is hardly consistent with language used in *Barney v. Watson*, 92 U. S. 449, but it seems to be recognized as sound in *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560. But whatever weight is to be given to *Brune v. Marriott*, it is important in one respect as showing that, whenever the question of the time of making protest has been in issue, the inquiry has been what is the statutory provision on this point. In that case the court only directed its examination to the construction of the words "at or before the payment," in the act of 1845; just as in *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, the court confined its attention to the proper signification of the words "within ten days after the ascertainment and liquidation," in the act of 1864. After the passage of the act of June 30, 1864 (section 2931), and down to the enactment of the Revised Statutes in 1875, the act appears to have been treated by the courts as repealing by implication the act of 1845, and consequently as containing the whole law on the subject of protest. *Barney v. Watson*, 92 U. S. 449. It has been more recently held, however, that the act of 1864 did not repeal the act of 1845, and that both acts, as now embodied in sections 2931 and 3011, Rev. St., are to be construed as coexisting.

Arnson v. Murphy, 109 U. S. 238, 3 Sup. Ct. 184; *U. S. v. Schlesinger*, 120 U. S. 109, 7 Sup. Ct. 442; *Porter v. Beard*, 124 U. S. 429, 8 Sup. Ct. 554. But, however this may be, this much is true: that, since the act of 1864, the supreme court has assumed that all the requirements of a valid protest were contained in that act, and that a protest made within 10 days after liquidation is good. The question of the time of protest under the different statutes is carefully discussed in *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, and it is there assumed that the act of 1864 governs as to time. And so with the treasury department. It has by its regulations and the practice of its officers, since 1864 and down to the customs administrative act of 1890, recognized a protest made before the expiration of 10 days after liquidation as good and valid under the law to enable an importer to maintain an action against a collector for the recovery of duties illegally exacted. Since the decisions in *Arnson v. Murphy* and other cases holding that the act of 1864 did not repeal the act of 1845, I think, if the question under consideration had arisen after the passage of the act of 1864, and before the amendment of section 3011 under the act of 1877, it would have been difficult to have arrived at a satisfactory conclusion. This difficulty, however, would not have been caused by reason of the words "payment under protest," in the first part of section 3011, but because the statute apparently contained two kinds of protest,—one described in the act of 1845, now section 3011; and the other in the act of 1864, now section 2931. The amendment of section 3011 repealing the protest therein contained removed this inconsistency, and made the law clear and intelligible.

For these reasons, I am of opinion that the protests now offered in evidence were made within the time required by law, and therefore should be admitted.

THE MARY GARRETT.

ANDERSON v. THE MARY GARRETT.

(District Court, N. D. California. October 29, 1894.)

No. 10,701.

1. ADMIRALTY—JURISDICTION—INJURY ON WHARF.

Admiralty has no jurisdiction of an action for injury to a person on a wharf, caused by negligence originating on a ship; and it makes no difference that the person was employed as a seaman on the ship.

2. SAME—WAGES.

The fact that libellant claims, as part of his damages for the tort, loss of his wages as seaman, does not aid the jurisdiction of admiralty.

Libel by Gust. Anderson against the steamboat *Mary Garrett*, her tackle, apparel, and furniture, for damages for personal injuries to a seaman employed on the vessel, sustained on a wharf by reason of the alleged negligence of the mate and owner of said vessel in unloading a portion of the cargo. Exceptions to the jurisdiction of the court. Exceptions sustained.

G. M. Spencer and John C. Hughes, for libellant.

Woods & Levinsky and W. G. Holmes, for claimant.

MORROW, District Judge. The action in this case is in rem against the steamboat *Mary Garrett*, and is brought to recover damages for personal injuries sustained by libellant while in the employment of said vessel. The case is now before the court upon exceptions by claimant to the amended libel filed October 8, 1894. The exceptions are directed to the jurisdiction of the court, it being contended that it is sought, by the cause of action set out in the amended libel, to recover damages for an injury sustained on a wharf; or, in other words, that the damage was inflicted on land, and not on water, and that, therefore, this court, as a court of admiralty, has no jurisdiction. It appears from the amended libel that on June 9, 1893, the libellant entered into the service of the claimant as a seaman on board of the *Mary Garrett*, then lying in the port of San Francisco, and destined on a trip to the city of Stockton, an inland port in the state of California; that the vessel arrived on or about June 10, 1893, at the port of the city of Stockton, with libellant on board; that at said last-named time the libellant was injured by and through the negligence and carelessness of the mate of the vessel in discharging a portion of the cargo of said vessel. The fifth article of the amended libel contains the averments of fact which, it is claimed, are fatal to the jurisdiction of this court. It is as follows:

"And the said libellant further alleges that by reason of the carelessness and negligence of said libelee in receiving a portion of the cargo aforesaid, from the consignors thereof, in an unsafe and dangerous condition for shipment, in that a portion of said cargo aforesaid, consisting of a large amount of sheet iron, was received by said libelee for shipment, loosely placed, unbound, upon a wheeled vehicle, and carelessly and negligently handled, by reason of the commands of the said mate, in that said wheeled vehicle, on which said sheet iron lay loose and unbound, was, by the commands of said mate, caused to be wheeled down a steep descent along the gang plank from said vessel to the dock, at the time and place aforesaid, while said gang plank was in a steeply inclined position, and by reason of the carelessness and negligence of said libelee in not providing suitable and safe machinery and appliances for the proper unloading of said portion of said cargo, and by reason of the carelessness and negligence of said libelee in not causing said portion of said cargo to be put in a safe and suitable condition for being handled at said time and place aforesaid, said portion of the cargo of said vessel was discharged upon and fell upon libellant, and thereby said libellant received and suffered the injuries and damages hereinbefore set forth."

It is also further averred in other articles that the injury was due to the carelessness and negligence of the claimant, the California Navigation & Improvement Company, in failing to provide suitable machinery and appliances for the unloading of the cargo, and also in making use of the wharf, knowing that it was in an unsafe and dangerous condition.

While the language employed in the amended libel does not clearly, and in so many words, state that libellant received the injury on the wharf, yet the reasonable interpretation of the language used in narrating the manner in which the injury was sustained is

hardly susceptible of a different conclusion. In fact, it was conceded at the argument that libellant was injured on the wharf. That a wharf is, figuratively speaking, regarded, in the admiralty, as land, and not as water, is well settled. It is deemed but an improvement or extension of the shore for commercial purposes. *The Rock Island Bridge*, 6 Wall. 213; *The Ottawa*, 1 Brown's Adm. 356, Fed. Cas. No. 10,616; *The Empire State*, 1 Newb. 541, Fed. Cas. No. 12,145; *The Mary Stewart*, 10 Fed. 137. The proposition is elementary in the admiralty law that the test of the jurisdiction of admiralty courts over torts is the locality of the injury. The question which is conclusive upon the jurisdiction of this court as a court of admiralty is, where was the injury sustained? On land or on water? If upon the land, then the admiralty cannot take cognizance of the tort; if upon the "water," this term comprehending in this country the high seas and the navigable waters, this court has exclusive original jurisdiction of an action in rem for damages. Henry, in his work on Admiralty Jurisdiction, etc., (page 68, § 26), thus states the general proposition:

"This jurisdiction, as far as it concerns torts, depends entirely upon the locality; but it must be committed on the water, and not on the land."

The authorities all affirm the same principle in unequivocal terms. *The Plymouth*, 3 Wall. 20; *The Rock Island Bridge*, 6 Wall. 213; *The Neil Cochran*, 1 Brown's Adm. 162, Fed. Cas. No. 10,087; *The Ottawa*, 1 Brown's Adm. 356, Fed. Cas. No. 10,616; *The Mary Stewart*, 10 Fed. 137; *The Arkansas*, 17 Fed. 383; *The Professor Morse*, 23 Fed. 803; *The H. S. Pickands*, 42 Fed. 239; *The John C. Sweeney*, 55 Fed. 540.

Nor does it make any difference whether the tort had its inception, its origin, upon water, if the consequential effects of the wrong, the consummation of the tort, happened on land. It is immaterial, so far as the admiralty jurisdiction is concerned, that the tort originated on water, if the injury happened on land. This was decided in the case of *The Plymouth*, 3 Wall. 20. In that case the steam propeller *Falcon* anchored beside the wharf of Hough & Kershaw, in Chicago river, which was a navigable stream. There were large packing houses on the wharf, filled, at the time, with valuable stores. Owing to the negligence of those in charge of the *Falcon*, the vessel took fire; and the flames spreading to the wharf and packing houses, these were wholly consumed, with the stores therein contained. Mr. Justice Nelson, who delivered the opinion of the court, said:

"It will be observed that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality,—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters, not extending beyond high-water mark. * * * Since the case of *The Genesee Chief*, 12 How. 443, navigable waters may be substituted for tide waters. This view of the jurisdiction

over maritime torts has not been denied. But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water,—in other words, as the wrong began on the water,—where the admiralty possesses jurisdiction, it should draw after it all the consequences resulting from the act."

After dwelling upon the fact that it is the locality of the injury that determines whether a court of admiralty has or has not jurisdiction, the learned justice proceeds:

"We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters,—the Chicago river; and, as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass, but quite as efficient a cause of damage as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given: The whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends,—on the high seas or navigable waters. The learned counsel, who argued this case for the appellants with great care and research, admitted that it was one of first impression; that he could find no case in the books like it. The reason is apparent, for it is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has sought to be classed."

The doctrine enunciated by this case has not since been limited or otherwise impaired; but, where the question has arisen, the doctrine has been unqualifiedly recognized as correct. The *Neil Cochran*, 1 Brown's Adm. 162, Fed. Cas. No. 10,087, and cases cited above. It is true that most of the cases cited against the jurisdiction of this court as a court of admiralty involved actions in rem against vessels for collisions with the land; that is, with wharves, piers, bridges, and, in one case, with a marine railway. The *Neil Cochran* was a case where a libel was filed against the schooner *Neil Cochran* for collision with a drawbridge. Held not a maritime tort. In *The Ottawa*, 1 Brown's Adm. 356, Fed. Cas. No. 10,616, a libel in rem was filed against the *Ottawa* for collision with a wharf. Held not a maritime tort. In *The Arkansas*, 17 Fed. 383, that vessel was libeled for an injury to a tank containing a large quantity of oil, by being floated and propelled against it. The tank was part of a depot for the reception and storage of oil upon the levee in the city of Keokuk, near the Mississippi river; but, by reason of an unusual and extraordinary flood of the river, the water extended to and around the said property, and the vessel, while being navigated, collided with it. It was held that an action in rem could not be maintained, said depot being a structure upon land, although the water was the means or agent by which the vessel was floated upon this land structure. In *The Professor Morse*, 23 Fed. 803, a libel in rem

was brought for an injury to a marine railway. Held not a maritime tort, the marine railway not being a floating structure. In *The John C. Sweeney*, 55 Fed. 540, a libel was filed against the vessel for colliding with a drawbridge. Held not a maritime tort. In the *Rock Island Bridge Case*, 6 Wall. 213, a maritime lien was claimed and sought to be enforced against a portion of the bridge known by the above name for alleged damages sustained by two steamboats in colliding with that part of the bridge. But the supreme court held (Mr. Justice Field delivering the opinion) that the bridge was, to all intents and purposes, part of the land, and that a maritime lien could not be impressed thereon. Although the facts of these cases cannot be said to be analogous to the case at bar, in that the injuries were done to the land, or what has been held to be tantamount to land, viz. wharves, piers, bridges, etc., while in the case at bar the injury was inflicted on land, though the cause of the injury arose on or proceeded from the vessel, nevertheless the principle invoked in all these cases, and repeatedly enunciated by the decisions, is common to the case at bar, viz. that it is the locality of the injury, not of the wrong, strictly speaking, which is the test of the jurisdiction of admiralty over torts; and it would seem, logically, that, if courts of admiralty have no jurisdiction over injuries by vessels to land, a fortiori they ought not to have jurisdiction over torts resulting in damage on land. In two cases the facts are quite analogous to those in the case at bar. In *The Mary Stewart*, 10 Fed. 137, it appeared that an injury was sustained by a man while he was standing on a wharf. He was injured by a bale of cotton which was being hoisted aboard the vessel loading at the wharf, but which fell before it reached the ship's rail, and struck him. It appeared that the rope which broke was part of the ship's tackle. The district judge (Judge Hughes, of the eastern district of Virginia) held that the admiralty had no jurisdiction over such a tort, nor could state statutes give it such jurisdiction. The learned judge said:

"It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of tort the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. *The Plymouth*, 3 Wall. 20. This springs from the well-known principle that there are two essential ingredients to a cause of action, viz. a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water. Now, the injury in the case at bar happened on the land. Wharves and bridges are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached. And this is the case, whether they project over the water or not. Injuries to or on them, therefore, are not cognizable in the admiralty."

The other case is *The H. S. Pickands*, 42 Fed. 239, decided by Judge Brown, of the eastern district of Michigan. In that case the libellant was engaged in repairing a vessel which lay at a wharf, and he attempted to descend a ladder connecting the wharf with the bulwark of the vessel. The ladder had been secured against slipping

by a cleat at the bottom, which, by the negligent act of the master, had been removed. In descending the ladder, it slipped, and libellant was thrown upon the wharf, and injured. The learned judge used the following language:

"I am clear in my opinion that a court of admiralty has no jurisdiction of this case. It has never been doubted since the case of *The Plymouth*, 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon the ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule."

On appeal to the circuit court the case was affirmed by Mr. Justice Brewer.

The fact that in the present case the libellant was a seaman, employed on the *Mary Garrett*, can, it seems to me, make no difference in the application of the principle involved, because the test of the jurisdiction of the court as a court of admiralty is not whether the injured party was or was not a seaman employed on a particular vessel from which the cause of injury is alleged to have emanated, but the test, and the only one, is as to the locality of the damage or injury. It is claimed, however, that in this particular case the court has jurisdiction over the tort, for the reason that the libellant is not only suing for damages, but also for loss of wages. It is to be observed in this connection that the action is brought primarily for damages suffered from the personal injury set out in the amended libel, and that the claim for wages is made incidentally, not as growing out of the contract of employment existing between the claimant and libellant, but as additional damages alleged to have resulted from the personal injury sustained. The libellant is therefore, in my opinion, in no better position. It follows that the exceptions to the jurisdiction of this court should be sustained, and the libel dismissed.

THE MEDEA.

THE IDLEWILD.

WILLIAMS v. THE MEDEA et al.

HANDRAN v. SAME.

(District Court, S. D. New York. October 22, 1894.)

SHIPPING—TUG AND TOW—COLLISION—PIERS AND SLIPS—OBSTRUCTION—USAGE.

The tug *M.*, about noon of July 1st, tied up a fleet of canal boats, consisting of several tiers of three or four boats in a tier, at the end of the Red Star Line pier, Jersey City, in the ebb tide, for the purposes of removal and distribution to their various destinations, in accordance with the usage of many years; and no city ordinance forbade this practice. That pier is about 108 feet longer than the piers below it. The day was mild, and the westerly wind set the end of the tow still further away from the piers below. The steamtug *Idlewild* soon afterwards, in removing another vessel from the end of one of the piers below the Red Star pier, collided with and damaged two boats in the end tow. *Held*, that thus tying up at the pier above under circumstances

and for the purposes stated was not an unlawful obstruction of the slips below; and the Medea was acquitted of fault, and the Idlewild held for lack of sufficient care.

Libels were filed in this case by James N. Williams and Annie M. Handran, respectively, against the steamtugs Medea and Idlewild. The libelants were the owners of two canal boats, which had been damaged by collision.

Hyland & Zabriskie, for libelants.

Robinson, Biddle & Ward and Mr. Hough, for the Medea.

Wing, Shoudy & Putnam and Mr. Burlingham, for the Idlewild.

BROWN, District Judge. Considering the usage of many years, and that no existing regulation is shown to have been violated, I think the Medea was not in fault for tying the top of the tow at the Red Star Line pier, for the distribution of the various boats as usual; and that the difference in length between the Red Star pier and the piers below, viz., about 108 feet, left, in mild weather, and with a west wind, a reasonable provision for the exit of boats between the tow and the slips below. The passage by the Medea without difficulty, though more heavily incumbered than the Idlewild, while the Idlewild and Cossackie were still at the end of the wharf, seems to me a very conclusive corroboration of the above; and shows that the collision, though slight, is due only to the lack of necessary care by the Idlewild, or perhaps the lack of necessary experience on the part of the young man who alone in the wheelhouse was managing the wheel and the signals.

I must, therefore, hold the Idlewild, and exempt the Medea.

The damages are so small that they ought to be agreed upon, without the expense of two references.

THE HATTIE PALMER.

HAWKINS v. THE HATTIE PALMER.

(District Court, S. D. New York. October 22, 1894.)

SHIPPING—NONDELIVERY OF FREIGHT—CONVERSION.

The steamer H. P., making daily trips between New York and New Rochelle, took some barrels of freight for delivery at City Island. On touching there, no person being in readiness to receive the barrels as usual, or to pay freight, the steamer retained the goods on board, and sent word to the consignee, whose place of business was about 200 yards from the landing, to come for them the next day, which notice was received by the consignee. The next day, no one appearing, the goods were still retained on board, and on the following day the steamer was arrested on this libel for conversion. The wharf was not a safe place to leave the goods unattended, and the vessel was always ready to deliver the goods on payment of freight. *Held*, no conversion, and the libel dismissed, with costs.

This was a libel for the alleged conversion of goods which had been shipped upon the steamer Hattie Palmer.

George A. Black, for libellant.
Convers & Kirlin, for claimants.

BROWN, District Judge. There is not to my mind the least evidence of any conversion of the libellant's goods in this case. The dock where the Hattie Palmer landed at City Island was a private dock; it had no storehouse, and there was no convenience for storage. For heavy freight like that in question, the usage and practice had been for the libellant, the consignee, to be present to receive it, either himself, or by his employés with his own teams. In this instance he knew the goods were coming, but made no provision to receive them. They could not safely be left upon the wharf unguarded, and there was no person there to guard them. The Hattie Palmer, in a case like this, was under no obligation to provide a storehouse, or guard. Her only duty was to make reasonable provision for delivery, when the libellant was ready to receive the goods, and pay the freight. As there was no one ready and prepared for this on libellant's behalf—Mr. Ketchum, the expressman, having no such authority, and having refused to take them—the retention of the goods on board until the boat's return from New Rochelle the next noon was entirely reasonable, and the most economical and proper disposition that could be made of the goods. Word was sent to Mr. Hawkins to have some one present to take the goods on the steamer's return the next day from New Rochelle, and to pay the freight, which word Mr. Hawkins received that evening; but he again failed to have any person present to receive the goods, though his yard was but about 200 yards from the landing. They were, therefore, allowed to remain on board for still another day; and the next day Mr. Hawkins libeled the vessel, claiming a conversion, and caused her arrest at such a time as to prevent one of her regular trips.

The evidence leaves no doubt in my mind that the absence of Mr. Hawkins, and his failure to provide for the receipt of the goods as usual on both occasions, were willful; and that an occasion was sought by him for an arrest and detention of the vessel, with intent to injure her business. None of the cases cited by the libellant's counsel seem to me to have any relevancy to the present case.

The libel is dismissed, with costs; and if it were appropriate to such a case, I should charge the libellant with the special damages caused by his arrest and detention of the ship.

THE VILA.

MUNSON v. THE VILA.

GIERTSEN et al. v. SAME.

(District Court, E. D. New York. September 6, 1894.)

1. SALVAGE—RIGHTS OF CHARTERER—WAIVER.

A provision inserted in a charter party for the charterer's benefit, forbidding the ship to stop to pick up any wreck, or in any way assist or tow any vessel, without an exception even for saving life, amounts to a waiver by the charterer of any claim for salvage earned by the ship by towing in a derelict.

2. SAME—COMPENSATION—DERELICT.

Three thousand dollars, upon a valuation of \$8,108.70, allowed to the owners of a steamer for towing into New York, her port of destination, a dangerous derelict found 40 miles at sea, in fair weather, and with a delay of 24 hours.

Goodrich, Deady & Goodrich, for Munson, charterer.

Wing, Shoudy & Putnam, for Giertsen et al., master and crew.

Butler, Stillman & Hubbard and George Cromwell, for cargo.

BENEDICT, District Judge. These two actions are brought to recover salvage compensation for services rendered to the bark Vila and her cargo by the steamer Bredablick on August 30, 1893. The Bredablick was a steamer under charter to the libellant, Munson. At the time of the rendition of the salvage service she was bound to New York, where, upon her arrival, her charter would expire. When nearing New York on her regular course, the Bredablick fell in with the bark Vila, a derelict, about 40 miles from shore, on the afternoon of August 30th. The wind at the time was very light, the sea calm enough to permit the sending of a boat's crew to the derelict. The derelict was found to be apparently sound in her hull, with 24 or 25 inches of water in her. She had a cargo consisting of rags and bones. The Vila's own hawser was taken on board the Bredablick, and the Vila was then towed to New York, where she arrived at the Highlands about 8 o'clock on the night of August 31st, and at 3 o'clock the next morning was anchored off Quarantine, Staten Island. The weather during the time was always favorable, and no damage of any kind was sustained by the steamer in rendering the service. The Bredablick did not deviate from her course, but was detained about 24 hours. The Vila was no doubt in some danger. She was a derelict in the Atlantic ocean. She was, however, leaking but slightly, was in no danger of foundering, and was capable of remaining afloat for an indefinite time. The cargo was not of a perishable nature, and she was in the general track of vessels passing between southern ports and New York, far enough from the shore to be in little danger from that source, and where it was almost certain that she would be sighted in a very short time by some of the numerous vessels at all times passing there. In her condition and position she was a source of danger to other vessels.

The charterer, Munson, has filed a libel, claiming to be entitled to

the salvage. It appears that his charter provided that he should pay port charges, pilotage, agencies, and commissions, the owner providing and paying for provisions, and wages, consular, shipping, and discharging fees; and it also contained the following clause: "On account of the perishable nature of the cargoes that this ship is intended to carry, she is not allowed to stop to pick up any wreck, or in any way assist or tow any vessel, especially when by so doing she is liable to be detained." For delay of the steamer 24 hours the charterer paid the shipowner at the charter rate, \$68, together with \$28 for eight tons of coal. In my opinion, the insertion of such a clause in the charter party amounts to a waiver of any claim for salvage on the part of this charterer, if such claim existed. He made a contract which would prevent the rendition of salvage services, without the merciful exception of a deviation for the purpose of saving life, and he secured to himself a right of action against the shipowner. To that he must be confined. The libel of the charterer is therefore dismissed, and with costs.

No appearance having been entered in behalf of the vessel, and the proceeds of her sale having been eaten up in expenses, the only unsettled question is as to the amount of salvage to be paid by the freight and cargo. The freight has been valued at \$494.17, and the cargo at \$7,614.53. Taking all the circumstances into consideration, I am of the opinion that a suitable salvage compensation for the services rendered in towing in this dangerous derelict would be \$3,000. Inasmuch as there has been no appearance for the freight, the whole of the freight, \$494.17, may be awarded to the salvors, and, deducting that from \$3,000, leaves the sum of \$2,505.83 to be paid by the cargo.

THE IDLEHOUR.

(District Court, N. D. New York. October 19, 1894.)

SEAMEN'S WAGES—DISCHARGE.

Claims for wages are highly favored in admiralty courts, and discharges are not justified for trivial causes.

The libellant, Frederick Bradley, was employed as mate of the steamer Idlehour during the summer of 1894. The steamer made excursion trips from Buffalo to points on the Niagara river. The libellant was employed May 8, 1894. He was discharged July 15, 1894.

Both sides agree that he was to be boarded by the claimant, but there is a dispute as to the date when this agreement took effect. The steamer did not begin her regular trips until June 9, 1894. The libellant contends that he was entitled to be paid for his board for a month from May 8th to June 9th, although the crew had not been assembled and those that were employed were only engaged in fitting the vessel out for the summer's business. The claimant insists that the agreement to board the crew commenced when the steamer began running on June 9, 1894. The claimant also insists that the contract was not by the month but by the day "at the rate of \$65 per month," and that the libellant is only entitled to a per diem com-

pensation for the days when he actually worked, prior to the time the steamer commenced her regular trips. The libellant maintains that the contract from its inception was by the month and that the claimant had no right to discharge him except at the end of a month. Before the Idlehour commenced running, but some time after the contract was made with the libellant, he was informed that it was a regulation of the claimant that the officers and crew should, when on duty, dress in uniform. The libellant demurred to this at first, but afterwards consented to purchase a uniform. He now seeks to recover the sums deducted from his wages in payment of this uniform. The master and the mate did not agree and the mate was discharged, the master maintaining that under the terms of the agreement he could do this at any time.

Urban C. Bell, for libellant.

Harry D. Williams, for claimant.

COXE, District Judge. I am convinced that the claimant did not agree to furnish board to the libellant until the Idlehour commenced her regular trips. After the crew were assembled arrangements could be made for boarding them together, not before. This would seem to be in accordance with custom and common sense. The claim for board prior to June 9th, is, therefore, disallowed.

The contract was clearly by the month and not by the day. The proof discloses no other agreement. The court cannot consider what the claimant intended to do but only what the parties actually did do. The deductions for May 30 and June 2 were unauthorized. If shipowners would observe ordinary precautions and require these agreements to be in writing controversies like the present would seldom occur.

The regulation that the crew of the Idlehour should dress in uniform was a perfectly proper one. In fact the claimant would have been subject to censure had he attempted to run an excursion steamer manned by a crew clad in the motley garments of landsmen. It is hardly to be supposed that every item of detail like this would have been remembered at the time the original agreement was made. Although the libellant objected at the outset he subsequently agreed to the purchase of the uniform.

The discharge was unauthorized. There was nothing in the libellant's conduct to warrant it. The claims of mariners for wages are highly favored by the courts and discharges are not justified unless for causes far graver than anything developed by this evidence. The Superior, 22 Fed. 927; The Garnet, 3 Sawy. 350, Fed. Cas. No. 5,244; The Maria, 1 Blatchf. & H. 331, Fed. Cas. No. 9,074; The Mentor, 4 Mason, 84, Fed. Cas. No. 9,427. It follows that the libellant is entitled to a decree for \$59.90, and costs.

THE RICHMOND.

THE E. HEIPERSHAUSEN.

RILEY et al. v. THE RICHMOND and THE E. HEIPERSHAUSEN et al.

(Circuit Court of Appeals, Second Circuit. September 26, 1894.)

No. 110.

COLLISION—TOW AND ANCHORED VESSEL—NEGLIGENCE OF ANCHOR WATCH—TUG AND HELPER.

A tug going up the Hudson river with a flood tide, at night, with a tow consisting of 9 tiers of canal boats, with 4 boats in most of the tiers, and making a flotilla about 1,600 feet long, discovered a vessel half a mile ahead, lying at anchor outside the boundaries prescribed by the regulations of the secretary of the treasury. The tug and her helper undertook to draw to the opposite side of the river, but the last tier of the tow was swung by the force of the tide beyond the line of the tug, and libelants' boat, which was in such tier, struck the anchored vessel, and was sunk. The anchor watch on the anchored vessel saw the flotilla approaching when some distance away, and, if he had given his vessel chain, the tide would have carried her back and out of danger. He testified he attempted to let out the chain, but failed. *Held*, that both the tug and anchored vessel were in fault, and properly condemned to pay libelants damages. 56 Fed. 619, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by F. Riley and another against the steam tug E. Heipershausen and the steamship Richmond for collision. There was a decree for libelant against both vessels. 56 Fed. 619. The owners of the tug and steamship appeal. Affirmed.

Owen, Gray & Sturges, for appellant the Richmond.

Robert D. Benedict and Mr. Carpenter, for the Heipershausen.

Alexander Cameron, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The steamship Richmond and the steam tug Heipershausen were both adjudged in fault by the district court, and condemned to pay the libelants damages for the injuries inflicted upon the canal boat Thomas Flood and her cargo by the collision between the steamship and the canal boat. Both the owners of the steamship and of the tug have appealed, and each appellant assigns as error that the vessel of the other should have been found solely in fault by the district court. The collision took place about 9 o'clock in the evening of June 10, 1892, under the following circumstances: The Heipershausen started from the East river with a tow of canal boats bound for Albany. As she proceeded up the Hudson river, other canal boats were added to the flotilla, including the libelants' canal boat, which was taken from one of the piers at Hoboken. The flotilla then consisted of 9 tiers of canal boats, with 4 boats in most of the tiers, and the Heipershausen leading, with hawsers 550 feet long attached to the outside boats in the front tier, constituting a flotilla about 1,600 feet in length. The

steam tug Haviland was acting as a helper to the Heipershausen, towing alongside of her, with a hawser fastened to one of the middle boats of the head tier. While the flotilla was proceeding along the westerly side of the river, parallel with and about 500 feet from the ends of the piers, the Heipershausen discovered the steamship Richmond about half a mile away, lying at anchor, and somewhat to the easterly of the course of the flotilla. The evening was clear, there was no wind, and the tide was flood. The Richmond had her regulation anchor light properly set and brightly burning, and a man on deck watching the anchor. She was anchored somewhat outside the boundaries prescribed by the regulations of the secretary of the treasury. These regulations, made pursuant to the act of congress of May 16, 1888, authorizing the secretary of the treasury to define and establish an anchorage ground for vessels, among other places in the Hudson river provide that vessels may anchor in the Hudson river to the westward of a line from Castle Point to Bull's ferry, and north of Fourteenth street, Hoboken ferry landing, but that in no case shall a vessel anchor within 200 yards of the shore, or in such position as to impede the movements of a ferry, or to prevent ready access to and from the piers. Opposite and above the Richmond, on the easterly shore of the river, some vessels of the United States navy were lying at anchor, but there was a clear space of a quarter of a mile or over between the Richmond and the nearest of these vessels. Soon after discovering the Richmond, the tug and her helper put their helms hard a-port, and made for the opposite side of the river, carrying the flotilla on an oblique course across and up the river, at a speed of six or seven miles an hour. When the Heipershausen had come up to within a short distance of some of the naval vessels, the rear of the flotilla was below the Richmond, swinging by the force of the tide beyond the line of the course of the tug, and over towards the Richmond; and the libelants' canal boat, which was the port boat in the last tier, struck the anchor chain, and then the stem of the Richmond, and soon after she filled and sank with her cargo. The man acting as anchor watch upon the Richmond saw the flotilla approaching when it was a considerable distance away. A man upon one of the rear boats of the flotilla shouted to him to give the Richmond chain. If he had done this, the tide would have carried her back and out of danger. He testifies that he attempted to let out the chain, but did not succeed. As the boats struck, the mate of the Richmond came on deck, and immediately let out the Richmond's chain. With the strong tide then running, it is apparent that she would have readily swung back if the chain had been seasonably released.

Upon these facts, we think it very clear that fault is to be imputed to both the Heipershausen and the Richmond. If the tug was free from negligence in all other respects, it suffices to condemn her that she undertook to navigate a flotilla in a part of the river where she was likely to meet numerous vessels, when she had so arranged and organized it that she could not, under the normal conditions of wind and tide, safely conduct it by a vessel lying at anchor, seen half a

mile away, with no obstruction between or beyond, and when there was a clear channel in which to maneuver, at least a quarter of a mile wide on her own starboard hand. It was her duty, going on a flood tide, with a flotilla over a quarter of a mile long, to provide some means for controlling the rear tows in case it should become necessary, in order to avoid other vessels, to deflect materially from a direct course. The fact that she could not execute safely such a maneuver as she attempted demonstrates that her tow, as she had made it up, was unwieldy, unmanageable, and a menace to the safety of other vessels entitled to the use of the river. When she undertook the maneuver, she could have detached her helper, and sent it to the rear of the flotilla, to assist in keeping the end of the tow in line. Under the circumstances, her omission to do this was inexcusable.

Although the Richmond was in fault, because she was occupying a position in breach of the regulations respecting the anchorage ground, we are not satisfied that this fault was, under the circumstances, a contributory cause of the collision. If, notwithstanding the fault of the Richmond, the Heipershausen could have avoided the collision by exercising ordinary care, the Richmond ought not to be condemned. Under such circumstances, the fault of the Richmond would not be a proximate cause of the loss. If, however, her fault in this respect was remote, she was in fault in another respect, which suffices to charge her with liability. It is the duty of a vessel brought up in a frequented channel to maintain a vigilant anchor watch, ready to give her chain or sheer her clear of an approaching vessel. The Richmond was anchored at a place presumably inconvenient or embarrassing to the navigation of other vessels. It was a place, also, in which long flotillas of boats in tow of tugs were frequently passing in both directions. The anchor watch did not exercise reasonable vigilance to avoid the collision. His explanation of his failure to let out her chain is quite inadequate. There is no reason why the Richmond should not have taken the chain, and we are satisfied either that the man on watch did not attempt to let it out, or did not know how to do so. It is patent that a competent and vigilant man might have released the chain in season, if not to have avoided a collision altogether, certainly to have materially mitigated the consequences.

We conclude that the district court properly condemned both vessels, and that the decree should be affirmed, with interest and costs.

THE J. J. DRISCOLL

THE CONCHO.

THE H. B. RAWSON.

WHITE STAR TOWING CO. et al. v. REED et al.

(Circuit Court of Appeals, Second Circuit. September 12, 1894.)

No. 153.

**COLLISION — STEAM VESSELS MEETING — TIDE — PROPER SIDE OF CHANNEL—
LOOKOUT.**

A steamer rounding the Battery into the East river collided with a schooner in tow of a tug on a hawser about 150 feet long. The tow was going out with the ebb tide, and making slow progress. The tug saw the steamer and her course in season to have kept away more to the north side of the channel, which she did not attempt to do until a few minutes before the collision. The steamer did not keep a proper watch on the tow and its movements, though both were visible in season, and hence did not avoid the latter by porting, as she could easily have done. *Held*, that both were in fault. 58 Fed. 811, affirmed.

Appeal from decree of district court, southern district of New York, holding the tug J. J. Driscoll and steamship Concho both responsible for damages sustained by the schooner William Johnson (in tow of the J. J. Driscoll on a hawser) from collision with the Concho, between Governor's Island and the Battery, March 1, 1893. See 58 Fed. 811.

Chas. M. Hough, for the J. J. Driscoll.

Wilhelmus Mynderse, for the Concho.

Chas. C. Burlingham, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The questions presented are entirely questions of fact, and the evidence is extremely conflicting. Upon examination of the record we see no reason to reverse the finding of the district judge that the collision would not have happened had either the tug or the steamship taken "more timely and efficient measures to avoid each other." Decree of district court affirmed, with interest, and half costs to the Johnson against each steam vessel.